

2010-4

# Public Service Media: Money for Content

## LEAD ARTICLE

### **Financing and Supervision of Public Service Broadcasting**

- European legislative framework for the financing and supervision of public media services
- Funding models for public service media in the member states (Germany, Finland, France, Netherlands, Austria, Slovak Republic, Spain)
- Supervision of public service media funding and services (Germany, United Kingdom, Ireland, Austria)

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**IRIS plus 2010-4**  
**Public Service Media: Money for Content**

ISBN (Print Edition): 978-92-871-6904-4  
Price: EUR 24,50  
European Audiovisual Observatory, Strasbourg 2010

ISBN (PDF-Electronic Edition): 978-92-871-6907-5  
Price: EUR 33

**IRIS plus Publication Series**  
ISSN (Print Edition): 2078-9440  
Price: EUR 95

ISSN (PDF-Electronic Edition): 2079-1062  
Price: EUR 125

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**Typesetting:**

Pointillés, Hoenheim (France)

**Print:**

Pointillés, Hoenheim (France)  
Conseil de l'Europe, Strasbourg (France)

**Cover Layout:**

Acom Europe, Paris (France)

**Publisher:**

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**Please quote this publication as:**

IRIS plus 2010-4, Public Service Media: Money for Content (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2010)

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# Public Service Media : Money for Content



## 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](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

**Susanne Nikoltchev**

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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,<sup>1</sup> 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".<sup>2</sup> Last year, an edition of *IRIS plus* dealt with the public service remit and online services offered by broadcasters.<sup>3</sup> 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.

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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.<sup>4</sup> The 1997 Amsterdam Protocol<sup>5</sup> 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.<sup>6</sup>

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

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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*<sup>9</sup> and *TV2 Danmark et al. v. Commission*<sup>10</sup> 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.<sup>11</sup>

According to Recommendation R (96) 10,<sup>12</sup> 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) 9<sup>13</sup> 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) 3<sup>14</sup> 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),<sup>15</sup> 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.<sup>16</sup> In the decision *Faccio v. Italy*,<sup>17</sup> 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.<sup>18</sup> 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

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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](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),<sup>19</sup> 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,<sup>20</sup> while advertising revenue amounted to around EUR 220 million.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> Although several administrative appeal courts have ruled on the applicability of licence fees to such PCs (in a variety of different cases),<sup>24</sup> 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.<sup>25</sup>

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”.

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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](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; *BayVGH*, 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.<sup>26</sup> 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).<sup>27</sup> 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”.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> Most German administrative courts therefore consider that Internet PCs fulfil the condition of being “ready to receive programmes”.<sup>31</sup> 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”.<sup>32</sup>

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.<sup>33</sup>

## 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

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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) BVerfGE 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").<sup>34</sup> 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.<sup>35</sup>

## 2. Finland

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

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.<sup>39</sup> 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.<sup>40</sup>

### 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.<sup>41</sup> 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/ukk.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=Yleisradion%20julkisen%20palvelu%20ja%20rahoitus.%20Yleisradion%20julkista%20palvelua%20ja%20rahoitusta%20selvitt%C3%A4neen%20ty%C3%B6ryhm%C3%A4n%20loppuraportti.%2023.4.2009](http://www.lvm.fi/c/document_library/get_file?folderId=534580&name=DLFE-7420.pdf&title=Yleisradion%20julkisen%20palvelu%20ja%20rahoitus.%20Yleisradion%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 tax<sup>42</sup>) 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 121<sup>43</sup> (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 service<sup>44</sup> prohibits all advertising on public service television from the end of 2011.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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”<sup>48, 49</sup>

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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](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](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).<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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”.<sup>53</sup>

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.<sup>54</sup>

## 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.<sup>55</sup>

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.<sup>56</sup>

### 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](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*<sup>57</sup> (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)<sup>[58]</sup>.”

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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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.

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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.<sup>62</sup> 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.<sup>63</sup>

## 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.<sup>64</sup> 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.<sup>65</sup>

Meanwhile, the Commission has opened a formal state aid procedure against Spain in order to investigate the new funding system for RTVE.<sup>66</sup> 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.<sup>67</sup> In this respect, Spain has received a formal request for information under Art. 258 TFEU.<sup>68</sup>

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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](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),<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> 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.<sup>72</sup> The three-step test is applied to the examination of new or amended telemedia services before they are approved and “activated”.<sup>73</sup> 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*<sup>74</sup> 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).<sup>75</sup> 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*.<sup>76</sup> 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,<sup>77</sup> 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.

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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.<sup>78</sup> 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.<sup>79</sup> 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 supervision<sup>80</sup> 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 Communications<sup>81</sup> (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,<sup>82</sup> 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;

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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](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 decision<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup>

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83) The BBC Trust’s decision is available at: [http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/local\\_video/decision.pdf](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](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](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](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.<sup>88</sup> 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.<sup>89</sup> 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

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88) Ofcom's report for 2009 is available at: [http://www.ofcom.org.uk/tv/psb\\_review/annrep/psb09/psbrpt.pdf](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.<sup>90</sup> 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”.

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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](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.<sup>91</sup> 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 *Bundswettbewerbsbehörde* (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.<sup>92</sup>

## 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,

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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.<sup>93</sup> For programming autonomy is an element of broadcasting freedom that is particularly closely protected under European and constitutional law.

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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>



# What is funded and how?

For media services operated by public broadcasters, funding and content are two sides of the same coin, and our *IRIS – Legal Observations of the European Audiovisual Observatory* electronic newsletter (<http://merlin.obs.coe.int/newsletter.php>) has reported on both aspects on several occasions in the last six months.

One reason is the ongoing discussion in Spain and France about whether it is permissible for the various audiovisual sector players to levy taxes to compensate for the loss of advertising revenue among public service broadcasters.

However, in those countries where broadcasters can continue to rely both on licence fees or state aid and advertising income the question of funding has not been fully resolved either, as shown by the articles on Slovakia. Finally, there are still some countries where the issue of funding public service broadcasting is arising for the first time because state-run television is being transformed into public service broadcasting, as in the case of Kyrgyzstan.

There is another interesting development in Latvia, which is attempting to implement a public-private partnership model to deal with the dramatic fall in the funding for its exclusively state financed public broadcasting service.

The familiar question of how licence fees are to be laid down and levied has not lost its topical relevance. In particular, the internet-based reception of broadcasting services and the multifunctionality of various reception devices are stimulating the discussion in Austria, Switzerland and Germany. Poland has shown that there must be provision for exceptions in countries where licence fees are levied. However, if there are too many exceptions this may result in difficulties for the funding of media services operated by public broadcasters.

If public money is spent, this should promote the purpose that it is sought to achieve. In order to ensure this, significant amendments are to be made to Austrian broadcasting legislation, especially the ORF-Gesetz (ORF Act). The attribution of places on multiplexes operated by public service broadcasters with must-carry status also constitutes state support, which is why Malta provides for a consultation procedure on the criteria proposed for selecting channels to be awarded licences. These criteria are also based on the quality of the content.

## Tax Money for Advertisement

### Spain

#### Law on the Funding of RTVE Corporation Adopted

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The draft law reforming the funding of the national public service broadcaster, the RTVE Corporation, presented to the Parliament in May 2009, was passed in August, after amendments were debated and considered during the summer (see IRIS 2009-8: 11/16). Law 8/2009 on the funding of the Spanish Radio and Television Corporation eliminates advertising as a source of income, instead proposing a new financial equilibrium to be achieved mainly through State subsidy and three different types of taxes. It also imposes additional public service obligations on RTVE.

The corporation will continue to derive revenue from an existing tax on the use of spectrum frequencies (up to a maximum of EUR 330 million per year), however in addition two new taxes are also to be imposed on national telecommunications operators offering audiovisual services, as well as national commercial television companies operating pay or free-to-air services via cable, satellite or terrestrial networks.

The tax to be paid annually by national commercial broadcasters is to amount to 3% of their gross operating income, corresponding to their yearly turnover, and that to be faced by pay-TV operators and telecommunications companies is to be 1.5% and 0.9%, respectively. Nevertheless, it has been specified that the latter will not contribute more than 25% of the Corporation's total income and that, in turn, free-to-air and pay-TV operators will not add more than 15% and 20% of the same.

Direct support from the State is guaranteed so as to enable financial equilibrium in case other resources are reduced, as long as the national public service broadcaster's expenditure is in line with a pre-approved budget. Nevertheless, RTVE's total budget will be limited to EUR 1,200 million for the period from 2010 to 2011 and will not be allowed to grow more than 1% annually during the period from 2012 to 2014. Additionally, the Corporation will have to create a reserve fund from the income that is surplus to the cost of providing its public service activities.

As regards additional public service broadcasting obligations, the following can be outlined. RTVE will be required to:

- Dedicate at least twelve hours per week, through any of the Corporation's radio and television stations, to the support of programmes and interactive services where political parties, unions and social groups are represented.
- Increase programmes designed to educate and entertain the youngest section of the audience. From Monday to Friday between 5pm and 9pm 30% of the offerings on the children's channel should be directed at children from 4 to 12 years of age. During weekends and holidays, such programming should be offered from 9am to 8pm. Once the switch-off of analogue television has taken place, content will have to be broadcast in Spanish, co-official languages and/or English, making use of the multilingual system.
- Commit to making programming as accessible as possible to all audiences, including those with any kind of disability. Before 1 January 2013, TVE will have to deliver subtitles in at least 90% of its offerings - aiming to reach 100% where practicable - and offer at least 10 hours a week of programmes that include audio description and 10 hours a week of programmes that include sign language.
- Broadcast European audiovisual works in at least 60% of its main channels' prime time slots, increase by 20% the legal obligation to fund European audiovisual productions, and diversify the independent suppliers of commissioned productions.

