4. Case-law of the European Court of Human Rights

The Court has established a rich body of case law on freedom of expression, and in this scope, also specific rules on audiovisual media and on PSM. Considering that the general principles on freedom of expression and of the media, along with its limits, constitute a basic framework applicable to all cases, it may be useful to reiterate them here.

"*Freedom of expression, as secured in Article 10 § 1, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress.*"[63]

Regarding the importance of news media in the architecture of this right, the Court has stressed that "*[f]reedom of the press and other news media afford the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.*"[64]

The immediate effect of the audiovisual media and the use of radio and television as sources of entertainment were considered by the Court to afford this type of media particular impact on the audiences' opinion formation: "*The audiovisual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages through sound and images, such media have a more immediate and powerful effect than print.*[65] *The function of television and radio as familiar sources of entertainment in the intimacy of the listener or viewer's home further reinforces their impact. Moreover, particularly in remote regions, television and radio may be more easily accessible than other media.*"[66]

63. Lingens v. Austria, 8 July 1986, § 41, Series A no. 103.
64. Handyside v. the United Kingdom, § 49, 7 December 1976, Series A no. 24.
65. Jersild v. Denmark, 23 September 1994, § 31, Series A no. 298, and Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, § 79, ECHR 2004-XI.
66. Manole and Others v. Moldova, no. 13936/02, § 97, ECHR 2009 (extracts).

In view of the wide reach and impact of the audiovisual media, the requirement of editorial independence is of particular importance: "*A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.*"[67]

Another important issue in terms of ensuring adequate and sufficient level of protection of the right to freedom of expression is the nature of the State's obligations in this regard. The Court has established that the so-called negative obligation of refraining from arbitrary interference may not always suffice; accordingly, member states must in addition fulfil a range of positive obligations: "*Genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere but may require it to take positive measures of protection, through its law or practice.*"[68]

In the context of media freedom, States have a fundamental positive obligation to ensure a pluralist media environment, or as the Court has termed it, to serve as the ultimate guarantors of media pluralism: "*Given the importance of what is at stake under Article 10, the State must be the ultimate guarantor of pluralism.*"[69] The Court furthermore found that this observation is especially valid in relation to the audiovisual media, whose programmes are often broadcast very widely.

In connection to the audiovisual media, the Court has also developed several principles that apply specifically to them, including PSM. First of all, it has specified how the general principles on freedom of expression and media freedom apply in the field of audiovisual media: *"The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the State's margin of appreciation."*[70]

That said, the Court has recognised that "*a public service broadcasting system is capable of contributing to the quality and balance of programmes*."[71]

The Convention system being subsidiary to the safeguarding of human rights in national systems, the Court has refrained from prescribing a specific model for

67. VGT Verein gegen Tierfabriken v. Switzerland, no. 24699/94, §§ 73 and 75, ECHR 2001-VI.
68. Özgür Gündem v. Turkey, no. 23144/93, §§ 42-46, ECHR 2000-III; Fuentes Bobo v. Spain, no. 39293/98, § 38, 29 February 2000; Appleby and Others v. the United Kingdom, no. 44306/98, §§ 39-40, ECHR 2003-VI.
69. Manole and Others v. Moldova, no. 13936/02, § 97, ECHR 2009 (extracts) , https://hudoc.echr.coe.int/eng?i=001-94075.
70. Ibid., § 100
71. Informationsverein Lentia and Others, Informationsverein Lentia and Others v. Austria, 24 November 1993, § 33, Series A no. 276.

how the media should be organised in each State. Therefore, no obligation can be imposed on States to create a PSM system, provided that some other means are used to achieve the quality and balance of news and information.[72]

However, as evidenced by the judgment in *Manole and others v. Moldova,* if there is such a system in place or if the State decides to create PSM, it must guarantee that the system provides a pluralistic audiovisual service: "*Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.*"[73]

In this connection, the Court made an important clarification, referring to the Committee of Ministers' standards for guidance on how to interpret States' responsibilities with regard to PSM: *"[s]tandards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe … provide guidance as to the approach which should be taken to interpreting Article 10 in this field.*"

Below, the most important Court judgments and decisions regarding PSM are presented in chronological order.

