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Online activities of public service media: remit and financing



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Foreword

When going online, audiovisual media service providers adapt their activities to the expectations of their audiences and, consequently, elaborate new ways of presenting their content. This is true both for commercial and for public service media (PSM). For the latter there are also further aspects to consider, which are specifically related to their remit and to the fact that they are using public money. The financing of PSM is strictly connected to the definition of their remit according to EU state aid rules and to the interpretative indications given by the European Commission as to their application.

Nothing new one could say. The topic has already been dealt with by the Observatory in previous publications:

- the IRIS *Plus* of 2009 on “The Public Service Remit and the New Media” examined the regulatory framework applicable to the Internet-related activities of public service broadcasters;¹
- the IRIS *Plus* of 2010 on “Public Service Media: Money for Content” explored in its Lead Article both European legislation and national developments concerning financial and content-related supervision.²

What is new is the practice that has developed since the adoption of the Communication of the Commission on the application of state aid rules to Public Service Broadcasting in 2009. The introduction of the so-called Public Value Test (PVT) and of the Market Impact Assessments (MIA) has changed the way of defining both the remit and the financing of PSM. It is exactly how these two issues have been accordingly dealt with during the past six years that is at the centre of this publication.

This IRIS *Special* has been prepared by the Institute of European Media Law (EMR) in Saarbrücken and brings together contributions from various authors. It focuses on a selection of European countries: Austria, Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, Sweden and the UK. The countries have been chosen with the intention of providing a set of different approaches.

After an introduction to the European regulatory framework (both of the EU and CoE) applicable to Public Service Media written by Peter Matzneller (EMR), Klaus Radke (WDR) and Sebastian Schweda (EMR) give an overview of the definition of the public service remit and the funding schemes respectively in the selected countries.

A special focus is placed on Denmark by Christian Berg (Danish Ministry of Culture), on Germany by Katrin Neukamm (WDR) and on Hungary by Gábor Polyák (Mertek Media Monitor), in order to show concrete examples of public service performances in the online environment.

¹ Ridinger M., “The Public Service Remit and the New Media”, IRIS plus, supplement to IRIS, Legal Observations of the European Audiovisual Observatory, Issue 2009-6, Strasbourg, 2009,

<http://www.obs.coe.int/documents/205595/264587/IRIS+plus+2009en4LA.pdf/3febdb44-89f8-452a-98fc-fa63067e5452>.

² Bron C.M., “Financing and Supervision of Public Service Broadcasting”, in Nikoltchev S. (ed.), “Public Service Media: Money for Content”, IRIS plus 2010-4, European Audiovisual Observatory, Strasbourg, 2010,

<http://www.obs.coe.int/documents/205595/264589/IRIS+plus+2010en4LA.pdf/4d531a6e-ad02-4958-aeb3-2c3aabfcd1e4>.



An organic overview of the implementation of the PVT and MIA in the selected countries is provided by Gianna Iacino (EMR) that digs into the responsible institutions and the procedures foreseen at national level, including their duration and costs. Richard Burnley (EBU) and Ross Biggam (ACT) offer the points of view of the public service and commercial broadcasters on how the PVT has worked, before Peter Matzneller (EMR) rounds up.

Strasbourg, June 2015

Maja Cappello

Head of the Department for Legal Information

European Audiovisual Observatory



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European legal framework on public service media and their remit online





Introduction

Peter Matzneller, EMR

In the course of the constant development of broadcasting and its remit, three different ways of providing the individual with comprehensive and balanced information have emerged essentially since the middle of the last century: in addition to commercial and state-run broadcasters, there are public service broadcasters whose task it is to ensure social diversity in their programming. This is due to neither the commercial broadcasters, which rely on in-programme advertising and are therefore subject to the laws of the marketplace and have to tailor their programmes accordingly, nor the state-run channels, which are under the control of the government in power, are set up to meet all the needs of a democratic society.

As a result of the licensing of commercial broadcasters, in addition to the existing, mostly state-run or public service channels, market conditions have changed in favour of an intensely competitive media system in which public service broadcasting constitutes a platform that permits an open exchange of views by various social and political players, provides the public with information and renders political and social processes transparent, thus enabling the population to form opinions and take decisions.

At the beginning of the 21st century, the keywords in the field of broadcasting are digitisation and (technical) convergence. Digitisation has led to a big increase in the number of channels and in the amount of text and audiovisual content available, which has in turn been accompanied by further differentiation with regard to programming and means of distribution. The media companies and broadcasters operating in the market are increasingly being joined by private individuals who post publications or other offerings on the Internet, with the result that it is becoming harder and harder to differentiate between the various media. Both the online offering of a traditional newspaper and the website of a public service TV channel provide the individual with information in the form of text and images and with audiovisual film material. Text, pictures, sound and video are increasingly merging into “multimedia” and all content can be received on a wide variety of terminal devices, from PCs to mobile telephones.

Against the background of increasingly intense competition between commercial and public service broadcasters, and in view of the Protocol of 2 October 1997 on the system of public broadcasting in the member states,³ the EU Commission decided to draw up the “EU state aid compromise”⁴ for the funding of public service broadcasting, which establishes a link to commercial and competition law and accordingly attempts to resolve any conflicts that may arise as a result.

In light of these changes in the media sector, it is crucial for ensuring the political awareness of the public in a democracy to keep bearing in mind what demands have to be met by media in general and public service broadcasters in particular.

³ Protocol on the system of public broadcasting in the Member States of 2 October 1997 (OJ C 340 of 10 November 1997, p. 109), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/PRO/09:en:HTML>. Its key provision states: “The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account”.

⁴ Decision of the European Commission C (2007) 1761 FINAL, 24 April 2007 – State aid E 3/2005, http://europa.eu/rapid/press-release_IP-07-543_en.htm.



This IRIS *Special* issue accordingly discusses the public service broadcasters' offerings in the digital environment. An introductory overview of requirements to be met at the level of the Council of Europe and the European Union is followed by a comparative legal analysis of the public service broadcasters' remit for the provision of online media. Following on from this, a comparison of selected European funding systems will provide the basis for three detailed country reports that will highlight the impact of the specific funding structure on the extent of public service broadcasters' online activities. The publication will then go on to compare the implementation of the public-value test in selected EU member states and conclude with two observations on the success of the test from the different points of view applying in each case.



1. The European framework regarding online activities of public service media

Peter Matzneller,⁵ EMR

This chapter is intended to outline European prerequisites that set the frame for the provision of public service media with a particular focus on their activities in an online environment. First, relevant recommendations of the bodies of the Council of Europe, as well as jurisprudence of the European Court of Human Rights will be analysed, followed by an assessment of the set of provisions of the European Union and legal practice of the Court of Justice of the European Union.

1.1. Council of Europe

1.1.1. Conventions, Recommendations, Resolutions and Declarations

Public service broadcasting benefits from protection by and the guarantees of Article 10 of the European Convention on Human Rights (ECHR).⁶ This protection is a consequence of the deliberate decision by a state to establish a public broadcasting system that provides pluralistic audiovisual media services.⁷

In this regard, the Council of Europe outlines the close connection between the free circulation of information and the free expression of opinions. It assigns to public service broadcasting a special remit to ensure pluralism and to contribute to culture. Further, it outlines the importance of public service broadcasters' independence and expresses its demand for participation by public service broadcasters in new media services.⁸

1.1.1.1. The role of public service broadcasting in a democratic society

The Committee of Ministers of the Council of Europe on several occasions outlined the important role of public service broadcasting in a democratic society. For example, in Recommendation Rec (2003) 9 it stresses,

⁵ The author would like to thank Gregor Euskirchen, legal clerk at the Institute of European Media Law, for his valuable input to this article.

⁶ Art. 10 ECHR reads: "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." The Convention is available at: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

⁷ Berka, W. & Tretter, H., "Public Service Media under Article 10 of the European Convention on Human Rights", Study on behalf of the European Broadcasting Union, 2013, p. 25, http://www3.ebu.ch/files/live/sites/ebu/files/Publications/Art%2010%20Study_final.pdf.

⁸ For more details on the Council of Europe's general approach to public service broadcasting see the comparative study of the Institute of European Media Law, conducted on behalf of the European Broadcasting Union, <http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Media%20Law/Legal%20Topics/EMR%20Study%20-%202nd%20version.pdf>.