- Have the possibility of buying sports rights limited to 10% of its total annual budget from a general interest sporting events list designed by the *Consejo Estatal de Medios Audiovisuales* (Audiovisual Media Council) yet to be created.
  - Provide information regularly about debates in Parliament and broadcast live those sessions of special interest to citizens.
- *Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española* (Act 8/2009 of 28 August 2009 on the funding of RTVE Corporation)  
<http://merlin.obs.coe.int/redirect.php?id=12122>

IRIS 2010-1:18

## European Commission

### Commission Requests Information from Spain on New Charge on Operators

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In March 2010, the European Commission sent a letter of formal request for information to Spain under EU infringement procedures (Article 258 of the Treaty on the Functioning of the European Union) in relation to a new administrative charge imposed on national telecoms operators. The charge, which amounts to 0.9% of the yearly turnover of telecoms operators, was introduced through Spanish Law 8/2009 on the funding of the Spanish Radio and Television Corporation in order to offset the elimination of paid advertising on the Spanish public service broadcaster *Corporación de Radio y Televisión Española* (RTVE) (see IRIS 2009-8: 11/16 and IRIS 2010-1: 18). A limited number of operators were exempted from paying the charge on the basis of their geographical scope and the type of services they provide.

The Commission is concerned that the provisions of the new law could be incompatible with EU law, as the charge does not appear to be related to costs arising from regulatory supervision. It thus unduly burdens the companies in question, possibly limiting their investments in new networks and advanced services. According to the provisions of the Authorisation Directive (Directive 2002/20/EC) charges on telecoms operators may only be imposed in order to finance certain administrative and regulatory activities and should be transparent, objective and proportionate. In addition, interested parties should be consulted in the appropriate manner.

The Commission opened a formal State aid investigation into the new funding scheme in December 2009. The formal request for information is without prejudice to that investigation.

If the Spanish Government does not respond to the formal request or if the observations the Government presents are not satisfactory, the Commission may issue a “reasoned opinion” under EU infringement procedures, requesting that Spain amend the legislation in question to ensure compatibility with EU rules.

- “Telecoms: Commission requests information from Spain on new charge on operators; closes infringement case on universal service”, IP/10/322, Brussels, 18th March 2010  
<http://merlin.obs.coe.int/redirect.php?id=12392>

IRIS 2010-5: 4

## France

### Conseil d'Etat Cancels Abolition of Advertising on Public Television before Legislation Is Adopted

Amélie Blocman  
Légipresse

In a decision on 11 February 2010 the *Conseil d'Etat* cancelled the letter from the Minister for Culture and Communication of 15 December 2008 calling on the Chairman of France Télévisions to stop marketing advertising space on the group's channels between 10 p.m. and 6 a.m. "in accordance with both the spirit and the letter of the legislative reform in hand". The letter was issued at a time when the bill on reforming the audiovisual sector, directed mainly at abolishing advertising on public service television, was pending: the Act had only passed through the National Assembly on its first reading, and was awaiting examination by the Senate, scheduled for 19 January 2009. The Government, however, wished to have the advertising abolished immediately, from 5 January 2009, and had therefore sent the disputed letter calling on France Télévisions to abandon advertising from that date. It did so, as approved by the company's board of directors on 16 December 2008, before the Senate's deliberations. About twenty members of the Senate, who held the Minister's letter and the resolution adopted by the board of directors to be against the law, called on the *Conseil d'Etat* to cancel them, even though the arrangements were already being applied. The *Conseil d'Etat* concurred, recalling that under Article 34 of the Constitution, "The law lays down the rules concerning the civil rights and the fundamental guarantees granted to citizens for the exercise of public freedoms; the freedom, diversity and independence of the media (...)". In the present case, the *Conseil d'Etat* held that the abolition of advertising during a substantial part of airtime was a measure that had the effect of depriving France Télévisions of a significant part of its income and impacting on the guarantee of its resources, which constituted an element of its independence and could therefore only be decided on by the legislative authority. The two contested documents were therefore cancelled.

Although this decision, seen by the opposition as "a slap in the face for the executive authority", is fairly strong symbolically, the CSA feels that it will have "no practical consequences". As the *Conseil d'Etat* notes, the cancellation only concerns the period between 5 January - the date on which the measure was implemented - and 8 March 2009, the date on which the Act reforming the audiovisual sector, and abolishing advertising between 10 p.m. and 6 a.m. on the channels in the France Télévisions group, came into force. This measure, decided on by the legislator and in force for more than a year, is not *a priori* being called into question, except perhaps by the European Commission. The Commission has qualified the 0.9% tax on turnover imposed since the adoption of the Act of 5 March 2009 on telecom operators to compensate for the abolition of advertising as "an administrative fee incompatible with European law", and France therefore has two months to reply. To be continued, then!

- *Conseil d'Etat, (5<sup>e</sup> et 4<sup>e</sup> sous-sect.), 11 février 2010, Mme Borvo et autres* (Conseil d'Etat, (5<sup>th</sup> and 4<sup>th</sup> sub-sections), 11 February 2010, Ms Borvo et al.)  
<http://merlin.obs.coe.int/redirect.php?id=12253>

IRIS 2010-3: 20



## Discussion on the Maintenance of Daytime Advertising on France Télévisions Channels

Amélie Blocman  
Légipresse

On 8 January 2008, the French President Nicolas Sarkozy announced his desire to abolish advertising on the public-sector television channels. A year later the Act on audiovisual communication and new-style public-service television was adopted, following on from the recommendations of the "Commission on the new-style public-service television" chaired by Mr Copé, introducing the gradual abolition of advertising on public-service channels between 8 p.m. and 6 a.m. (in force since 5 January 2009), pending its total abolition by the end of 2011 (end of analog television) (see IRIS 2009-4: 10/14).

Things do not seem to be as static in reality as they are portrayed in the Act, however. Thus at the end of January the European Commission instigated infringement proceedings against France for its "telecom tax" of 0.9% of turnover that telecom operators were required by law to pay to compensate for the abolition of advertising on public-sector television (see IRIS 2009-9: 5/4).

The MP Christian Kert, who is also a director of France Télévisions, quickly followed by Jean-François Copé, chairman of the majority UMP group in the National Assembly, stated that they were opposed to the abolition of advertising before 8 p.m. on the France Télévisions channels, and were even planning to table a bill on the matter. If advertising were to be abolished totally, there would be a shortfall of about 400 million euros in the financing for the public-sector audiovisual group, if the telecom tax were to be discontinued. A number of MPs wonder whether the State is in a position to provide this financing. There is also some uncertainty hanging over the private-sector channels, inasmuch as the anticipated "opportunity effect" did not happen and inasmuch as the transfer of the volume of advertising from the public sector to the private sector does not seem to be sufficient. The President is not in favour of such a turnaround, however. "The law will be applied. It provides for a consultation in May 2011 on whether advertising should be maintained before 8 p.m. or not. That date will be kept. But the aim remains the total abolition of advertising", a presidential spokesperson stated. Indirectly, the possible maintenance of advertising before 8 p.m. could compromise the sale of the France Télévisions Publicité public corporation, which is currently adjourned indefinitely. A debate on the application of the Act of 5 March 2009 is on the agenda for the Senate on 10 May, and a bill "to ensure the safeguarding of public-service television", through the maintenance of daytime advertising on public-sector television, tabled by the Senate member Jack Ralite, is to be discussed on 20 May 2010.

- *Proposition de loi visant à assurer la sauvegarde du service public de la télévision, présentée par M. Jack Ralite et les membres du groupe CRC-SPG* (Bill to ensure the safeguarding of public-service television, tabled by Mr Jack Ralite and members of the CRC-SPG group)  
<http://merlin.obs.coe.int/redirect.php?id=12399>

IRIS 2010-5: 22

## Mixed Funding

### Slovakia

#### Developments in the Financing of Public Television

*Jana Markechova  
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The last three years have brought several changes in the area of public media financing in the Slovak Republic. The legislative changes introduced several different sources of financing, including payments for public services, resources granted under contracts with the State and contributions from the Audiovisual Fund. There is a proposal in the Parliament to alter the existing system. In line with S. 21 of the present Act No. 16/2004 Coll. on Slovak TV (see IRIS 2004-4: 15/33) the income for television is generated inter alia from:

- payments for public services in the area of television broadcasting provided by Slovak TV;
- the contribution from the State budget granted according to the contract with the State and assigned for the implementing of programmes of public interest or special investment projects;
- revenues from the broadcasting of advertising;
- grants from natural and legal persons for the fulfilment of public interest activities.

The “payments for public services in the area of television broadcasting” have been established by Act No. 68/2008 Coll. These are to be paid by all natural persons who purchase electricity and by employers who employ at least three persons. This new model has replaced the former “concessionary fees”. According to the former system only natural persons who owned a television receiver and legal persons who held a record of a television receiver in their accounting were obliged to pay the fees. Since there was no possibility of controlling the ownership of TV sets a fair portion of households and companies avoided their obligations. The new system based on electricity consumption covers practically all households and commercial premises. This has brought an increase in the amount of revenue collected. The aim of the new Act is to save the system of public contributions which was on the brink of extinction.