Informationsverein Lentia and others v. Austria, judgment of 24 November 1993[74]

No justification for a broadcasting monopoly of PSM organisation

This case concerns the impossibility to set up a radio and a television station, as under the Austrian legislation in force at the relevant time, this right was restricted to the Austrian Broadcasting Corporation (PSM organisation). According to the Austrian Government, only the system in force based on the monopoly of PSM made it possible for the authorities to guarantee the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for programmes.

The Court found this restriction to contravene Article 10 of the Convention. It stated that a public monopoly imposed the greatest restrictions on freedom of expression, namely the total impossibility of broadcasting otherwise than through a national (state) station. Due to far-reaching character of such restrictions, they can only be justified where they correspond to a pressing need.

72. Manole and Others v. Moldova, § 100.
73. Ibid., § 101
74. Informationsverein Lentia and others v. Austria. https://hudoc.echr.coe.int/eng?i=001-57854

The Court stressed that as a result of the technical progress made over the last decades, justification for these restrictions could no longer be found in limited radio frequencies resources. Citing the practice of other countries which either issued licenses subject to specified conditions of variable content or enabled private participation in the activities of the national corporation, the Court noted that it could not be argued that there were no equivalent less restrictive solutions.

According to the Court, the experience of several European States of a comparable size to Austria, in which private and public stations coexisted, showed that the fears expressed by the Government, namely that the national market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of "private monopolies", were without merit.

Verein gegen Tierfabriken v. Switzerland, judgment of 28 June 2001[75]

Prohibition of broadcasting political advertisement on animal cruelty via PSM not "necessary in a democratic society"

VgT, an association for the protection of animals, produced a television advertisement denouncing the industrial rearing of pigs and encouraging people to eat less meat. The authority responsible for the broadcasting of commercials at the Swiss PSM refused to broadcast it on account of its "clear political character", relying, as did subsequently the Swiss Federal Court, on the prohibition on "political advertising" in Swiss law. Such a prohibition was to prevent financially powerful groups from obtaining a competitive political advantage, protect the formation of public opinion from undue commercial influence, and contribute towards the independence of radio and television broadcasters in editorial matters. VgT, aiming to reach the entire Swiss public, had no other means than the national broadcaster at its disposal, since regional private and foreign television channels could not be received throughout Switzerland.

The Court found that the refusal was prescribed by law and pursued a legitimate aim. As to the necessity of the interference, the Court found that the State's margin of appreciation was particularly essential in commercial matters, but since this case concerned participation in a debate affecting the general interest rather than purely commercial interests, the margin of appreciation was reduced. A prohibition of "political advertising" may be compatible with Article 10 of the Convention in certain situations, but the reasons must be relevant and sufficient to justify the interference, and the Court did not find that to be the case. VgT was not a powerful financial group and did not intend to hinder the broadcaster's independence or unduly influence public opinion, so the complete prohibition to broadcast the advertisement amounted to a restriction that was not necessary in a democratic society.

As the Swiss authorities refused to reopen the proceedings, and the violation of VgT's freedom of expression thus continued, VgT applied to the Court again and in 2009 Switzerland was held responsible for another violation of its freedom of expression,

75. Vgt Verein gegen Tierfabriken v. Switzerland. https://hudoc.echr.coe.int/eng?i=001-59535

the Government not having been able to prove that the Court's earlier decision was no longer valid or relevant.

Radio France and others v. France, decision of 23 September 2003[76]

Independent PSM recognised as non-governmental organisation vis-à-vis the State

PSM independence from the Government is at the centre of the Court's admissibility decision in *Radio France and others v. France*, with the recognition that the non-governmental nature of a PSM organisation can be derived from its legal status and the rights stemming from it. If the legislature – in accordance with Recommendation No. R (96)10 on the guarantee of the independence of public service broadcasting – has devised a framework that guarantees PSM's editorial independence and its institutional autonomy, the organisation can be considered as independent from the Government, even if it considerably depends on its financing.