*the specific role of the broadcasting media, and in particular of public service broadcasting, in modern democratic societies, which is to support the values underlying the political, legal and social structures of democratic societies, and in particular respect for human rights, culture and political pluralism.*⁹

The Parliamentary Assembly has also addressed the remit of public service broadcasting. Similar to the Committee of Ministers, it focuses on the particular role of public service broadcasting and, in its Recommendation 1641 (2004), states the following:

*Public service broadcasting, whether run by public organisations or privately-owned companies, differs from broadcasting for purely commercial or political reasons because of its specific remit, which is essentially to operate independently of those holding economic and political power. It provides the whole of society with information, culture, education and entertainment; it enhances social, political and cultural citizenship and promotes social cohesion. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers a variety of programmes and services catering for the needs of all groups in society and it is publicly accountable.*¹⁰

1.1.1.2. Public service broadcasting and new media

When it comes specifically to new media and the online world, the Council of Europe has on several occasions acknowledged the important role and the mission of public service broadcasters and regularly points to the fact that their services need to be present also in an online environment in order to satisfy the needs of society.

In its most recent Recommendation Rec(2015)6, the Committee of Ministers, in line with the ECtHR,¹¹ makes clear that Article 10 ECHR also applies to the Internet. Although not expressly directed towards public service media, the Committee makes reference to the public service mission when stating that:

*[s]tates have an obligation to guarantee to everyone within their jurisdiction the right to freedom of expression and the right to freedom of assembly and association, in full compliance with Articles 10 and 11 of the ECHR, which apply equally to the Internet.*¹²

Therefore, the Committee of Ministers recommends that member states, when developing and implementing Internet-related policies at national level and within the international community:

⁹ Committee of Ministers, Recommendation Rec(2003)9 of 28 May 2003 on measures to promote democratic and social contribution of digital broadcasting, available at:

<https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282003%299&Language=lanEnglish&Site=COE&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

¹⁰ Parliamentary Assembly, Recommendation 1641 (2004) of 27 January 2004 on public service broadcasting, point 2, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/EREC1641.htm>.

¹¹ See below chapter 1.1.2.2. for more details on relevant jurisprudence of the ECtHR in this regard.

¹² Committee of Ministers, Recommendation Rec(2015)6 of 1 April 2015 on the free, transboundary flow of information on the Internet, principle 1.1,

<https://wcd.coe.int/ViewDoc.jsp?id=2306649&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.



promote and protect the free, transboundary flow of information, having due regard to the principles of this recommendation, in particular by ensuring that these principles are reflected in regulatory frameworks or policies and in practice; [and to]

*encourage the private sector, civil society and technical communities to support and promote the implementation of the principles included in this recommendation.*¹³

This Committee's assessment can be seen as a follow-up on earlier elaborations of the bodies of the Council of Europe on public service broadcasting. In this vein, the Parliamentary Assembly in its Recommendation 1878 (2009) deals in particular with public service broadcasters and states that their mission requires them to make use of new technologies and to offer new additional services, including interactive and on-demand media services on all available platforms, so as to reach all audiences and in particular young people.¹⁴ In the same Recommendation, the Assembly also states:

*As media markets converge further, and users' demands change, public service broadcasters should diversify their services through thematic channels, on-demand media, recorded media and Internet-based media services in order to offer a comprehensive and competitive range of media services to the public at large in accordance with their public service mission. Technological progress in the field of audiovisual media and electronic communications means that public service broadcasters should also make use of new technologies.*¹⁵

The Committee of Ministers also recognises the need for public service organisations to use diverse platforms and to offer various services to fulfil their public service remit. In its Recommendation Rec(2007)3, it points to the principle of universality, which according to the Committee is fundamental to public service media and which should be addressed having regard to technical, social and content aspects. The Recommendation in particular addresses the member states when it demands that,

*Member states should, in particular, ensure that public service media can be present on significant platforms and have the necessary resources for this purpose.*¹⁶

An additional tribute to new technologies and their importance for public service broadcasters can be found in the Recommendation Rec(2011)7 of the Committee of Ministers, which acknowledges that developments in information and communication technologies and their application to mass communication have led to significant changes in the media ecosystem. Thus, regarding public service broadcasting, the Recommendation, in the tradition of its preceding papers, encourages member states to,

*adopt strategies to promote, develop or ensure suitable levels of public service delivery so as to guarantee a satisfactory level of pluralism, diversity of content and consumer choice and ensure close scrutiny or monitoring of developments.*¹⁷

¹³ Ibid, point 6.

¹⁴ Parliamentary Assembly, Recommendation 1878 (2009) of 25 June 2009 on funding of public service broadcasting, point 17, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17763&lang=en>.

¹⁵ Ibid, point 9.

¹⁶ Committee of Ministers, Recommendation Rec(2007)3 of 31 January 2007 on the remit of public service media in the information society, <https://wcd.coe.int/ViewDoc.jsp?id=1089759>.



The challenges for public service media in a new media environment are also addressed by the Committee of Ministers in its Declaration on public service media governance. The Committee is aware of the fact that for all public service media new skills and approaches will be needed to complement, or in some cases replace, long-established ways of functioning. Thus, the declaration states:

The development of new information and communication technologies gives public service media an unrivalled opportunity to fulfil their remit in new and more effective ways, allowing them to offer better-targeted and more interactive content and services. It also allows public service media to enter into a meaningful dialogue with their audiences, engaging them as stakeholders, participants and co-creators, rather than as simply passive recipients. This is particularly relevant to services aimed at youth, whose use of Internet-delivered, mobile and participatory media is significant. Successful adaptation and adoption of new platforms assist public service media in fulfilling additional purposes within their public service remit.¹⁸

While this declaration clearly puts public service broadcasters themselves at the centre of its encouragement, the Committee of Ministers in its Recommendation Rec(2012)1 focuses more on the duties of member states when calling upon them to,

further strengthen and, where necessary, enhance the appropriate legal and financial environment, including the external governance arrangements for public service media organisations, by drawing inspiration from the appended guiding principles, thereby guaranteeing the independence and sustainable development of public service media and empowering them to take up the challenges of technological progress and editorial competition.¹⁹

1.1.2. Jurisprudence of the European Court of Human Rights

Generally, the Court stresses that freedom of expression, as protected by Article 10 ECHR, constitutes an essential basis for a democratic society.²⁰ Limitations on that freedom, as foreseen in Article 10 paragraph 2, are interpreted strictly. Interference in the exercise of that freedom by states is possible, though must be “necessary in a democratic society” or correspond to a “pressing social need”. Whilst the national authorities have a certain margin of appreciation, this is not unlimited, as it goes hand in hand with the Court’s supervision.²¹

¹⁷ Committee of Ministers, Recommendation Rec(2011)7 of 21 September 2011 on a new notion of media, <https://wcd.coe.int/ViewDoc.jsp?id=1835645>.

¹⁸ Committee of Ministers, Declaration on public service media governance of 15 February 2012, point 9, <https://wcd.coe.int/ViewDoc.jsp?id=1908241>.

¹⁹ Committee of Ministers, Recommendation Rec(2012)1 on public service media governance of 15 February 2012, <https://wcd.coe.int/ViewDoc.jsp?id=1908265>.

²⁰ E.g. *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#%22itemid%22:%22001-57499%22>].

²¹ *Aleksey Ovchinnikov v. Russia*, Decision of 16 December 2010, Application No. 24061/04, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102322#%22itemid%22:%22001-102322%22>].



1.1.2.1. The role of public service broadcasting in a democratic society

The right to freedom of expression and information recognised in Article 10 includes, inter alia, the freedom to receive and impart information and ideas by broadcasting media.²² In *Radio France and others*,²³ the Court clarified that public service broadcasters can qualify as “non-governmental organisations” in the meaning of Article 34 of the Convention and can therefore apply to the Court.

The Court in this context highlights the principle of pluralism and the function of the state as a supreme guarantor to secure pluralism, particularly in the area of audiovisual media. In addition, it explicitly confirms this in its judgments in the cases of *Informationsverein Lentia and others*,²⁴ *Manole*²⁵ and *Kaleta*²⁶ (in respect of public service broadcasting). Nevertheless, the Court, while recognising the possibility of justifying restrictions of the freedom of expression with legitimate aims, also recognised the positive obligation of the member states to establish a legal framework that allows operators to act and make use of their freedom.²⁷

1.1.2.2. Public service broadcasting and new media

Although the Court so far has not been asked to decide specifically on online activities of public service media, it is remarkable that it applies the general principles deduced from Article 10 ECHR to cases concerning online publications.²⁸ Along this vein, the Court acknowledges that the Internet,

*In the light of its accessibility and its capacity to store and communicate vast amounts of information, [...] plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10.*²⁹

In another judgment, the Court, in deciding on whether or not a website should be taken into consideration for the purpose of examining the necessity of the disputed measure, made a reference to the general importance of the Internet, as it took the view that,

²² *Sacchi v. Italy*, 12 March 1976, Application No. 6452/74, <http://hudoc.echr.coe.int/webservices/content/pdf/001-74805>.