The latest amendment to the Slovak TV Act has introduced another method of public television financing: State contracts. These should stabilise the budget of Slovak TV and support the creation of original works. Their existence should not cause the exclusion of State aid for other specific projects, e.g., digitisation. On 21 December 2009 Slovak TV signed a State contract according to which financial resources from the State budget will be granted for the production of original programmes of public interest (see IRIS 2010-1: 40). One problem with the State contract could be that these means of financing have never been notified to the Commission.

A Member of Parliament filed a proposal according to which from January 2011 public television and radio should not be financed from payments for public services and State contracts but directly from the State budget. The MP claims that the proposed model of financing of these media should bring more funds and more independence.

According to the proposed amendment, Slovak TV should receive an annual amount of 0.7% of the State budget expenses while Slovak Radio should be granted a 0.3% portion of the budget. With reference to the preparatory memorandum, this model should double the available financial resources of Slovak TV and Slovak Radio compared to those that they receive in accordance with the present system.

The Ministry of Culture asserts that such a model of public media financing would cause a nationalisation of those broadcasters. On the other hand, the new legislation may bring about a simplification of the complicated system of financing.

IRIS 2010-3: 37

## Contracts between the State and Public Broadcasters

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The Slovak Government approved the proposal of a contract on content, aims and provision of public television broadcasting services for the period of 2010-2014 ("State Contract") and the proposal of Amendment No.1 to the State Contract for the year 2010 ("Amendment"). The parties involved are Slovak TV ("STV") and the Ministry of Culture ("Ministry").

The State Contract was proposed by the Ministry on the basis of Government Resolution No. 741 of 15 October 2008 concerning the proposal of a concept of contracts between public broadcasters and the State about contents, aims and provision of public radio and television broadcasting services. Pursuant to this Resolution the Ministry was obliged to submit the proposal to be discussed in Government proceedings.

While the State Contract with STV has been approved, the contract with Slovak Radio ("SRo") is still under discussion, as there are several reservations on the part of Sro, inter alia towards suggestions the Ministry wants to include in the State Contract and the Amendment.

The aim of the State Contract is to form a medium-term strategy for the creation, production and broadcasting of programmes by STV. The contractual obligation of the State (which represents the public in this relationship) is to provide financial resources as a State budget contribution according to the Act on State Budget, granted pursuant to the State Contract and intended to support the production of public interest programmes, i.e., programmes aimed at satisfying the informational and cultural needs of the audience in the territory covered by the broadcaster. STV binds itself to using these financial resources for the creation, production and broadcasting of such programmes, i.e., mainly dramatic, documentary and animated works that promote the cultural identity of the Slovak Republic according to Section 3 lit. h) of Act No. 308/2000 Coll. on broadcasting and retransmission and Act No. 195/2000 Coll. on Telecommunications, examples of which include inter alia the following:

- educational and informational programmes for minors;
- programmes providing legal information, supporting a healthy life-style, protection of nature, environment, life, property and road safety;
- programmes which present cultural issues, with emphasis on Slovak culture and the culture of national minorities and ethnic groups;
- programmes which present religious activities.

STV can use the financial resources provided for the creation of the above-mentioned programmes in its own capacities or in co-operation with other providers of audiovisual works. In addition, the State Contract will have a positive impact on the STV budget. According to the Amendment the income of STV will increase by EUR 12,500,000 in 2010 and in the period of 2010-2014 by at least EUR 10,000,000 for each year. The State budget expenditure will increase accordingly.

IRIS 2010-1: 40

## Kirghizistan

### PSB Statute Adopted

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On 30 April 2010 the Provisional Government of the Kyrgyz Republic adopted a Decree on establishing the Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic, which entered into force immediately. The Provisional Government by its own decree No. 1 of 7 April 2010 took upon itself the power of the parliament and the President of the Republic, thus its decrees can be considered as national statute law.

The Decree of 30 April ordered the transformation of the State-run National TV and Radio Corporation into the "Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic" (PBC). The decree stipulates that the first Supervisory Board of 15 members be appointed for a period of 3 years by the Provisional Government from among the candidates presented by NGOs. The Director-General of the PBC is to be appointed by the Supervisory Board for 5 years.

The Decree approved the Statute of the Public TV and Radio Broadcasting Corporation which in itself presents a detailed piece of legislation. The Statute is an almost verbatim replica of the Statute of the Kyrgyz Republic "On the National Radio and Television Broadcasting Corporation", which was adopted by the Zhogorku Kenesh (parliament) on 8 June 2006 and signed into law on 2 April 2007 (see IRIS 2007-6: 14/21). This Statute was then annulled by the introduction on 2 June 2008 of the Statute "On television and radio broadcasting" adopted by the parliament on 24 April 2008 (see IRIS 2008-9: 16/25). The difference lies only in the new name of the Corporation.

The new Act determines the main provisions concerning the legal status of the Corporation, the financial aspects of its activity, programming, and questions of advertising and sponsorship. The PBC has the legal status of a State agency: its rights and freedoms are guaranteed by the State. At the same time the Government may not interfere in the operation of the PBS.

Among the goals of the Corporation are the maintenance of national interests, national culture and traditions, the formation of a common information and broadcasting space, the creation of a positive world image of the Kyrgyz Republic as a democratic country, as well as the production of high quality programmes on socially important issues. At the same time the Statute demands that news and current affairs programmes be produced objectively in the spirit of the best journalistic culture. It stipulates protection of journalistic sources and the need for the code of practice with some of its provisions already included in the text of the Statute.

The management and control of the Corporation shall be the responsibility of the Supervisory Board and the Director-General. The Supervisory Board is the supreme body of the PBC; it consists of 15 members elected for five years by the parliament, five from among the ten candidates proposed by the president, five from among the ten candidates proposed by the parliament itself, and five from the ten candidates from civil society, that is "academic institutions, public associations, the mass media, etc." (Art. 13). As here the Statute contravenes the Decree, the Decree shall be in force but only in relation to the first call of the Supervisory Board.

The Director-General is the executive manager of the PBC and is elected by the Supervisory Board in an open contest.

The activity of the Corporation is based on the principles of transparency. Its annual report shall be delivered to the president and parliament and be published in the press.

According to Article 20 of the Statute the main source of financing of the Corporation comes from the national budget (this budgetary finance shall be protected from appropriation for

other purposes), as well as income from its commercial activity, the sale of intellectual property, advertising and sponsorship.

Article 9 contains provisions on advertising. It imposes limits of ten per cent of both the daily and hourly broadcasting time used for advertising. Advertising of tobacco and alcohol products shall be forbidden. Many provisions of the rules of advertising and sponsorship, as well as the right of reply are not dissimilar to those in the European Convention on Transfrontier Television.

Article 7 allows the Corporation to offer for tender up to 30 per cent of the broadcasting time for independent producers. Only 40 per cent of all programmes broadcast can be supplied by foreign producers. Moreover a minimum of 50 per cent of all programmes shall be in Kyrgyz.

- Декрет Временного Правительства Кыргызской Республики о создании Общественного телерадиовещания в Кыргызской Республике (Decree on establishing Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic) of 30 April 2010
- Положение Кыргызской Республики "Об Общественной телерадиовещательной корпорации Кыргызской Республики" (Statute of the Public TV and Radio Broadcasting Corporation of the Kyrgyz Republic)
- Legal review of the Decree on Establishment of Public Television and Radio Broadcasting in the Kyrgyz Republic  
<http://merlin.obs.coe.int/redirect.php?id=12429>

IRIS 2010-6: 36

## Public-private Partnership

### Latvia

#### Changes in the Radio and TV Law Related to PSB

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The Saeima has again adopted amendments to the Latvian Radio and TV Law. The Radio and TV Law is one of the laws experiencing the most frequent changes in the Latvian legal environment. It has already been amended 15 times since its adoption in 1995. The Law itself now should approach its demise due to the planned adoption of the new Electronic Media Law which is intended to transpose the AVMSD. However, the new Electronic Media Law is not likely to be adopted without lengthy discussions; it was submitted to the Saeima for review on 16 June 2009, but since then has not been adopted even in the first reading. Therefore, in order to address the urgent needs of the audiovisual sector, new changes to the Radio and TV Law have been proposed. On 1 October 2009 the Saeima adopted amendments that allow the public broadcasters to transfer some of their programmes to private parties according to public-private partnership principles.

The proposed changes address the drastic decrease of the State financing to the public broadcasting companies due to the diminishing State budget. The Latvian public broadcasters are financed only from the State budget, as there are no public license fees. It is estimated that for the year 2010 the State financing may be up to 40% less than for this year. Latvijas Radio, the public service radio broadcaster, which currently broadcasts on five channels, has announced that due to budgetary problems it would have to shut down some of its channels. As a solution it has suggested

that one of its most popular channels, Radio 2, a music channel, might be transferred to a private partner under public-private partnership principles. For this, the Radio and TV Law would have to be changed, as it provides that a broadcasting permit cannot be transferred to another person. The National Broadcasting Council (NBC) and the Saeima reacted sympathetically to the above proposal and thus the current urgent changes to the Radio and TV Law were initiated. It was proposed to amend the Law by inserting a new provision as follows:

“In the order envisaged by the Public and Private Partnership Law the NBC may transfer to a concession to another person (to a broadcasting company) the rights to prepare and transmit a specific programme of a public broadcasting company. In such a case the broadcasting permit is issued for the period of the concession agreement, but for no more than five years. [...]”.