Deciding on whether Radio France, the national radio broadcaster, could bring an application against the State as a "non-governmental" organisation, the Court relied on the following factors: the organisation was not under the supervision of the State but under the control of the "independent authority" of the *Conseil supérieur de l'Audiovisuel*; the organisation did not have a monopoly in sound broadcasting but operated in a sector open to competition; it was, essentially, subject to the legislation on incorporated companies; it exercised no powers which would be exempt from the ordinary law and its activities were subject to the jurisdiction of the ordinary courts.

According to the Court, although the French law assigned public-service tasks to Radio France and although the organisation was largely dependent on the State for its finance, the French legislature had established a regime whose objective was to guarantee its editorial independence and institutional autonomy. The Court thus found that there was little difference between Radio France and private radio stations. The law which placed sound broadcasting in a competitive context did not confer on the applicant company a dominant position in that sector.

Faccio v. Italy, decision of 31 March 2009[77]

Proportionate nature of the obligation for owners of TV sets to pay the licence fee

The applicant applied to the Radiotelevisione italiana (RAI) subscriptions bureau to cancel his subscription to the public television service in 1999. In August 2003, the tax police affixed seals to his television set, preventing it from being used. This was considered by the applicant to excessively interfere with his freedom to receive information and other content from commercial channels and violate Article 10 of the Convention.

The licence fee constitutes a tax that is used for the financing of PSM service. In the Court's view, regardless of whether or not the applicant wished to watch programmes

76. Radio France and others v. France. https://hudoc.echr.coe.int/eng?i=001-61686
77. Faccio v. Italy. https://hudoc.echr.coe.int/eng?i=001-92184

on public channels, the mere possession of a television set obliged him to pay the tax in question. Conversely, even accepting that it would be technically possible to set up a system enabling viewers to watch only private channels without paying the licence fee, this would be tantamount to stripping the tax of its very essence, namely a contribution to a community service rather than the price paid by an individual in exchange for the reception of a given channel.

The Court noted that taxation matters belonged to the prerogatives of the State authorities, and that the public nature of the relationship between the taxpayer and the community remained predominant. In light of these considerations and of the reasonable amount of the fee in question, the Court found that the obligation for owners of TV sets to pay the licence fee was proportionate to the objective pursued by the State.

Wojtas-Kaleta v. Poland, no. 20436/02, judgment of 16 July 2009[78]

Journalists' right to express critical opinion on their PSM employer protected by the right to freedom of expression

This case is important from the perspective of the balance between (PSM) journalists' freedom of expression and loyalty to their employers. The Court determined that in the case of the applicant the right to freedom of expression outweighed the duties of employees towards their employers.

The applicant, a journalist with a public television company and also the President of the Polish Public Television Journalists' Union, was reprimanded by the company after criticising, in comments to the press and in an open letter, its decision to take two classical music programmes off the air.

The applicant's case raised the issue of how the limits of loyalty of journalists working for PSM should be delineated and what restrictions could be imposed on them in public debate. The Court found that the obligation of discretion and constraint does not apply with equal force to journalists as it is in the nature of their functions to impart information and ideas. Moreover, the PSM's programming policy is an issue of public interest and concern, thus allowing a narrow scope for restrictions.

The applicant's employer had been entrusted with a special statutory mission which included assisting cultural development with special emphasis on national intellectual and artistic achievements. The applicant argued that the changes in its programming policy were not consistent with that mission and echoed widely shared concerns about the declining quality of music programmes. Although she claimed to have done so in her role as a journalist commenting on a matter of public interest, the company had taken the view that merely participating in the debate was sufficient to establish a breach of her obligations as an employee, without weighing those obligations against the company's role as a public service. Similarly, the domestic courts had endorsed that conclusion without examining whether and how the

78. Wojtas-Kaleta v. Poland. https://hudoc.echr.coe.int/eng?i=001-93417

subject matter and context of her comments could have affected the permissible scope of her freedom of expression.