²³ *Radio France and others v. France*, 23 September 2003, Application No. 53984/00, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61686#%7B%22itemid%22:%5B%22001-61686%22%5D%7D>.

²⁴ *Informationsverein Lentia and others v. Austria*, 24 November 1993, Series A, Volume 276, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57854#%7B%22itemid%22:%5B%22001-57854%22%5D%7D>.

²⁵ *Manole and others v. Moldova*, 17 September 2009, Application No. 13936/02, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94075#%7B%22itemid%22:%5B%22001-94075%22%5D%7D>.

²⁶ *Kaleta v. Poland*, 16 July 2009, Application No. 20436/02, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93417#%7B%22itemid%22:%5B%22001-93417%22%5D%7D>.

²⁷ For more details on the jurisprudence of the Court regarding public service broadcasting in general see the comparative study of the Institute of European Media Law, op. cit. (fn. 4).

²⁸ For a comprehensive overview of the Court's judgments on online publications see the report of the research division of the Council of Europe, “Internet: Case-Law of the European Court of Human Rights”, 2011, p. 11 *et seq*, www.echr.coe.int/Documents/Research_report_internet_ENG.pdf.

²⁹ *Times Newspapers Ltd. (Nos. 1 and 2) v. The United Kingdom*, 10 March 2009, Application Nos. 3002/03 and 23676/03, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91706#%7B%22itemid%22:%5B%22001-91706%22%5D%7D>.



*the website did have to be considered because, as it was accessible to everyone, including minors, the impact of the posters on the general public would have been multiplied on account of the reference to the website.*³⁰

In the circumstances of the case, these elements were put forward to strengthen the state's interest in taking measures to restrict the right to impart information. Nevertheless, the restriction must remain proportionate, pursuant to the general principles of interpretation of Article 10 ECHR.

1.2. European Union

1.2.1. Primary law

Requirements for member states in the area of public service broadcasting at European Union level are predominantly found in two provisions of the TFEU: Article 56, which guarantees the free movement of services (with further guidance in Article 57-62 and exceptions in Articles 51-54 TFEU), and Articles 106, 107 et seq. TFEU, which aim to prevent distortions of competition.

Broadcasting is qualified as a service which is protected by Article 56 TFEU, but a restriction may be justified on grounds of public policy, public security or public health, according to Article 62 in combination with Article 52 TFEU. In addition, in line with persistent jurisprudence of the CJEU, restrictions may be justified by compelling reasons of public interest.

When it comes to the funding of public service broadcasting, Article 107(1) TFEU marks a central provision, as it stipulates that:

Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

Nevertheless, Article 106(2) TFEU provides for a derogation from state aid rules in cases where the application of competition rules would run the risk of obstructing the performance of services of general interest:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

The European Courts and the Commission have always regarded public service broadcasting as a service of general economic interest and assessed its compatibility with Article 106(2) TFEU.³¹

³⁰ *Mouvement Raëlien Suisse v. Switzerland*, 13 January 2011, Application no. 16354/06, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112165#%22itemid%22:%22001-112165%22>].



For the European Court's application and interpretation of those provisions in the area of broadcasting, the following primary and secondary law and other legal acts of the European Union's institutions are of importance.

1.2.2. Secondary law

On a secondary basis, the Amsterdam Protocol on the system of public broadcasting³² confirms the member states' competence to define the remit of public service organisations and to provide for their funding in order to enable them to fulfil their remit.

The fundamental principles of the Amsterdam Protocol are referenced in the Resolution of the Council and of the member states of 25 January 1999 concerning broadcasting,³³ which reaffirms public service broadcasting's "cultural, social and democratic functions which it discharges for the common good" and its "vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity."

Regarding new media services, the Resolution also stipulates that an increased diversification of the programmes on offer in the new media environment would reinforce the importance of the comprehensive mission of public service broadcasters. The Resolution further stresses that:

*the ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age.*³⁴

Thus, an involvement of public service broadcasters in new media services is explicitly required, as public service broadcasting according to the Resolution:

*has an important role in bringing to the public the benefits of the new audiovisual and information services and the new technologies.*³⁵

The challenges of the digital era, which is, inter alia, characterised by increased consumer choice, but also by a risk of audience fragmentation and increasing media concentration, are also anticipated by the Resolution of the European Parliament of 25 November 2010 on public service broadcasting in the digital era on the future of the dual system.³⁶ In a similar vein, the Resolution calls upon the

³¹ Scheuer, A., Maus, J., Matzneller, P., "Europe – The contribution of public service media to freedom of expression and pluralism and the obligations on states to safeguard the remit and independence of PSM" in *Public Service Media According to Constitutional Jurisprudence – The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence*, op. cit. (fn. 4); see also Ridinger, M., "The Public Service Remit and the New Media" in IRIS plus 2009-6, p. 6, available at: www.obs.coe.int/documents/205595/264587/IRIS+plus+2009en4LA.pdf; for a more detailed depiction of the Commission's relevant acts and decisions on online media of public service broadcasters, see below chapter 3.

³² Protocol on the system of public broadcasting in the Member States, OJ C 340/109, 10 November 1997, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/PRO/09:EN:HTML>.

³³ 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 30/1, 5 February 1999, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41999X0205&from=EN>.

³⁴ Ibid, Recital 6.

³⁵ Ibid, Recital 5.

³⁶ Resolution of the European Parliament of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI)), OJ C 99E, 3 April 2012, p. 50-56, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0438+0+DOC+XML+V0//EN.



member states to ensure that there are sufficient resources to enable public service broadcasters to take advantage of the new digital technologies and to secure the benefits of modern audiovisual services for the general public.

Having in mind the principle of technological neutrality, the European Parliament has stressed that public service broadcasters, within the remit assigned to them, must have the opportunity to offer their services, including new services, on all platforms. It also makes explicit reference to the documents of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe and reminds member states,

of their commitment to these European standards, and recommends that they provide appropriate, proportionate and stable funding for public service media so as to enable them to fulfil their remit, guarantee political and economic independence and contribute to an inclusive information and knowledge society with representative, high quality media available to all.³⁷

Besides these documents, that take a somewhat soft law approach, some hints on the treatment of online activities of public service broadcasters can also be deduced from the Audiovisual Media Services Directive (2010/13/EU),³⁸ which acknowledges that the co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.³⁹

The Directive underlines the impact of audiovisual media services on the process of formation of opinion. It covers all services with audiovisual content irrespective of the technology used to deliver the content: the rules apply whether one watches news or other audiovisual content on TV, on the Internet or on one's mobile phone. However, taking into account the degree of choice and user control over services, the AVMSD makes a distinction between linear (television broadcasts) and non-linear (on-demand) services.

1.2.3. Jurisprudence of the Court of Justice of the European Union

The CJEU acknowledges freedom of expression as one of the fundamental principles of a democratic society and the freedom to provide cross-border broadcasts as an indispensable institution within the Union. However, the CJEU recognises the general possibility to justify a derogation on grounds of public policy, namely the maintenance of the non-commercial and, hence, pluralistic nature of the national broadcasting system.⁴⁰ However, since in the *Bond van Adverteerders and others* case⁴¹ only foreign broadcasters were subject to the restrictions, the Court holds that such discriminatory restrictions cannot fall within the derogations authorised by Article 56 EEC Treaty (now Article 62 in

³⁷ Ibid, Recitals 17 and 18.

³⁸ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15 April 2010,

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&from=EN>.

³⁹ Ibid, Recital 13.

⁴⁰ Scheuer, Maus, Matzneller, op. cit., p. 48.

⁴¹ CJEU, Case C-352/85, *Bond van Adverteerders and others v The Netherlands State* [ECLI:EU:C:1988:196],

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=94264&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8430>.



connection with Article 52 paragraph 1 TFEU), as they are not proportionate to the intended objective.

The Court also recognises the possibility of justifying certain restrictions with the objective of maintaining pluralism as a general interest protected by Article 10 ECHR.⁴²

When it comes to prerequisites for public service broadcasting, the CJEU does not exclude the member states' right to establish a broadcasting monopoly in favour of the public service broadcasting, as it states in the *Sacchi* case⁴³ that the existence of a monopoly also with regard to television advertising is not in itself contrary to the principle of free movement of goods, which can be advertised through television spots, on condition that no discrimination is created between domestic products and imported products to the detriment of the latter.⁴⁴ This has been confirmed later by the Court in the *ERT* case.⁴⁵

Community law does not preclude the granting of a television monopoly for considerations of a non-economic nature relating to the public interest. However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition.