Another proposed amendment was to decrease the number of members of the NBC from nine to five (to address the need to save State budgetary funds). The Saeima reviewed the proposed amendments in only two readings in accordance with urgent legislative proceedings. When approving the amendments in the second reading on 24 September 2009 the Saeima engaged in lengthy and lively discussions on the usefulness of the changes and how to implement the changes to the number of NBC members. As a result, the draft law was returned to the commission to improve the transitional rules, and the changes were finally approved on 1 October 2009. The transitional rules provide that the existing members of the NBC (currently, there are six members left) will continue to hold office until the end of their terms, however, the Saeima will elect new members only if the number of the NBC members is less than five.

The changes came into force on the day following their publication in the official newspaper.

- *Grozījumi Radio un televīzijas likumā* (Amendment to the Radio and Television Law, published on 8 October 2009)  
<http://merlin.obs.coe.int/redirect.php?id=12074>

IRIS 2009-10: 16/22

## Raising Licence Fees

### Austria

#### Administrative Court Decides on Obligation to Pay ORF Licence Fee

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The Austrian *Verwaltungsgerichtshof* (Administrative Court - VwGH) ruled on 10 May 2010 (Case 2009/17/0177) that the ORF licence fee only has to be paid if it is technically possible to receive all the television programmes covered by the ORF's television remit.

The legal dispute was preceded by an Administrative Court decision in 2008 (Case 2008/17/0163) in which the present plaintiff successfully brought an action against the levying of the ORF licence fee. The ORF had previously informed the plaintiff that a change in the encryption system meant that programmes could in future only be received at the plaintiff's location by means of DVB-T reception modules. The plaintiff did not have the necessary equipment and could no longer receive the television programmes ORF 1 and ORF 2 with his satellite receiver and smartcard, whereupon he stopped paying the ORF licence fee. The defendant, Info Service GmbH (GIS), continued to demand

that the plaintiff pay the licence fee as he had at least one operational radio or television set in his household.

By section 31(1) and (3) of the ORF-Gesetz (ORF Act), anyone in Austria is entitled to receive the ORF's radio and television programmes against payment of an ongoing licence fee, and this obligation exists irrespective of the frequency and quality of the programmes or their reception. The beginning and end of the obligation are governed by the *Rundfunkgebührengesetz* (Broadcasting Licence Fees Act), sections 2(1) and 1(1) of which provide that anyone who operates broadcasting reception equipment in a building must pay the licence fee. Such equipment comprises technical devices that render presentations or performances visible or audible within the meaning of section 1(1) of the *Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks* (Federal Constitutional Law on Safeguarding the Independence of Broadcasting). The Administrative Court concluded from this in 2008 that there was a mutual relationship between the reception of the ORF's programmes and the licence fee payable. It pointed out that a distinction had to be drawn between the obligation to pay the licence fee and the mode of payment, which was governed by the Broadcasting Licence Fees Act. The reference to that legislation in the ORF Act showed that for the purposes of the licence fee the requirement concerning the possession of operational broadcasting reception equipment was only met when the equipment was capable of actually receiving the ORF's programmes, which was not the case. GIS nonetheless demanded that the licence fee continue to be paid as the plaintiff could receive the speciality channels ORF 2 Europe and ORF Sport Plus without a new smartcard.

The Administrative Court has now ruled that the ORF licence fee only has to be paid when all the television programmes covered by the ORF's remit can be received using existing operational reception equipment. The statutory remit, it stated, required the provision, inter alia, of two television programmes that could be received nationwide. If this was not guaranteed, then no licence fee was payable.

- *Erkenntnis des VwGH vom 10. Mai 2010, Geschäftszahl 2009/17/0177* (Administrative Court's judgment of 10 May 2010, 2009/17/0177)  
<http://merlin.obs.coe.int/redirect.php?id=12474>

IRIS 2010-6: 8

## Switzerland

### Reception Charges also Apply to Households with ADSL Connection or Clock Radio

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RTS Radio Télévision Suisse (Geneva)

In a decision delivered on 21 December 2009, the *Tribunal Administratif Fédéral* (federal administration court - TAF) looked into the question of whether the charge for receiving radio and television programmes still had to be paid when a person with an ADSL connection or a clock radio stated that these were not used for listening to the radio. Article 68 (1) of the Federal Radio and Television Act (LRTV) provides that anyone installing or operating a device intended for receiving radio and television programmes (a receiver) must pay a reception charge. Reception charges are payable per household, not per appliance. Families, couples or people living together pay the charge once only.

The TAF recalled firstly that the reception charge was due even if some programmes, either Swiss or foreign, could not be received or were of poor quality. It was therefore payable by anyone with a

radio or television on which programmes could be received, regardless of whether the person with the radio or television used it, and if so, how and how much. The obligation to pay the charge began on the first day of the month following the installation of the receiver or the start of operation and ended on the last day of the month in which the receiver ceased to be used or ceased to be in place, but not before the end of the month in which this was announced to the body receiving the charge.

According to the TAF, the text of Article 68 (1) of the LRTV expresses clearly the idea that the State does not wish to, and cannot, check whether anyone who has the necessary means of receiving radio programmes does in fact listen to them or not. As a result, even if the members of a household state that they do not listen to the radio in their home, the mere fact of installing receivers incurred liability to pay the charge, even if they were intended for purposes other than listening to the radio. As a result, it did not matter whether a person who owned an appliance allowing reception of radio programmes used it or not.

Thus the TAF judged that households with an ADSL connection and specific software making it possible to receive radio or television programmes were liable to pay the charge. Similarly, the presence of a clock radio in the living room, regardless of whether the device was in fact only used for telling the time, also justified payment of the reception charge.

- *Arrêt n° A-2182/2009 du Tribunal administratif fédéral du 21 décembre 2009* (Decision No. A-2182/2009 of the Federal Administrative Court on 21 December 2009)

IRIS 2010-6: 14

## Germany

### Kirchhof Report on Household Tax Published

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In his report on the financing of public service broadcasting, published on 6 May 2010, Prof. Dr Kirchhof, former Federal Constitutional Judge, recommends that the licence fee obligation should no longer be dependent on whether the fee payer owns a broadcasting reception device, but should apply to each household.

ARD, ZDF and Deutschlandradio had commissioned Kirchhof to write the report. He believes that linking the licence fee to reception devices is inappropriate, raising doubts over the legality of the current licence system. One reason for this is media convergence. Whereas in the early days of television a single device tended to be used in each household or business premises, these days increasing numbers of people carry a broadcasting and television device around with them in the form of a mobile telephone or PC. The current rules no longer reflect reality, are inappropriate and are therefore unfair.

The current monthly licence fee comprises a basic charge of EUR 5.76 and an additional TV fee of EUR 12.22 payable by owners of devices capable of receiving television programmes, except where legal exemptions apply.

The household tax proposed by Kirchhof would apply to each private household, regardless of whether or not the householder owns a reception device. The distinction between the basic and overall fee would be abolished, and replaced by a single charge for all households. Businesses would pay a business premises tax, depending on the number of employees. Low-income households would either remain exempt or would receive a State allowance to the value of the licence fee, payable with their housing benefit.



The cost of the broadcasting tax would continue to depend on the broadcasters' needs. The current system, under which the financial needs of public service broadcasters are established by the KEF, would be maintained.

The *Rundfunkkommission* (Broadcasting Commission) of the *Länder* hopes to agree how the licence fee will be collected in future at the Conference of Minister-Presidents on 9 June 2010. An unofficially published draft *Rundfunkgebührenstaatsvertrag* (Inter-State Agreement on broadcasting fees), dated 31 March 2010, contains most of the recommendations of the Kirchhof report.

- *Gutachten über die Finanzierung des öffentlich-rechtlichen Rundfunks vom April 2010* (Report on the funding of public service broadcasting, April 2010)  
<http://merlin.obs.coe.int/redirect.php?id=12472>
- *Staatsvertragsentwurf* (Draft Inter-State Agreement)  
<http://merlin.obs.coe.int/redirect.php?id=12473>

IRIS 2010-6: 22

## Land Prime Ministers Agree on Household Based Licence Fee

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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.

The main objectives of this change to a device-independent broadcasting licence fee model are to solve the problem of media convergence, create a simpler system for levying licence fees and achieve an expected a reduction in administrative costs.

It is intended to keep the licence fee at its current level of EUR 17.98, and there will no longer be a distinction between a standing charge and a charge for television reception.

The basis for charging the broadcasting licence fee is to be either a household or place of business, with only one fee to be levied in future for all the individuals living in a dwelling. The amount payable per place of business will vary according to the number of people regularly employed there and be based on a ten-step sliding scale. For example, the first step is for businesses with up to four employees and enables one-third of the licence fee to be charged, the fourth step covers the range 50 to 249 employees and requires the payment of four times the licence fee, while the tenth step applies to businesses with 20,000 employees or more and requires payment of 150 times the licence fee.

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

The revenue shifts within the ARD caused by the change to the new model are to be compensated for internally by employing specific mechanisms that take account of Germany's federal structure while retaining the flat rate charge. To this end, the ARD is to submit a joint financial and structural equalisation proposal. For the current licence fee period, the ARD has found an interim solution to the question of financial and structural equalisation.