The Court observed that the domestic courts took no note of the applicant's argument that she had been acting in the public interest. In the Court's view, it was also relevant that the applicant's comments had had a sufficient factual basis, while at the same time amounting to value judgments not susceptible of proof; that the tone had been measured; that no personal accusations had been made; and that her good faith was not in dispute.

In sum, having weighed up the various competing interests, including the right to freedom of expression on matters of general interest, the applicant's professional obligations and responsibilities as a journalist and the duties and responsibilities of employees towards their employers, the Court concluded that the interference had not been "necessary in a democratic society" and there has been a violation of Article 10 of the Convention.

Manole and others v. Moldova, judgment of 17 September 2009[79]

The State as the ultimate guarantor of pluralism is required to put in place statutory guarantees of PSM independence to ensure that the public has access to a range of opinion, reflecting the political diversity in the country.

Nine applicants, journalists, editors and producers employed at Teleradio-Moldova (TRM), a state-owned company which at that time was the only national broadcaster in Moldova, complained about a number of acts showing that the public broadcaster was effectively controlled by the Government and the ruling political party, resulting in a censorship regime for the journalists. The political control of the majority party was evidenced by the replacement of the TRM management, only a trusted group of journalists could report on political issues, with a clear bias towards the ruling party, and other journalists were reprimanded, programmes were taken off the air and the opposition parties had but limited opportunities to have their views heard.

After a strike by TRM journalists, a structural reorganisation of TRM was carried out and a large number of journalists were not retained in their posts. The journalists claimed that they were dismissed for political reasons and appealed the decision before the domestic courts, without success.

The Court found a violation of Article 10 of the Convention, establishing that the legislative framework had been insufficient and failed to provide safeguards against the control of TRM's senior management, and thus its editorial policy, by the Government.

In this benchmark case, the Court laid down a list of provisions concerning the audiovisual media. According to the Court, any situation in which any powerful group obtains position of dominance over the audiovisual media and starts exercising pressure on other broadcasters, curtailing their editorial freedom, represents undermining of the fundamental role of freedom of expression.[80]

79. Manole and others v. Moldova, https://hudoc.echr.coe.int/eng?i=001-94075
80. Ibid, § 98

In the Court's opinion, the State should not only self-limit its interference in the exercise of freedom of expression, but also take positive measures to protect it through law or practice[81] and thus become the ultimate guarantor of pluralism.[82]

If the State decides to create a public broadcasting system and it becomes the main broadcaster in the region, it is indispensable that it ensures the provision of impartial, independent and balanced news, information and comment and also provides a forum for public discussion with broad spectrum of views and opinions.[83]

The Court ruled that the domestic law did not provide any guarantee of political balance in the composition of TRM's senior management and supervisory body. General measures, including legislative reform, were required to ensure that the legal framework complied with the requirements of Article 10 and guarantee a pluralistic audiovisual service.

This could be done, for example, by the inclusion of members appointed by the political opposition in the composition of TRM's senior management and supervisory body, or by providing safeguards against interference from the ruling political party in these bodies' decision-making and functioning. In particular, the Court considered it necessary that the rules for appointing the members of the supervisory council provide adequate safeguards against political bias.

As for the question of guidance over the standards relating to PSM, the Court pointed to the Committee of Ministers' recommendations R(96)10 and Rec(2000)23[84] and the Committee's Declaration on the guarantee of the independence of PSM,[85] giving these non-binding documents of the Council of Europe additional weight.[86]

81. Ibid, § 99
82. Informationsverein Lentia and others v. Austria, § 38. https://hudoc.echr.coe.int/eng?i=001-57854
83. Ibid, § 101
84. Recommendation no. R(96)10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168050c770; Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322
85. Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states. https://rm.coe.int/16805d7431
86. Manole and others v. Moldova, §§ 51-54, 102.