Regarding questions of financing of public service broadcasting, the General Court in its judgment in *TV2 Danmark*⁴⁶ states that state aid is compatible with the EC Treaty (now TFEU), provided that the qualitative requirements set out in the public service remit are complied with. In its judgment in *SIC*, the Court in addition emphasises that only the member state has the power to assess the public service broadcaster's fulfilment of the remit.⁴⁷

As far as the classification of public service broadcasters as services of general economic interest (SGEI) is concerned, the Court in its judgment in *TV2 Danmark* acknowledged the member states' wide margin of appreciation and their freedom to decide how to finance these services. In the *SIC* case, the General Court states that Community law does in no way preclude a member state from defining broadcasting SGEIs widely in order to include the broadcasting of full-spectrum programming. According to the Court:

⁴² CJEU, Case C-288/89, *Gouda v. Commissariaat voor de Media* [ECLI:EU:C:1991:323], <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=96733&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8536>, see also Case C-353/89, *Commission v. Netherlands* [ECLI:EU:C:1991:325], <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97021&pageIndex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=8666>.

⁴³ CJEU, Case 155/73, *Giuseppe Sacchi* [ECLI:EU:C:1974:40], <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=88564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8708>.

⁴⁴ See also Scheuer, Maus, Matzneller, op. cit., p. 53.

⁴⁵ CJEU, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and other* [ECLI:EU:C:1991:254], <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=96792&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8741>.

⁴⁶ General Court, judgment of 22 October 2008, *Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, TV 2 Danmark A/S and Others v Commission of the European Communities* [ECLI:EU:T:2008:457], <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66952&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8797>.

⁴⁷ General Court, Case T-442/03, *SIC - Sociedade Independente de Comunicação, SA v Commission of the European Communities*, [ECLI:EU:T:2008:228], at para. 211-213, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66879&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8894>.



*that possibility cannot be called into question by the fact that the public service broadcaster carries on, in addition, commercial activities, in particular the sale of advertising space.*⁴⁸

Thus, although – and similar to what has been said above regarding the ECtHR – there is no decision of the Courts of the European Union available that expressly focuses on online activities of public service broadcasters, it can be concluded from existing jurisprudence that European courts so far have not identified obstacles to the provision of online media of public service broadcasters.

1.2.4. Decisions of the European Commission

In the first Broadcasting Communication of 2001,⁴⁹ the Commission recognised that a wide definition of the public service remit is legitimate, meaning that even services that are not “programmes” in the traditional sense, such as online information services, might be included in the public service remit, if they address “the same democratic, social and cultural needs of the society in question”. However, the Broadcasting Communication states that the definition of the public service remit should be as precise as possible.⁵⁰

In the Broadcasting Communication of 2009,⁵¹ the Commission acknowledges that “technological developments have also allowed the emergence of new media services such as online information services and non-linear or on-demand services”. The Commission is aware of the fact that “commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models”. Nevertheless, the Commission – by citing the Council Resolution on public service broadcasting of 1999⁵² – confirmed that “public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the member states in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences”.

Besides, the Commission in a couple of decisions on national implementations of the funding scheme for public service broadcasters had the opportunity to further define the range of public remit regarding online services.

In a case concerning the funding of France 2 and France 3, the Commission confirmed the member state’s broad definition of the public service remit and assessed that its supervision is limited to the question of manifest errors. In this vein, the Commission confirmed that the disputed schedules of tasks and obligations for the concerned broadcasters were sufficiently clearly defined and legitimate.⁵³

⁴⁸ General Court, Case T-442/03, op. cit. (fn. 47), para. 202.

⁴⁹ European Commission, Communication on the Application of State Aid Rules to Public Service Broadcasting [2001] OJ C 320/5, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1115%2801%29:EN:HTML>.

⁵⁰ See also Ridinger, op. cit., p. 6.

⁵¹ European Commission, Communication on the application of State Aid Rules to Public Service Broadcasting [2009] OJ C 257/1, http://ec.europa.eu/competition/state_aid/legislation/broadcasting_communication_en.pdf.

⁵² 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 [1999] OJ C 030/1, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41999X0205&from=EN>.

⁵³ C(2003) 4497, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004D0838&from=EN>.



In a British case, the Commission stated that a digital entertainment channel is covered by the public service remit when the additional offering is supplementary in nature, differs from commercial offerings and is predictable for the commercial providers.⁵⁴

Regarding the funding of the Irish public service broadcaster, the Commission stated that, while purely commercial activities are not covered by the public service remit, this can include, for example, the publication of books or audiovisual material when the public service benefit is established beforehand.⁵⁵

Finally, with the so-called “state aid compromise”, the Commission ended a proceeding involving public service broadcasting in Germany where the Commission had demanded from the competent authorities to guarantee that the public service broadcasters’ commercial activities are clearly separated and exercised according to economic principles.⁵⁶ In addition, the Commission established a couple of conditions that should secure a most precise definition of the public service remit, especially for activities in the area of the new media.⁵⁷

Not least based on this decision, some member states – including Germany – introduced in their national legislation systems dedicated to offering public service media the possibility of making appropriate use of new technologies, whilst guaranteeing to not distort competition with private media service providers.⁵⁸

1.3. Conclusion

It emerges from treaties and secondary law of the Council of Europe and the European Union that great importance is attributed to the Internet and its surrounding services for the information of the public. Thus, it is not surprising that member states are repeatedly encouraged to empower public service media to benefit from technological progress. However, at least so far, European Courts, whilst stressing the importance of the Internet’s role in enhancing public’s access to information, have not yet decided on whether or not specific online activities of public service media may exceed their recognised remit.

A totally different picture appears when looking at various decisions of the Commission that, on a case-by-case basis, set the scene for what is covered by the public service remit in a digital context. The Commission’s approach finally resulted in the “state aid compromise” that, together with the subsequent Broadcasting Communication of 2009, has served as a guideline for member states for the implementation of tests to avoid market distortions when enabling public service media to become active in an online environment.

⁵⁴ N 37/2003, http://ec.europa.eu/competition/state_aid/cases/133835/133835_469556_45_2.pdf.

⁵⁵ E 4/2005 (ex NN 99/1999), http://ec.europa.eu/competition/state_aid/cases/198587/198587_816753_152_2.pdf.

⁵⁶ E 3/2005, http://ec.europa.eu/competition/state_aid/cases/198395/198395_678609_35_1.pdf.

⁵⁷ For a comprehensive summary of the conditions see Ridinger, *op.cit.*, p. 6.

⁵⁸ For a comparative analysis of existing tests in Europe followed by comments from the EBU and the ACT see the chapter “The Public Value Test and its Implementation” of this IRIS *Special*.





2. The remit of public service media on the Internet

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2.1. The media at the beginning of the global information age

“What we know about our society, indeed the world we are living in, we know through the mass media”, according to a now well-known dictum by the German sociologist Niklas Luhmann⁵⁹ dating from 1995, at a time when the rise of the World Wide Web and the outlines of a new information age only began to emerge. Nonetheless, at least in many parts of the world, the key medium of television still helps to shape the image of the human being as a witness of current events, an image hitherto unknown in the history of the media. Audiovisual content has become the most important media “window on the world” in a form never seen before. Taken as a whole, the mass media have developed into a mirror of humanity, even if they can never show “the full picture”. With suggestive force and often imperceptible to us, their narratives structure every individual’s view and knowledge of the world and help to give meaning and build an identity.

Interactivity, one of the characteristic features of the web, plays a helpful role here. This observation has also been reflected in the judgments of the highest courts. For example, when interpreting the right to freedom of expression within the meaning of Article 10 of the European Convention on Human Rights (ECHR),⁶⁰ the European Court of Human Rights is guided by the consideration that the Internet is, in view of the improved access to and ease of dissemination of information, “one of the principal means for individuals to exercise their right to freedom of expression”, especially as “it offers essential tools for participation in activities and debates relating to questions of politics or public interest”.⁶¹

It is indeed one of the “greatest promises of the Internet” – as UNESCO states in the draft of the study *Keystones to foster inclusive Knowledge Societies* published in 2015 – to provide people everywhere and at any time with direct and fast access to the world’s knowledge.⁶² According to the French sociologist Manuel Castells, it is already possible to speak of a “potential synergistic relationship” between the digitisation of information and communication technology and the development of the human race. There is broad agreement with Castells’ thesis that the quality of this relationship has become a key resource for social progress.⁶³

⁵⁹ Cf. Niklas Luhmann, *Die Realität der Massenmedien*. Vorträge. Nordrhein-Westfälische Akademie der Wissenschaften: Geisteswissenschaften, Opladen 1995.