In connection with the planned levy of a household-based licence fee from 1 January 2013, advertising and sponsorship in public service broadcasting are to be treated in the same way from that date, which means there may be no sponsorship on Sundays and public holidays and after 8pm Monday to Saturday, with the exception of major sporting events.

The prime ministers believe that the position they have taken up in their paper has been confirmed by Professor Kirchhof's report on the funding of public service broadcasting published on 6 May 2010 (see IRIS 2010-6: 22). In that report, the author sets out under what conditions the funding of public service broadcasting by means of a household/place of business based licence fee is permissible under German constitutional law.

IRIS 2010-6: 21

## Poland

### Constitutional Tribunal Judgment on the Act on Licence Fees

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*National Broadcasting Commission, Warsaw*

On 4 November 2009 the Constitutional Tribunal assessed a motion of the Polish President to examine the conformity of certain provisions of the Act of 13 June 2008 amending the Act of 21 April 2005 on Licence Fees with the Constitution.

The motion relates to provisions enlarging significantly the group of persons being exempt from the duty to pay licence fees. Concerns have been expressed that this might infringe the principle of legal security and the rule of law.

Previously the following persons were exempted from the payment of licence fees:

- 1) persons who have been adjudged to:
  - a) be classified as invalids of group I,
  - b) be totally incapacitated for work and unaided existence pursuant to the Act of 17 December 1998 on Old Age and Disability Pensions from the Social Insurance Fund,
  - c) have a serious degree of disability pursuant to the Act of 27 August 1997 on Occupational and Social Rehabilitation and on Employment of Disabled Persons,
  - d) be permanently or temporarily totally incapacitated for work on a farm pursuant to the Act of 20 December 1990 on Social Insurance of Farmers and who are entitled to a nursing allowance;
- 2) senior citizens over 75 years;
- 3) persons who receive a nursing benefit from a competent authority that performs tasks related to family benefits, mandated as tasks falling within the scope of government administration, or a social pension from the Social Insurance Board or any other authority in charge of old-age and disability pensions;
- 4) deaf persons with ascertained anacusis or ambilateral hearing loss;
- 5) the blind whose visual acuity does not exceed 15%.

The Act in question exempted in addition inter alia all pensioners over 60 years, whose pensions do not exceed 50% of the average remuneration, persons sent to internment camps during the state of war, unemployed persons, and beneficiaries of social care.

It has been observed that extending the group of persons exempted from the licence fee payment obligation will result in a serious loss in the revenues of public radio and TV broadcasters, which might endanger the proper functioning of public media.

According to the Tribunal the legislator had the right to enlarge the group of persons exempted from the licence fee obligation as such an act is within its discretion. The lawmaker's discretion comprises not only the issue of exemption from the licence fee obligation, but also other issues connected with the functioning of public radio and TV, including the rules of financing and the amount of public funds allocated to the fulfillment of the public remit.

The Tribunal found that the fulfillment of the public remit is impossible without ensuring adequate financial outlay coming from public means. Still, it is up to the legislator to establish the tasks of public media and the way financing them.

- *Komunikat prasowy po rozprawie dotyczącej abonamentu radiowo - telewizyjnego and Dodatkowy Komunikat prasowy* (Press releases on case no.: Kp 1/08 of 19 November 2009)  
<http://merlin.obs.coe.int/redirect.php?id=10177>

IRIS 2010-1: 34

## Public Service Value

### Austria

#### Preparations for Major Broadcasting Law Amendment

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At the end of 2009, the *Bundeskanzleramt* (Federal Chancellery) published for debate an extensive draft amendment to Austrian broadcasting laws. The consultation procedure has since been completed, so the Federal Government can now consider the opinions that have been submitted as it draws up a Government bill.

The organisation and remit of the *Kommunikationsbehörde Austria* (Austrian communications authority - KommAustria) are the subject of significant changes. In future, KommAustria will not be subject to directives and will take the form of a collegiate authority. Its role will be extended to include legal supervision of *Österreichischer Rundfunk* (Austrian broadcasting corporation - ORF) and audiovisual media services, as well as tasks set out in the *Fernseh-Exklusivrechtgesetz* (Act on exclusive television rights - FERG). On the other hand, supervision of collecting societies is transferred to the new *Aufsichtsbehörde für Verwertungsgesellschaften* (supervisory authority for collecting societies). Appeals against KommAustria's decisions can still be submitted to the *Bundeskommunikationssenat* (Federal communications senate).

The financing of ORF will be adapted to conform to the rules agreed between Austria and the European Commission at the end of 2009. The following measures are designed to ensure that the money received by ORF from licence fees is only used to fund activities that clearly fall within the public service remit defined by the Parliament in accordance with EU law, and to prevent

any unnecessary distortion of competition linked to the fulfilment of this remit. To this end, the ministerial draft makes provision for the following measures:

- ORF's public service remit must be clarified with regard to its online services and special interest channels. This should be achieved by amending its legal remit and instructing ORF to draw up "service concepts", which should provide more concrete definitions.
- In addition, ORF must set up an internal quality assurance system involving its three most important organs, i.e., the Director-General, the *Stiftungsrat* (Foundation Board) and the *Publikumsrat* (Viewers' Council). An external council of experts will evaluate the overall performance of the quality assurance system and decide whether the quality criteria are being met in key areas. The *Publikumsrat* only has the power to make recommendations. KommAustria is required to ensure compliance with the provisions of the quality assurance system.
- It should be determined in advance whether new services provided by ORF - such as a new specialist channel or an additional online service - comply with European State aid law. To do so, such services must provide added value compared to existing public services, but at the same time must not excessively distort competition. KommAustria will carry out this evaluation procedure.
- In order to prevent over-financing of ORF, the rules on calculating the maximum allowable licence fee will be clarified. As before, the level of the licence fee will be set by the *Stiftungsrat*, while the *Publikumsrat* will continue to have the right of veto with delaying effect; however, KommAustria will be obliged to examine decisions setting the licence fee.

The *ORF-Gesetz* (ORF Act) must also be brought into line with the AVMS Directive. To this end, the concepts of "commercial communication", "audiovisual media service" and "on-demand service" will be defined in the Act for the first time.

[...]

- *Ministerialentwurf 115/ME (XXIV.GP) und weitere Dokumente* (Ministerial draft 115/ME (XXIV.GP) and other documents)  
<http://merlin.obs.coe.int/redirect.php?id=12255>

IRIS 2010-3: 5

## Malta

### Broadcasting Authority Consultation Document on the Eligibility Criteria for General Interest Objective Stations

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On 23 March 2010, the Broadcasting Authority launched a consultation on the eligibility criteria for the classification of broadcasters that fulfil general interest objectives.

The Broadcasting Authority is playing a key role in the digital switch-over. Among its responsibilities the Authority has been charged with the selection process of the stations that will become General Interest Objective (GIO) Channels and will be carried on the digital multiplex platform to be operated by the public service broadcaster.

The purpose of the consultation document is to consult on the eligibility criteria that the Broadcasting Authority proposes to establish for the selection of broadcasters that are deemed to

fulfil general interest objectives and whose content would be entitled to carriage on the proposed GIO network on a free-to-air basis.

The Broadcasting Authority has set out the mandatory criteria for holding a general interest objective broadcasting licence. These include, inter alia, quality programming throughout schedules; reduction of repeat programmes; quality technical infrastructure; promotion of education, culture, the arts and national identity in programming; news and current affairs programming; programming for children; programming that provides access to persons with a disability; and broadcasting content prepared by independent producers. In addition, the Consultation Document is advocating the adoption of non-mandatory criteria which comprise a comprehensive and accurate information service in the interests of a democratic and pluralistic society; promoting a healthy lifestyle; and promoting environmental awareness and education.

A two-tier selection process for general interest objectives stations is proposed. The first stage is addressed to the public service broadcaster and existing licensed analogue free-to-air broadcasters. Stage two will then be opened for existing holders of a television broadcasting licence who do not broadcast on an analogue free-to-air frequency and applicants for a new television broadcasting licence who satisfy the requirements of the Broadcasting Act for a television licence.

Reactions to the proposals being made in this Consultation Document as well as to the provisions of the Draft Multiplex Licence which are attached to the consultation document have to be submitted to the Broadcasting Authority by Friday, 23 April 2010.

- Consultation Document on the Eligibility Criteria for the Classification of Broadcasters that fulfill General Interest Objectives  
<http://merlin.obs.coe.int/redirect.php?id=12376>

IRIS 2010-5: 29



# Public service audiovisual media services on the test bed

Germany, Denmark, the United Kingdom and the Netherlands have in the recent past introduced procedures that enable publicly financed media services to be scrutinised to ensure they carry out the public service remit linked to the funding they receive. This Zoom of this IRIS plus considers what services have up to now been examined under these procedures and what the findings have been. It also describes the situation in Belgium's Flemish-speaking Community and Norway, where public media services could in principle be subjected to such an examination but are currently not (yet) examined for various reasons. It should also be pointed out that the public value test described in the lead article has so far not been carried out in Ireland because no relevant new media services have been introduced. Whether this situation will change in the foreseeable future might be indicated in the Public Service Statement to be prepared by RTÉ by July 2010 in order to explain for what purposes and according to what rules<sup>1</sup> the public service broadcaster uses the television licence fees.

The following table was compiled by the Institute for European Media Law for Germany and the United Kingdom, Erik Nordahl Svendsen (Radio and Television Board) for Denmark and Marcel Betzel (of the Dutch media regulator Commissariaat voor de Media) for the Netherlands. In addition to the name and brief description of the media service, the outcome of the procedure (if completed) and the precise reference together with the relevant URL are mentioned.

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1) For further information, see <http://www.rte.ie/about/publicservicestatement.html>

	Service	Description	Decision
<b>DE Germany</b>	NDR-Mediathek <sup>2</sup>	Telemedia services offered by the public service broadcaster NDR, including archived programmes made available on the internet for a limited time	Decision in favour by the NDR Broadcasting Council of 27 March 2009; <a href="http://www.ndr.de/unternehmen/organisation/rundfunkrat/beschlussrundfunkrat/angebotmediathek100.pdf">http://www.ndr.de/unternehmen/organisation/rundfunkrat/beschlussrundfunkrat/angebotmediathek100.pdf</a>
	KI.KAplus	Media library of television programmes of the children's channel Kinderkanal (KI.KA) as video on demand for three age groups: preschool (3-5 years), primary school (6-9 years) and pre-teen (10-13 years)	Service approved by decision of the MDR Broadcasting Council on 21 September 2009; <a href="http://www.mdr.de/DL/6860733.pdf">http://www.mdr.de/DL/6860733.pdf</a> Published in the <i>Sächsisches Amtsblatt</i> (Saxony Gazette) of 22 April 2010, p. 569; <a href="http://www.sachsen-gesetze.de/shop/saechsabl/2010/16/read_pdf">http://www.sachsen-gesetze.de/shop/saechsabl/2010/16/read_pdf</a>
	kikaninchen.de	Online portal set up for especially for preschool children and designed to promote, among other things, their linguistic skills by encouraging them to join in singing and reading song texts and to foster their language acquisition by absorbing programme content and interacting with TV role models	Service approved by decision of the MDR Broadcasting Council on 21 September 2009; <a href="http://www.mdr.de/DL/6860635.pdf">http://www.mdr.de/DL/6860635.pdf</a> Published in the <i>Sächsisches Amtsblatt</i> (Saxony Gazette) of 22 April 2010, p. 576

2) The procedures were initiated and completed before the entry into force of the 12th *Rundfunkänderungsstaatsvertrag* (Amendment to the Inter-State Broadcasting Agreement).



Service	Description	Decision
ARD.de <sup>3</sup>	Telemedia service with information relating to the <i>Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten</i> (Association of German Public Service Broadcasters - ARD), including programme details, with archived programmes made available on the internet for a limited time and up-to-date news, sport and stock exchange information as well as internal ARD information	Decision still to be taken in each case
DasErste.de	ARD telemedia service, especially with archived information and entertainment programmes made available on the internet for a limited time	Decision still to be taken in each case
tagesschau.de	Telemedia service of the public service news programme "Tagesschau", including archived programmes made available on the internet for a limited time	Decision still to be taken in each case
sportschau.de	Telemedia service on the ARD sports programmes	Decision still to be taken in each case
boerse.ARD.de	Telemedia service with information on the trading markets	Decision still to be taken in each case
ARD Text, ARD Portal/iTV und EPG	Videotext; electronic portal containing basic information for viewers and listeners, for example on the ARD's and the broadcasters' remit, on the TV and radio licence and on programming; electronic programme guide	Decision still to be taken in each case

3) The responsibility for scrutinising the individual services listed as ARD telemedia and provided by the ARD's members (eg, ARD.de, DasErste.de, tagesschau.de) is divided between the individual Broadcasting Councils, whose regional broadcasters (BR, HR, MDR, NDR, RBB, SWR, WDR) are in charge of producing the services (in accordance with the principle of overall control, coupled with their respective responsibility for programming). For example, the SWR Broadcasting Council is responsible for the ARD.de service. Further information (in German) is available at <http://www.ard.de/intern/gremienvorsitzendenkonferenz-der-ard/-/id=54450/1p7izhm/index.html> ("Dreistufentest" section).

Service	Description	Decision
eins-extra.de <sup>4</sup>	The ARD's digital information programme	Decision still to be taken in each case
3sat.de	Telemedia service of the public service cultural television programme 3sat, including archived programmes made available on the internet for a limited time; programmes produced by ARD/ZDF	Decision still to be taken
phoenix.de	Telemedia service of the public service television information programme Phoenix, especially on political issues, including archived programmes made available on the internet for a limited time; programmes produced by ARD/ZDF	Decision still to be taken
SWR.de <sup>5</sup>	Telemedia service on the SWR, with a wide range of information	Decision still to be taken in each case
DASDING.de	Telemedia service of the SWR radio programmes, with a range of music aimed especially at young people	Decision still to be taken in each case
kindernetz.de	Telemedia service of the SWR, aimed especially at children and containing news and information adapted for children	Decision still to be taken in each case
planet-schule.de	Telemedia service with content for teachers and pupils in particular and offered in co-operation with the WDR	Decision still to be taken in each case
Swr2archivradio.radio.de	Internet radio service of the SWR	Decision still to be taken in each case

4) eins-extra.de and eins-festival.de (film, comedy and series content) and einsplus.de (scientific, social and economic themes) are telemedia services relating to the digital special-interest channels operated by ARD under the Inter-State Broadcasting Agreement.

5) In addition to the ARD's "joint" telemedia services, its individual regional broadcasters offer numerous services in respect of which the individual examination procedures have (in most cases) not yet been completed. By way of example, the telemedia services to be scrutinised by the SWR Broadcasting Council are mentioned here. See the decisions taken by the SR Broadcasting Council at its meeting on 17/18 May 2010: <http://www.sr-online.de/dersr/608/1036625.html>

	Service	Description	Decision
	zdf.de <sup>6</sup>	Telemedia service on the ZDF, including archived programmes made available on the internet for a limited time	Decision still to be taken in each case
	heute.de	News based ZDF telemedia service	Decision still to be taken in each case
	sport.zdf.de	Sports based ZDF telemedia service	Decision still to be taken in each case
	ZDFmediathek	ZDF telemedia service for on-demand television and interactive modules on the internet	Decision still to be taken in each case
	tivi.de	Telemedia service primarily aimed at children and containing information as well as knowledge and learning content specially edited for children.	Decision still to be taken in each case
	theaterkanal.zdf.de <sup>7</sup>	Culture based ZDF telemedia service	Decision still to be taken in each case
	ZDFtext	Videotext with the latest news, a programme schedule, etc.	Decision still to be taken in each case
<b>DK Denmark</b>	DR	DR services on public screens. DR delivers blocks of news and other content to screens at bus and train stations, public buildings, private centres, etc.	Approved <sup>8</sup> <a href="http://www.bibliotekogmedier.dk/medieomraadet/radio-og-tv/landsdaekkende-og-regional/dr/vaerditest/">http://www.bibliotekogmedier.dk/medieomraadet/radio-og-tv/landsdaekkende-og-regional/dr/vaerditest/</a>
	dr.dk/sundhed	A portal with health information from other media and partners plus DRs own content on the subject. Edited by DR.	Approved <a href="http://www.bibliotekogmedier.dk/medieomraadet/radio-og-tv/landsdaekkende-og-regional/dr/vaerditest/">http://www.bibliotekogmedier.dk/medieomraadet/radio-og-tv/landsdaekkende-og-regional/dr/vaerditest/</a>

6) On the issues involved in the procedures conducted by the ZDF Broadcasting Council and on the current situation, see: <http://www.unternehmen.zdf.de/index.php?id=66&artid=258&backpid=10&cHash=3f07731978/>

7) infokanal.zdf.de and neo.zdf.de are the additional telemedia services for the digital special interest channels operated by the ZDF under the Inter-State Broadcasting Agreement.

8) Formally speaking, the Radio and TV Board is only asked to give its comments while the DR itself decides whether or not to launch the service. The decision is indicated as "approved" in all three cases, however, because the public comment is understood as approval. The Board is likely to have formal decision making powers in the near future.