⁶⁰ Article 10(1) ECHR states: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁶¹ Quoted from McGonagle T., *User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship*, European Audiovisual Observatory, Strasbourg, IRIS plus 2013-2, p. 7, with further references and a bibliography, www.obs.coe.int/documents/205595/865106/IRIS+plus+2013en2LA.pdf/1190c92e-cf0f-4589-b7a7-455ee56241f3.

⁶² *Keystones to foster inclusive Knowledge Societies*, Draft Study, CONNECTing the Dots conference, 3-4 March 2015, UNESCO, Paris, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/internet_draft_study.pdf.

⁶³ Cf. Castells M. and Himanen P. (ed.), *Reconceptualizing Development in the Global Information Age*, Oxford University Press, 2014, p. 1 f.



The fact that the mass media, especially the publicly funded media, can strengthen the right to individual self-determination applies both to linear and interactive distribution and platforms, irrespective of the large number of offerings on the Internet. Their programmes and websites continue to make possible the idea of a “common experience”,⁶⁴ give a sense of the diversity of a society and at the same time sharpen the perception for unifying elements, and the public still has an impression of the intensity of “social cohesion”.⁶⁵ The European broadcasting legislators evidently trusted in this integration effect when setting the legal framework for the public service broadcasters’ activities in the digital environment, even though the reference in debates on the media is now more often to inclusion⁶⁶ rather than integration.⁶⁷

The power to form a sense of community is doubtless one of the merits of public service broadcasting in Europe. Without the media space that it creates for social self-discovery and without a well-informed, inclusive and pluralistic public that all citizens help to shape and in which “all citizens can meet everyone else”, in which “people obtain information, discuss, relax, enjoy, become educated, sometimes argue, create ideas, and listen”, the lasting unity of a state is just as inconceivable as a living democracy.⁶⁸

One of the most impressive descriptions of this phenomenon, using television as an example, can be found in the preamble to the Terms of Reference (Cahier des charges) for public service television in France:

*Television is the primary leisure activity of French people, but it is in fact much more than this. It is also the face of a society, an expression of its various facets and a window continuously open on the world. A space of discovery, learning and pleasure; a place of dialogue and debate. It is above all a strong and powerful link between all citizens, whatever their origin, age or cultural or ethnic affiliation. Over the decades, it has become part of our history and our collective memory.*⁶⁹

⁶⁴ Cf. Syvertsen T. et al., *The Media Welfare State: Nordic Media in the Digital Era*, chapter 4,

<http://quod.lib.umich.edu/n/nmw/12367206.0001.001/1:5/--media-welfare-state-nordic-media-in-the-digital-era?g=dculture;rgn=div1;view=fulltext;xc=1> and para. 9(1)(a) of the Broadcasting - An Agreement Between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, July 2006 (Royal Charter), http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf.

⁶⁵ See for example para. 11(1) of the *Staatsvertrag für Rundfunk und Telemedien* (Inter-State Agreement on Broadcasting and Telemedia, RStV) of 31 August 1991,

http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/15_RStV_01-01-2013.pdf, and section 24(1) of the Swiss *Bundesgesetz über Radio und Fernsehen* (Federal Broadcasting Act, RTVG) of 24 March 2006 (as at 1 February 2010): “Cohesion (...) among the (...) social groups”, <http://www.admin.ch/opc/de/classified-compilation/20001794/index.html>.

⁶⁶ Cf. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by Council decision 2006/515/EC of 18 May 2006, http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html, and Tambini D., “Public Media and Digitization. Seven Theses”, in Dragomir M. and Thompson M. (eds.), *Mapping Digital Media Global Findings, A Report by the Open Society Foundations*, July 2014, p. 75,

<http://www.opensocietyfoundations.org/sites/default/files/mapping-digital-media-overviews-20140828.pdf>.

⁶⁷ This term often used in domestic debates has been adopted by the Council of Europe and the European Parliament. In the Guiding principles concerning the remit of public service media in the information society, an appendix to a Council of Europe Committee of Ministers recommendation in 2007, it is emphasised that public service broadcasting should be a factor of social cohesion and integration of all individuals, groups and communities, <https://wcd.coe.int/ViewDoc.jsp?id=1089759>. The European Parliament stresses in a resolution adopted on 25 November 2010 the importance of public service broadcasting for social cohesion and social integration, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0438+0+DOC+XML+V0//EN>.

⁶⁸ Cf. Deltendre I., “Der gesellschaftliche Wert öffentlich-rechtlicher Medien”, in *TEXTE. Öffentlich-rechtliche Qualität im Diskurs*, published by BR, ORF, SRG SSR, WDR and ZDF, Vienna 2012, pp. 6 ff. (7),

<http://zukunft.orf.at/modules/orfpublicvalue/upload/11r0602.pdf>.

⁶⁹ Cf. Decree No. 2009-796 of 23 June 2009 laying down the Terms of reference for France Télévisions,

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020788471>.



2.2. Public service broadcasting on the World Wide Web

Against this background, it is clear that a state has a particular interest in regulating the media landscape⁷⁰ and in a detailed description of the remit of public service broadcasting. We read in broadcasting legislation everywhere that publicly funded public service programmes, as key factors of individual and social opinion-forming, bear a special responsibility for protecting the public interest.⁷¹ France Télévisions and Radio France are required by section 43-11 of the Loi Léotard⁷² to serve the “public interest”, as is the BBC according to paragraph 3(1) and 3(2) of the Royal Charter.⁷³ The Finnish broadcaster YLE, too, must serve the public interest according to section 1(1) of the Finnish Broadcasting Act,⁷⁴ as must RTÉ pursuant to section 114(1)(a) of the Irish Broadcasting Act 2009,⁷⁵ and the broadcaster SRG provides a “service for the general public” according to section 23 of the Swiss Broadcasting Act (RTVG).

In the tortuous World Wide Web, however, there is no automatic guarantee of access to contributions to public communication that fit this description as the specific way in which search engines, such as Google, operate generally leads to significant changes of perspective. Platform operators can – as the European Commission has made clear – not only determine “what content is accessible but can also impact choices, e.g. by varying the prominence with which certain content is displayed, limiting the citizen’s ability to change the menu or restricting certain applications. This could influence the de facto choice for citizens to access media offerings representing a plurality of opinions and can lead to a situation where citizens potentially find themselves in a vulnerable situation ... The availability of various platforms providing valuable content to users, as well as the openness of those platforms, is an important condition for a thriving media landscape”.⁷⁶

One of the most important tasks of the online presence of a public service broadcaster organised on an internally pluralistic basis is hinted at here: the continuous guarantee of diversity of opinion. Especially in times of profound social change, it is important for the traditional public

⁷⁰ Cf. Article 213 (1) of the Polish Constitution, adopted by the National Parliamentary Assembly on 2 April 1997, <http://www.sejm.gov.pl/prawo/konst/niemiecki/kon1.htm>.

⁷¹ See http://www.ard.de/home/intern/die-ard/kommissionen-der-ard/Bedeutung_des_oeffentlich_rechtlichen_Rundfunks/1019488/index.html and Steinmaurer T, Wenzel C., „Public Network Value - Study of ORF in cooperation with Bayerischer Rundfunk (2015): “Public Value, die gemeinwohlorientierte Qualität der öffentlich-rechtlichen Medienleistungen (...)”, http://zukunft.orf.at/show_content.php?sid=100&pvi_id=1592&pvi_medientyp=t.

⁷² Cf. Act No. 86-1067 of 30 September 1986 on freedom of communication (Loi Léotard), <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512205&fastPos=1&fastReqId=78965485&categorieLien=cid&oldAction=rechTexte>.

⁷³ Cf Royal Charter for the continuance of the British Broadcasting Corporation, October 2006 (Royal Charter), http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf.

⁷⁴ Cf. Laki Yleisradio Oy:stä, [/www.finlex.fi/fi/laki/ajantasa/1993/19931380](http://www.finlex.fi/fi/laki/ajantasa/1993/19931380); English version: Act on Yleisradio Oy (Finnish Broadcasting Company) (1380/1993; amendments up to 474/2012 included), www.finlex.fi/en/laki/kaannokset/1993/en19931380.pdf.

⁷⁵ Cf. Broadcasting Act 2009, www.dcenr.gov.ie/NR/rdonlyres/DE7C0393-76C1-42A5-A176-88C512F7AB9C/0/BroadcastingAct2009.pdf, and RTÉ’s Public Service Statement 2010 (12 July 2010): “RTÉ will ... serve the public interest”, www.rte.ie/documents/about/rte-pss-2010v1.pdf.

⁷⁶ Cf. European Commission, Green Paper on Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, Brussels, 24.4.2013, COM(2013) 231 final, p. 15, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF> and Communication from the Commission on the application of state aid rules to public service broadcasting (OJ C 257 of 27.10.2009). http://ec.europa.eu/competition/state_aid/legislation/broadcasting_communication_en.pdf and Deutscher Bundestag, 13. Zwischenbericht der Enquete-Kommission *Internet und digitale Gesellschaft/Kultur, Medien, Öffentlichkeit*. Bundestagsdrucksache 17/12542, Kapitel 6, 1.1.5.1 Betreiber von Suchmaschinen, p. 16, and 1.3.4.2 Suchmaschinen, p. 26, <http://dipbt.bundestag.de/dip21/btd/17/125/1712542.pdf>.



service media to also offer guidance on the Internet (para. 11d(3) of the Inter-State Broadcasting Agreement) not based on a mathematical ratio but on years of journalistic experience involving the careful sifting, selection and classification of relevant information.⁷⁷ Especially on the structurally participatory Internet, they can show that they are “reliable navigators”,⁷⁸ are cross-generational and involve all citizens who have no access to higher education, are immigrants, are living below the poverty line or are dependent on help from third parties for all kinds of reasons.⁷⁹ Last but not least, given the trend towards the commercialisation of all areas of life to be seen throughout the western world, public service broadcasting makes an inestimable contribution to the preservation of regional and European cultural achievements.⁸⁰

In most of the countries included in the survey – Austria, Belgium, Denmark, Germany, Finland, France, Hungary, Ireland, Italy, the Netherlands, Norway, Poland, Spain, Sweden, Switzerland, and the UK – public service broadcasting is not only empowered but also instructed to distribute its radio and television programmes and additional services on the Internet, whereas in Finland and Sweden it can decide itself whether and how to provide content on the web. There, websites are only mentioned as a conceivable option for the distribution of content. In many countries, broadcasting legislation contains no time-limits for the provision of content in media libraries, and the right is more frequently granted to offer not only text but also background information solely for video and audio items produced exclusively for websites.⁸¹

A number of broadcasting legislators are expressly calling for public service broadcasters to provide as extensive an online service as possible (live streaming, media library, historical archive, exclusive audio and video-on-demand offerings [premieres, series, etc], programme descriptions, photos, user generated content). In some countries there are appropriate commitments in the bylaws, as for example in section 17b, sentence 1, of the Bylaws for NRK AS, which states that the NRK should, as far as financially justifiable, make as many of its radio and television programmes available on demand on the Internet, both as live streaming and in an audio and video library, at least its own productions from the past seven days.⁸² Even further ranges paragraph 11(2) of its Service Contract (Contratto di servizio), that makes it compulsory for RAI to expand its online service. The contract categorically states that RAI will no longer only provide live streaming of linear television and radio programmes but also keep in its archive more and more broadcast content of particular value and relevant for educational and training purposes and for underscoring their cultural importance. It also states that the proportion of formats expressly developed and produced for the “new media” and likely to encourage public participation shall be gradually increased.⁸³

⁷⁷ Cf. para. 11(1) 3 of the Inter-State Broadcasting Agreement; see furthermore *A free and pluralistic media to sustain European democracy. The Report of the High Level Group on Media Freedom and Pluralism*, January 2013, www.osce.org/fom, European Parliament resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0286&language=EN>, which refers to: “cultivate a public sphere”.

⁷⁸ Cf. Hahn W. and Vesting T. (eds.), *Beck'scher Kommentar zum Rundfunkrecht*, Munich 2012, marginal no. 15 on para. 11d of the Inter-State Broadcasting Agreement.

⁷⁹ Cf. Moe H., *Public Broadcasters, the Internet and Democracy. Comparing Policy and Exploring Public Media Online*, Bergen 2008, www.academia.edu/971430/Public_Broadcasters_the_Internet_and_Democracy_Comparing_Policy_and_Exploring_Public_Service_Media_Online; on the free accessibility of public service website offerings, see Hahn (fn. 21), Rdnr. 79 zu § 11d RStV.

⁸⁰ Also Syvertsen, chap. 4.

⁸¹ Cf. Broadcasting Charter for television services (SVT), 3 October 2012, <http://www.svt.se/aboutsvt/the-broadcasting-charter>, <http://www.svt.se/aboutsvt/the-swedish-public-service-broadcaster>, and section 7(1) of the Act on Yleisradio Oy: “may be provided”.

⁸² Bylaws for NRK AS. Articles of Association of Norsk rikskringkasting AS laid down by the statutory General Meeting of 30 April 1996, last amended by the General Meeting of 29 June 2009, <http://www.nrk.no/about/bylaws-for-nrk-as-1.4029867>.

⁸³ Cf. Contratto nazionale di servizio tra il Ministero dello sviluppo economico e la RAI – Radiotelevisione italiana s.p.a., 2010-2012. The 2013-2015 follow-on contract has not yet entered into force.



A direct connection with the channel or programme⁸⁴ remains the guiding principle when organising public service broadcasters' websites. The obvious reason for this is mentioned in paragraph 3 of the Terms of Reference of France Télévisions: the online service should primarily serve the purpose of supplementing, completing or improving linear television and radio services.

The "online remits" granted under broadcasting legislation are a good example of how diverse and sometimes idiosyncratic legal language in Europe can be. Worldwide, the term "Internet" applies to all communication technologies associated with the World Wide Web, including the social media, the "Internet of Things" and the mobile Internet.⁸⁵ However, this term firmly established in everyday language appears to be only slowly finding its way into the language of media law, where references are often reminiscent of the analogue era.

There is certainly no lack of clarity in para. 18(2)(b) of the Belgian RTBF Management Contract (Contrat de Gestion),⁸⁶ Part 10 of the Danish Broadcasting Act,⁸⁷ para. 12(1) of the Framework Agreement for the BBC⁸⁸, para. 11(1) and (2) of the RAI Service Contract and section 17 of the Norwegian Broadcasting Act. These rules specifically refer to the Internet. Just as precise are section 114 (1)(b) and (4)(o) of the Irish Broadcasting Act 2009, where the term "website" is used, section 2(1)(2) and (3) and section 4e(1) and 4f(1) of the ORF Act, which refer to "online services", and para. 3 of the Terms of Reference of France Télévisions, which refers to the use of "online communication services". However, the legal terms employed by section 2.1(1) and (4) of the Dutch Media Act (Mediawet) 2008 ("all available supply channels/new media and distribution technologies"),⁸⁹ para. 1 of the Contratto di servizio for RAI ("new distribution platform"), the Danish Radio and Television Broadcasting Act ("all relevant technical platforms") and section 1 (1) of the Finnish Broadcasting Act ("purposes of public communication") are less clear. Finally, para. 11d(1) of the German Inter-State Broadcasting Agreement takes an entirely different approach in referring to "Telemédia".

The situation is similar when it comes to the expression used for content made available. In most cases, there is only a general reference to "services" (section 1(1) of the Finnish Broadcasting Act), "supplementary services" (SVT Broadcasting Charter), "additional services" or "content services" (section 7(1) of the Finnish Broadcasting Act) or "(non-linear) audiovisual media or communication services (on demand)" (Part 1, section 2(4) of the Danish Broadcasting Act; section 44-I of the Loi Léotard in conjunction with paras. 3, 21 and 22 of the Terms of Reference of France Télévisions; sections 114(1)(h) and 4(1) of the Irish Broadcasting Act 2009 or "internet services" (para. 18.2(b) of the RTBF Management Contract in Belgium) or "online services" (para. 5(1)(a) of the BBC's Royal Charter). Only in para. 11(2) of the RAI Service Contract, in sections 114(1)(b) and (4)(o) of the Irish Broadcasting Act 2009 and in section 17 of the Bylaws for NRK AS in Norway is there any specific reference to what is actually meant, namely "radio and television programmes" or, as in the Danish Radio and Television Broadcasting Act, "text, sound and images".

⁸⁴ Cf. section 114(1)(b) of the Broadcasting Act 2009 and section 2(1) and (3) of the Act on the Austrian Broadcasting Corporation (ORF-Gesetz), www.rtr.at/de/m/ORFG.

⁸⁵ See the definition in "Reflection and Analysis by UNESCO on the Internet", <http://unesdoc.unesco.org/images/0019/001920/192096e.pdf>.

⁸⁶ Cf. Contrat de Gestion de la RTBF 2013-2017, <http://archive.pfwb.be/1000000010970b8>

⁸⁷ Cf. Lov om radio- og fjernsynsvirksomhed (Radio and Television Broadcasting Act, cf. Consolidated Act No. 827 of August 26, 2009), www.kulturstyrelsen.dk/fileadmin/user_upload/dokumenter/medier/radio_og_tv/Engelsk_side/Promulgation_of_the_Radio_and_Televisi_on_Broadcasting_Act_2010.pdf.