	<b>Service</b>	<b>Description</b>	<b>Decision</b>
	dr.dk/tvaers	A portal that provides personal advice and assistance for young people, with links to many different organisations. Edited by DR.	Approved <a href="http://www.bibliotekogmedier.dk/medieomraadet/radio-og-tv/landsdaekkende-og-regional/dr/vaerditest/">http://www.bibliotekogmedier.dk/medieomraadet/radio-og-tv/landsdaekkende-og-regional/dr/vaerditest/</a>
<b>GB United Kingdom</b>	BBC - On-demand services	Telemedia service with content from the BBC broadcasting services made available on the internet for varying periods of time	Decision in favour by the BBC Trust of 25 April 2007; <a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/decisions/on_demand/decision.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/decisions/on_demand/decision.pdf</a>
	BBC high definition television channel	The BBC's HDTV channel	Decision in favour by the BBC Trust of 14 November 2007; <a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/hdtv/pvt_final_conclusions.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/hdtv/pvt_final_conclusions.pdf</a>
	Gaelic Digital Service	Gaelic digital television service, distributed by cable, satellite and broadband	Decision in favour by the BBC Trust of 28 January 2008; <a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/gaelic_digital_service/final_conclusions.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/gaelic_digital_service/final_conclusions.pdf</a>
	Local Video	Local video service covering news, sport and weather and five Welsh-language services on extended local BBS websites in 60 areas of the UK.	Decision by the BBC Trust of 23 February 2009 not to approve the plan; <a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/local_video/decision.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/local_video/decision.pdf</a>
	Canvas	Open joint venture of BBC, ITV, BT, Five, Channel 4 and TalkTalk for the development of an internet protocol based TV standard that enables viewers with a broadband connection to access on-demand services, such as the BBC iPlayer, the ITV Player and other internet content, on a television set using a set-top box.	Final decision still to be taken by the BBC Trust. The positive market impact assessment of 22 December 2009 is available at: <a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/canvas/prov_conclusions/mia.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/canvas/prov_conclusions/mia.pdf</a>

	Service	Description	Decision
	Apps for the iPhone	Free news and sports application programmes for the iPhone, enabling access in particular to the BBC websites BBC News ( <a href="http://news.bbc.co.uk/">http://news.bbc.co.uk/</a> ) and BBC Sports ( <a href="http://news.bbc.co.uk/sport">http://news.bbc.co.uk/sport</a> )	Decision still to be taken
<b>NL Netherlands</b>	Some experimental digital services and thematic channels of Dutch National Public Broadcasting Service (NPO)	<p>Experimental service: Narrowcasting;</p> <p>Experimental service: distribution of public content on mobile platforms;</p> <p>Experimental service: interactive service menus on digital TV platforms;</p> <p>Package radio thematic channels via digital cable, IPTV and other comparable cable infrastructures as an experiment;</p> <p>2 thematic TV channels with a renewed profile: Politics and Sports and Children and Parents, who are part of the total package of 12 TV thematic channels for distribution via digital cable;</p> <p>Experimental catch-up TV service known as <i>Uitzending Gemist</i> (missed broadcast) on request</p>	Approved by decision of the Minister of Education, Culture and Science of 21 April 2009. The minister made a new decision after some private parties had lodged an appeal. <sup>9</sup> In that decision (in response to the appeal) of 3 February 2010 the initial decision was upheld but more extensive reasons for it were given. The appellants appealed to the administrative court and the case is still pending.

9) The decision is in line with the Dutch ex ante procedure agreed on by the Dutch authorities with the European Commission. See the European Commission's decision of 26 January 2010 on the annual financing of the Dutch public service broadcasters, which refers to this ex ante procedure.

In addition to the information given in the table, it is interesting to have a look at two other countries that have dealt with the question of how to assess the public service remit with regard to new services.

## **Flanders** (by Karen Donders, Vrije Universiteit Brussel)

In the Flemish Media Decree of 27 March 2009<sup>1</sup> it is provided that new services of public broadcaster VRT require the approval of the Flemish government before their actual delivery. Article 18 indeed states that the VRT cannot deliver services which are not covered by the public service contract between the public broadcaster and the Flemish government without the approval of the latter. This approval is to be based on an advice of the Sectoral Council for the Media (*i. e.*, an independent advisory body consisting of members of the media sector and academics). The *ex ante* evaluation as briefly conceptualised in the Media Decree does not mimic a clear “Public Value Test” structure. It is merely specified that the Sectoral Council has to formulate its advice taking into account the important evolutions in the media market and the role of the public broadcaster therein. In addition, the Council should evaluate (or consult academic expertise for that purpose) the economic situation in the Flemish media landscape, the general offer in the market, technological evolutions, international trends, the protection and promotion of Flemish culture and identity, and the needs of the consumer.

As specified in the European Commission’s decision on the funding of Flemish public broadcaster VRT, the Flemish government is obliged to introduce an *ex ante* evaluation for the public broadcaster’s new media services and also the Media Decree – which transposed the appropriate measures of this decision – mentions the necessity of an advice and underlying evaluative exercise of a proposed service.

However, two observations render it unlikely that an *ex ante* evaluation will be soon conducted in Flanders. First of all, the Flemish government, that was obliged to define what “new services” are and, hence, which services necessitate an *ex ante* evaluation, defined a list of services which could not be considered as new services and would therefore escape a test. This list or so-called “addendum to the public service contract”<sup>2</sup> was drawn up together with the public broadcaster. Under the headings of “radio”, “television”, “internet” and “mobile” it covers an incredibly extensive list of services ranging from traditional programmes over websites with streaming of programmes to social networking services and text messages. A number of these services (*e.g.* the streaming of programmes) are tested in other countries like the United Kingdom and Germany. This is not the case in Flanders though where at present it seems possible only that new channels require a test. What is more, the public mission of pilot projects is not limited and their duration can extend to two years.

Next to this, it should also be noted that the Sectoral Council for the Media has not yet developed a procedure for an *ex ante* evaluation. Some discussions have taken place in the Council on the topic of *ex ante* evaluation. However, members of the Council are divided on the desirability of an *ex ante* test for the VRT’s new services. Some (notably the public broadcaster itself that is a member of the Council and a number of academics) claim the cost is too high and the budget problems of the public broadcaster too severe to allow for an extensive service expansion to new media platforms. Others (notably private sector representatives) argue a test is vital in order to curb the public broadcaster’s online expansion drift. For now, there is no procedure. This means that, even in a case where a

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1) *Vlaamse Gemeenschap (27 maart 2009). Decreet betreffende radio-omroep en televisie.* (Flemish Community (27 March 2009). Decree concerning radio and television broadcasting).

2) *Vlaamse Gemeenschap en VRT (2009). Verklarend addendum bij de beheersovereenkomst 2007-2011 inzake diensten die binnen het toepassingsgebied van de beheersovereenkomst vallen.* (Flemish Community and VRT (2009). Explaining addendum to the public service contract 2007-2011 concerning services that fall within the scope of the public service contract).

Both documents can be found on <http://www.cjasm.vlaanderen.be/media/regelgeving/#mediadecreet>

service would require a test (and that is unlikely given the width of the addendum, *cf supra*), this test would still have to await a procedure. Given the lack of consensus in the Sectoral Council, the latter will not quickly be agreed upon.

### **Norway** (by Gudbrand Guthus, Medietilsynet)

In the context of a case concerning the financing of the Norwegian public service broadcaster, NRK, the EFTA Surveillance Authority (ESA) has requested the Norwegian authorities to implement certain measures concerning NRK's public service remit.

NRK is the state owned public service broadcaster in Norway, financed by a license fee. In ESA's opinion, the financing of NRK was not compatible with the functioning of the EEA Agreement. Against this background the Norwegian authorities have accepted to implement appropriate measures proposed by ESA. One of these measures is to examine NRK's existing services on new media platforms, to assess whether these fall within the public service remit as this is formulated in the statutes. The Ministry of Culture has instructed the Norwegian Media Authority to make this assessment, which is due June 2010.

# Comparing the funding of public sector broadcasting in the European Union

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Comparing public sector funding in different European countries demands a high level of methodological care. European Union member states are required to ensure transparency with regard to the aid they grant to public undertakings, particularly broadcasters. Transparency obligations in the financial relations between public authorities and public undertakings and within undertakings to which special or exclusive rights have been granted, or which provide a service of general economic interest, are set out in Directive 80/723/EEC<sup>1</sup>. The Commission's evaluation, mentioned in its 2001 and 2009 Communications, assumes that the "public service remit" is defined clearly and accurately, and that a clear and appropriate distinction is made between public service activities and other activities. Undertakings are normally required at national level to keep separate accounts for these two types of activities so that the use of public funds is transparent and can be monitored. However, the keeping of separate accounts for public service and commercial activities, as requested by the European Commission, does not mean, in practice, that separate undertakings will automatically be created. Transparency is required with regard to the allocation of resources to activities, but this does not mean that broadcasters publish separate accounts and balance sheets. In practice, therefore, funding comparisons must be based on company accounts. And, in our view, the cardinal principle of such comparisons is that they should focus on the funding methods of all public undertakings and not – as is so easily done in France – just on those of the largest undertakings<sup>2</sup>.

For this reason, in the current circumstances, European statistical comparisons can be made concerning all the combined activities of public sector undertakings, but not on their public service activities only<sup>3</sup>. The quality of our statistical analysis depends on the level of detail that appears

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1) Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings.

2) The comparison between the budgets of France Télévisions and the BBC, although frequently discussed in political circles, has little methodological relevance. On the one hand, the BBC's activities include radio, the parliamentary channel and international services - activities which, in France, are carried out by Radio France, RFI, Canal France International, LCP-Assemblée nationale and La Chaîne Public Sénat, TV5 Monde and France 24, which (as well as La Sept-ARTE) must be included in the equation. On the other hand, the British public sector includes not only the BBC, but also the Channel 4 Group (which, although it is commercially funded, is publicly owned and has a public service remit), Welsh channel S4C and a broadcasting service for the armed forces. It should also be noted that the BBC is responsible for collecting the licence fee and managing its archives, activities which are outside the remit of France Télévisions.

3) Some private broadcasters (ITV in the United Kingdom, RTL Letzbürger in Luxembourg) can be given public service tasks, but these only play a marginal role in the programme schedule. In the Netherlands, most public service tasks are entrusted to associations.



in the balance sheets and accounts published by undertakings and in the information they disclose on the type of income that makes up their operating revenue<sup>4</sup>.

Depending on the analysis objectives, it is necessary to choose between consolidated and non-consolidated accounts.