⁸⁸ Voir http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf.

⁸⁹ Cf. Mediawet 2008, <http://wetten.overheid.nl/BWBR0025028/> and the Media Act 1987, www.lexadin.nl/wlg/legis/nofr/eur/arch/ned/mediaact.pdf.



2.3. Freedom of speech and freedom of expression and the online remit

In one form or another, all relevant provisions of broadcasting legislation make it clear that an online service must be covered by the general public service broadcasting remit, for example section 44-I of the French Loi Léotard and section 2.1(4) of the Dutch Broadcasting Act 2008. The definition of the broadcasting remit is kept abstract and put in general terms in all broadcasting laws (cf. para. 11(1) of the German Inter-State Broadcasting Agreement), but concrete and binding rules are generally to be found in a charter or agreement usually drafted with the involvement of the ministry responsible and the broadcaster (Cahier des Charges, Contrat de Gestion, Public Service Contract, Public Service Broadcasting Charter, Royal Charter, Framework Agreement, Charter of Services, Licence, etc).

The expectation that public service broadcasting will create “public value” by making a contribution to achieving the communicative objectives of a democratic society is expressed in quite different ways. In most of the legal instruments analysed, the state demands that the broadcaster provides stimulus for public debates on all topics of relevance to forming an informed political opinion. The legislature expects this to take the citizens’ need for information into account as much as possible. According to para. 11(1), in conjunction with para. 11d of the German Inter-State Broadcasting Agreement, public service broadcasting should “as a media outlet and a factor of the process of the free formation of individual and public opinions” enable all population groups to participate in the information society and in so doing meet the democratic, social and cultural needs of society.⁹⁰ There is a similar wording in para. 1 of the RAI Service Contract, which refers to “the democratic, social and cultural needs” of society, or section 7(2) of the Finnish Broadcasting Act, according to which programmes should “support democracy” and enable everyone to commit themselves to achieving political objectives. All these expectations therefore involve fundamental considerations on the importance of democratic public opinion for the exercise of basic rights, such as the ideas developed by the German philosopher Jürgen Habermas.⁹¹

The minimum requirements for all channels containing information include “objective and impartial reporting, and diversity of opinion and balance in all programmes” (para. 11(2) of the German Inter-State Broadcasting Agreement). Section 21(1) in conjunction with section 21(2)(1) of the Polish Broadcasting Act calls for all services, including information programmes, to be pluralistic, independent, balanced, innovative, full of integrity and of high quality and “be characterised by a sense that the reputation of public service broadcasting must be preserved”.⁹² In Switzerland Article 4(2) RTVG expect journalists working for public service broadcasters in particular to try to ensure the appropriate presentation of facts and events and to do so in such a way that “the public can form their own opinion”, while section 39 of the Irish Broadcasting Act 2009 provides that news broadcasts must meet the requirements of fairness, impartiality and balance, especially in the case of debates involving matters of public controversy.

Religious attitudes and feelings also shape political convictions. While reporting in many countries on any religious or ideological issue must comply with the requirement of neutrality, under section 21(2)(6) of the Polish Broadcasting Act public service broadcasting must only show respect to Christianity. Not least because of the substantive connection to section 18(2), according to which

⁹⁰ Ibid.

⁹¹ Cf. Habermas J., *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, 4. Aufl. Neuwied 1969.

⁹² Cf. Ustawa z dnia 29 grudnia 1992 o radiofonii i telewizji, http://www.krrit.gov.pl/Data/Files/_public/Portals/0/regulacje-prawne/polska/02012011_ustawa_rtv.pdf; English version: Broadcasting Act of 29 December 1992, www.krrit.gov.pl/Data/Files/_public/pliki/office/broadcasting-act_10-08-2011.pdf.



broadcasting must generally “respect the public’s religious convictions, especially the Christian system of values”, the Polish Constitutional Court has made it clear in a decision that section 21(2)(6) must be understood to be “denominationally independent”, thus ending a heated debate that had lasted many years.⁹³

The description of the remit for the Polish public service broadcasters contains other forms of wording rarely found in European broadcasting legislation. The remit also includes serving and strengthening the family (section 21(2)(7)), the propagation of a lifestyle characterised in particular by sport (section 21(2)(7a)) and a continuous contribution to combating social ills such as homelessness, poverty and unemployment.

If information is to become knowledge, a person must be able to place it in the right context. This insight gained in the field of information science has led to the provision of educational content – in both the narrower and the broader sense – also being considered one of tasks of public service broadcasting. Accordingly, in the production of information programmes consideration should always be given to how learning opportunities can be created. Section 7 of the Finnish Broadcasting Act may be cited as one example of this. The Internet offers public service broadcasting excellent opportunities in this field. As particularly good examples, mention may be made of the websites bbc.co.uk/arts, culturebox.francetvinfo.fr and cultura.rai.it.

2.4. Conclusion

“To enrich people’s lives” ... Alongside the necessity to impart knowledge, public service broadcasting cannot leave out of account the public’s need to be entertained. However, what should it emphasise in the trade-off between information and entertainment in order, in the words of section 48 of the Loi Léotard, to fulfil its “educational, cultural and social function” to enjoy continued popularity? This is a classical sixty-four thousand dollar question and one to which every period has its own answer. In such a diverse cultural area as Europe, there could in any case be no uniform response.

Finally, let us take a look at the London music scene, which is always good for a surprise and new perceptions. While the BBC in the United Kingdom, lovingly referred to by some as “auntie”, tries to keep up with the spirit of the times by undergoing a process of rejuvenation with regard to its programming, a young British pop duo has hit on the idea of calling itself *Public Service Broadcasting* and has given its second album the title *Inform – Educate – Entertain*. Connoisseurs of sophisticated British humour may well have wondered whether their guitarist J. Willgoose, Esq. and their drummer Wrigglesworth see themselves as the Anglo-Saxon equivalents of Max Raabe’s Berlin Palace Orchestra (Palastorchester), but anyone who experiences the artistic combination of historical image and sound documents with soundscapes produced on a guitar, banjo, keyboard, drums and a computer is more likely to find this reminiscent of the Penguin Cafe Orchestra. At any rate, the music world is delighted. In describing her impressions, the music critic of the ORF radio station FM4 wrote: “a bygone era of intellectual awakening is transported into the here and now”,⁹⁴ while The Irish Times approvingly wrote “superbly realised”.⁹⁵

⁹³ Polish Constitutional Court, decision W 3/93 of 2 March 1994 and Ritlefski K., Pluralismus als Strukturprinzip im Rundfunk. Anforderungen aus dem Funktionsauftrag und Regelungen zur Sicherung in Deutschland und Polen, p. 331.

⁹⁴ Cf. Umbauer E., “Ein außergewöhnliches Bandprojekt”, FM 4 ORF.at, 22 April 2013, <http://fm4.orf.at/stories/1733726/>

⁹⁵ Cf. Clayton-Lea T., “Public Service Broadcasting: Inform - Educate – Entertain”, *The Irish Times*, 15 November 2013, www.irishtimes.com/culture/music/public-service-broadcasting-inform-educate-entertain-1.1594778.



The success of public service broadcasting is evidently based on the fact that a skilful mix of acoustic and optical impressions and memories is awakened – not memories of just any time but those special moments in history associated in the collective memory with a new beginning based on hope and confidence. The duo unquestionably shows both in the sound studio and on stage that it has a keen sense of how the individual elements of the statement Inform – Educate – Entertain can be convincingly linked together.

Let us return to the identically worded description of the public service broadcasting remit. Is it not reasonable to conclude that skilful handling of form and content is necessary to ensure that also those who do not attach the same importance to its socio-political ideals as to a form language that incorporates their attitude to life are persuaded to show interest in its programmes? The relevant qualifications of experienced programme makers may be assumed from the outset. The fact that there is no lack of young creative individuals with the courage to engage in exciting experiments by interacting with the public can be seen by visiting many of the youth portals throughout Europe – from BBC Radio 1Xtra and NRK P3 to WDR's 1Live.

Why should the public service media not also succeed in future in doing professional work to enrich people's lives with a wealth of ideas – beyond the "here and now" and, in particular on the World Wide Web too?



Funding schemes in selected European countries





3. Broadcasting funding models in selected European states

Sebastian Schweda, EMR

How is public service broadcasting funded in Europe? How are the individual licence-fee funded models structured and what impact do online offerings have on these funding models? The following contribution discusses these questions in a comparison of the legal provisions applying to broadcasting funding models in twelve European states: Austria, Belgium (divided into the three regions Brussels-Capital, Flanders and Wallonia), Denmark, Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, Sweden and the United Kingdom (UK). In each case, an analysis has been carried out of whether, and if so which, broadcasters are funded by statutory licence fees and how these fees are calculated and levied (i.e., who has to pay them, who is responsible for collecting them and who decides on their distribution on the basis of what method). Current licence fee levels were also ascertained. The impact of the increasing availability of online content on the structure of models funded by licence fees is discussed insofar as they are supported by statutory provisions or in the practical organisation of the various systems.