In order to measure the size of the public sector in the European Union, we have considered the non-consolidated accounts of 85 publicly controlled undertakings, some of which have no public service remit and whose activities and income are entirely commercial. The total income of the public broadcasting sector in the European Union (27 member states) rose from EUR 29.9 billion in 2004 to EUR 31.9 billion in 2007, before falling to EUR 30.1 billion in 2008.

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4) Accessibility of the accounts of public undertakings varies from country to country. Many of them publish their activity reports, including their financial accounts, on their website. Even here, transparency is not guaranteed, since some do not publish the breakdown of their income. In many cases, our only source concerning income breakdown remains the data provided by undertakings to the EBU's Strategic Information Service, to which we are grateful. It should be noted that the quality of this data varies from one undertaking to another and from one year to another. For some public undertakings, our only source of information is the AMADEUS database, a collection of balance sheets edited by Bureau Van Dijk Electronic Publishing. AMADEUS provides accounts and balance sheets, but not the breakdown of income. Where there is a gap in these various sources, we contact the undertakings or the relevant ministry directly. In a small number of cases, our requests remain unanswered.

We should also mention the difficulties of long-term comparisons: structural reforms can make it difficult to compare one year to another. For example, the 2008 accounts of the various French companies that were merged to form France Télévisions in 2009 were not published. Some companies change the way they present their commercial income on a fairly regular basis. Finally, the instability of exchange rates between the Euro and other European national currencies does not make long-term comparisons easy.

Operating revenues of public radio and television companies in the European Union (EUR27)  
(2004-2008)

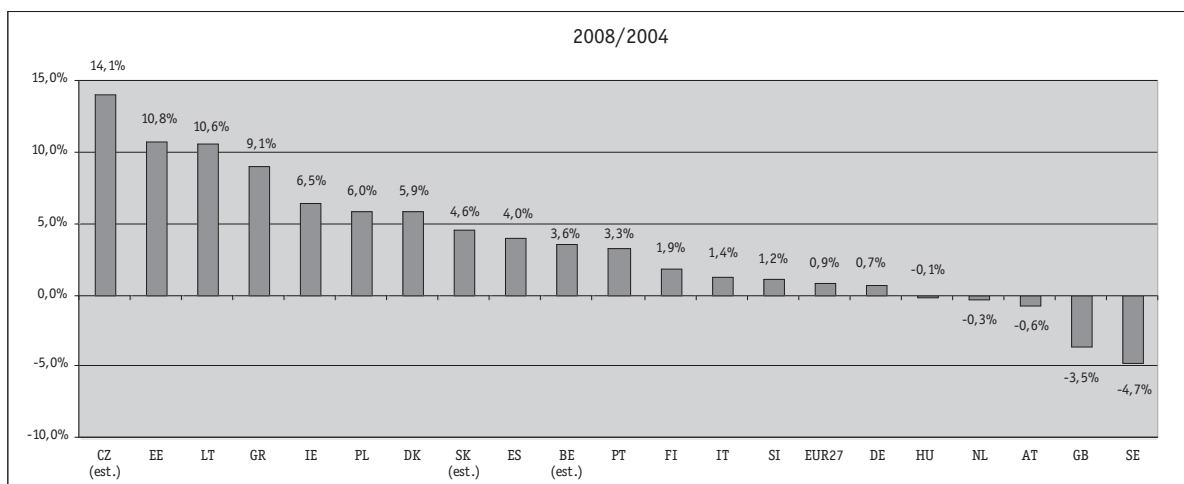
EUR thousand

	2004	2005	2006	2007	2008	2008/2007
AT	967,104	990,010	917,642	952,896	943,038	-1.0%
BE (est.)	671,136	716,910	790,328	770,209	772,111	0.2%
CZ (est.)	191,838	211,559	270,102	304,108	324,624	6.7%
DE	8,016,090	8,476,933	8,481,632	8,467,959	8,241,162	-2.7%
DK	675,868	710,391	735,947	845,282	849,436	0.5%
EE	21,273	21,248	25,439	27,726	32,065	15.6%
ES	1,826,902	1,711,759	1,806,137	1,833,759	2,136,065	16.5%
FI	368,459	415,302	396,374	409,051	397,517	-2.8%
FR	4,800,792	4,852,016	5,099,623	5,276,083	4,216,934	(1)
GB	6,131,275	6,393,253	6,847,058	6,178,605	5,306,559	-14.1%
GR	263,898	273,477	321,943	360,059	373,968	3.9%
HU	139,416	158,394	162,824	163,599	138,840	-15.1%
IE	342,882	369,888	405,021	441,152	440,760	-0.1%
IT	2,943,651	2,942,754	2,991,272	3,066,015	3,110,315	1.4%
LT	17,300	17,300	19,800	23,900	25,900	8.4%
LV	18,779	21,918	26,800	29,800	n.a.	n.a.
MT	7,103	5,738	5,615	6,475	n.a.	n.a.
NL	853,056	822,393	679,988	893,300	843,000	-5.6%
PL	473,820	551,294	583,784	668,360	597,441	-10.6%
PT	261,763	266,105	292,150	314,853	298,348	-5.2%
RO	180,565	203,880	243,341	n.a.	n.a.	n.a.
SE	718,671	712,062	739,319	696,424	593,948	-14.7%
SI	108,784	109,833	116,880	114,524	114,171	-0.3%
SK (est.)	87,127	79,141	87,561	92,047	104,244	13.3%
<b>EUR27 (2) (est.)</b>	<b>30,087,552</b>	<b>31,033,558</b>	<b>32,046,580</b>	<b>32,179,527</b>	<b>30,140,062</b>	<b>-6.3%</b>

(1) Due to the reform of the public broadcasting system, 2008 data are not comparable with previous years.

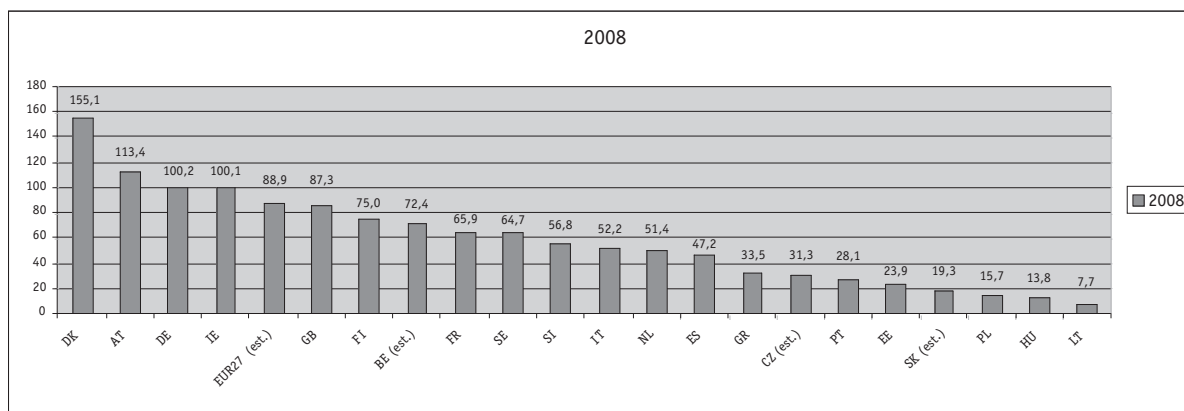
(2) Bulgaria and Cyprus are not included. No public television in Luxembourg.

Average annual growth rate of operating revenues of public broadcasting companies (2004-2008)



Average operating revenue per inhabitant of public broadcasting companies in the European Union (2008)

EUR/inhabitant











OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL  
EUROPEAN AUDIOVISUAL OBSERVATORY  
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

## Information services for the audiovisual sector

It is the task of the European Audiovisual Observatory to improve transparency in the audiovisual sector in Europe. It does this by collecting, processing and publishing up-to-date information about the various industries concerned.

The Observatory has adopted a pragmatic definition of the audiovisual sector in which it works. Its principal areas of interest are film, television, video/DVD, new audiovisual media services and public policy on film and television. In these five areas, the Observatory provides information in the legal field as well as information about the markets and financing. As far as its geographical scope is concerned, the Observatory monitors, records and analyses developments in its member states. In addition, data on non-European countries is also made available when judged appropriate. The various stages involved in providing information include the systematic collection and processing of data as well as its final distribution to our users in the form of print publications, information on-line, databases and directories, and our contributions to conferences and workshops. The Observatory's work draws extensively on international and national information sources and their contributions of relevant information. The Observatory Information Network was established for this purpose. It is composed of partner organisations and institutions, professional information suppliers and selected correspondents. The Observatory's primary target groups are professionals working within the audiovisual sector: producers, distributors, exhibitors, broadcasters and other media service providers, international organisations in this field, decision-makers within the various public bodies responsible for the media, national and European legislators, journalists, researchers, lawyers, investors and consultants.

The European Audiovisual Observatory was established in December 1992 and is part of the Council of Europe thanks to its status as a "partial and enlarged agreement". Its offices are in Strasbourg, France. The Observatory's membership currently comprises 36 European States and the European Community, which is represented by the European Commission. Each member appoints one representative to its board, the Executive Council. An Executive Director heads the international Observatory team.

**The Observatory's products and services are divided into four groups:**

- **Print Publications**
- **Information on-line**
- **Databases and Directories**
- **Conferences and workshops**

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# Legal Information Services from the European Audiovisual Observatory

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