3.1. Sources of funding for broadcasting services

Different models are available for funding broadcasting services: programmes may be funded solely by advertising, exclusively supported from public funds or funded through fees paid by their (potential) users.

The marketing of advertising time constitutes the main source of funding for free-to-air commercial services. Public service broadcasters, on the other hand, mainly receive their revenue either directly from public budgets or from statutory licence fees. Contractually agreed fees, however, are the principal source of revenue for commercial services that are predominantly free of advertising (e.g., pay-TV).

On the other hand, it was not possible to establish any differences in funding based on the content provided or the means of transmission employed. As far as we can see, the type of funding does not depend on whether the revenue is used for the production of conventional linear broadcasting services or of on-demand online video, audio and/or text-based content or whether content can only be obtained via the traditional means of distribution (terrestrial, cable, satellite), only on the internet or via all forms of reception.

In some countries, public service broadcasting is also partly funded by advertising (for example in Austria, Denmark, Hungary, Ireland, Italy, the Netherlands and the UK), but in most cases advertising is not intended to be the main source of revenue, the only exceptions being Poland and the UK. In Poland, advertising revenues are the main source of funding for the public service broadcasters, whereas in the UK two parallel funding models are employed: the British Broadcasting Corporation (BBC) is exclusively funded by licence fees, but Channel 4, ITV and Five, which are also considered public service broadcasters, do not receive a share of the licence fee proceeds, but mainly meet their expenditure from advertising revenues. The public broadcaster Österreichischer



Rundfunk (Austrian Broadcasting Corporation, ORF) and the Irish broadcaster Raidió Teilifís Éireann (RTÉ) are funded by an approximately fifty-fifty mix of licence fees and advertising.

Denmark has a system comprising different funding models, which vary according to the public service broadcaster: Danmarks Radio (DR) and the regional television programmes of TV 2 receive revenues from licence fees and various other sources, such as programme sales, other services, subsidies or dividends,⁹⁶ but for the national service of TV 2 and the fourth and fifth FM radio channels the law specifies self-financing as the only source of revenue and they receive no share of the licence fee proceeds.⁹⁷ Indirect state support for TV 2 is also possible through the granting of cheap loans. DR is legally prohibited from carrying advertising.⁹⁸

Accordingly, apart from the aforementioned cases of self-funding or funding through advertising, the only principal source of revenue, depending on the statutory framework, consists either of direct payments from the state budget or licence fees collected either by the state or bodies specially set up for this purpose. A closer look should be taken at the licence-fee funded models in particular as there are many possible variations. The models based partly on licence fees clearly constitute the majority among the funding arrangements in the countries surveyed. Finland, which has not levied a licence fee since 2013 after a change in the law, is an exception here: instead of a licence fee, a separate income levy is payable. This initially flows into the state budget but it is exclusively used for funding the public service broadcaster Yleisradio (Yle).

In the other countries surveyed whose public broadcasting services are exclusively funded from sources other than licence fees the situation also used to be different. For example, the Netherlands did not abolish the licence fee until the year 2000, and since then public service broadcasters have mainly been financed from state funds as well as from advertising revenues and self-generated income, such as membership fees, permissible forms of sponsorship, the publication of a programme guide, intellectual property rights and so-called supplementary activities.⁹⁹ In the Belgian region of Flanders and in the Brussels-Capital region, licence fees have not been levied since 2001 and 2002 respectively. The revenue needed is now made available to public service broadcasters from the region's budget and comes from general taxation. Tax rates are adjusted in order to obtain the amount of revenue required. Hungary abolished the licence-fee funding of public service broadcasting in 2002. The current model, which has applied since the Media Act 2010, provides for state funding based on the number of Hungarian households, and an estimated monthly amount per household of about EUR 4.50 has been set by law.¹⁰⁰

⁹⁶ Sections 11(7), 15(2) and 35 of Act No. 477 of 6.5.2010 (Radio and Television Broadcasting Act), available in English at www.kulturstyrelsen.dk/fileadmin/user_upload/dokumenter/medier/radio_og_tv/Engelsk_side/Promulgation_of_the_Radio_and_Television_Broadcasting_Act_2010.pdf.

⁹⁷ Section 11(8) and (9) RTBA.

⁹⁸ In Sweden, funding by means of licence fees is only permitted if the broadcasting licence contains a ban on advertising (cf. section 1 of the Act (1989:41) on Financing of Radio and Television in the service of the public, available in English at www.radiotjanst.se/Documents/Lagar_och_regler/The%20Act%20on%20Financing%20of%20Radio%20and%20Television%20in%20the%20service%20of%20the%20public.pdf).

⁹⁹ Bron C.M., "Financing and supervision of public service broadcasting", in Nikoltchev S. (ed.), *Public Service Media: Money for Content*, IRIS plus 2010-4, European Audiovisual Observatory, Strasbourg, 2010, www.obs.coe.int/documents/205595/264589/IRIS+plus+2010en4LA.pdf.

¹⁰⁰ More on the Hungary funding model in this IRIS *Special* edition: Gábor Polyák/Ágnes Urbán, Funding of the Hungarian Public Service Media.



3.2. The licence-fee funding model

Where broadcasting services are funded through statutory licence fees (Austria, Walloon Region of Belgium, Denmark, France, Ireland, Italy, Poland, Sweden, UK), a number of questions arise: how high is the amount payable, who has to pay, how are the fees collected and how are they distributed among the broadcasters entitled to receive them? These questions are discussed in detail below, with due account taken of the differences between traditional and online media if such differences can be identified.

3.2.1. Licence fee calculation

The amount of the licence fee is laid down by law (Walloon Region of Belgium, France, Sweden, Poland) or, in some, cases, by the government (Italy) or the government body responsible (Denmark with the involvement of the parliament, UK). In the latter case, it is determined either annually (Denmark, Italy) or after negotiations between the broadcasters entitled to receive the revenue and the government (UK). In Austria, the amount is decided by the bodies responsible for supervising the broadcaster entitled to receive it, with the participation of the government authority. In Poland, the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji, KRRiT) can reset the licence fee by order after taking account of the funds needed to cover the costs of fulfilling the public remit.¹⁰¹

In some cases, a distinction is drawn between (lower) fees for radio reception only and fees for receiving both radio and television.¹⁰² On the other hand, no distinction is made between linear and non-linear or between classical broadcasting services and services offered exclusively online.

The Austrian and British models are worth explaining in more detail. In Austria, the licence fee is made up of various different components: The amount charged to licence payers mainly consists of the programming levy, which chiefly benefits ORF, the only public service broadcaster, and serves to fund its programme services. The programming levy contains an amount in respect of VAT and a collection fee for the collecting agency GIS Gebühren Info Service GmbH, which was set up by statute.¹⁰³ In addition to the programming levy, a broadcast reception fee, which is forwarded to the Federal Finance Ministry, is payable.¹⁰⁴ It is levied on each reception device, but only one fee is payable if there are several devices in the same household or business premises. The total amount to be collected also contains a contribution for the promotion of art, which flows to the federal exchequer,¹⁰⁵ as well as a provincial levy laid down in the law of some Austrian provinces and the VAT payable on the licence fee, which flows to the public budgets.

The ORF itself essentially decides on the amount of the programming levy: in response to an application by the ORF's Director General, the fee is set by the ORF Foundation Council (Stiftungsrat) together with the ORF Viewers' and Listeners' Council and the regulator (KommAustria, as the

¹⁰¹ Section 3(5) of the TV and Radio Licence Fees Act of 21 4 April 2005, available in English at

www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/licence_fees_act_31012013.pdf.

¹⁰² For example in Austria. Cf; scale of fees (TV and radio) at <https://www.gis.at/gebuehren/uebersicht/>.

¹⁰³ Section 31 of the ORF Act; current version available at

www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000785.

¹⁰⁴ Section 3 of the Licence Fees Act (Rundfunkgebührengesetz, RGG); current version available at

www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10012892.

¹⁰⁵ Section 1 of the Act on contributions for the promotion of art (Kunstförderungsbeitragsgesetz); current version available at:

www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10009512.



statutory supervisory authority). The relevant legal and procedural provisions are contained in section 31 of the ORF Act. The ORF Foundation Council is an internal supervisory body whose members are appointed in varying numbers by the Federal Government (partly by taking account of the representation of the parties in parliament), the provinces, the ORF Foundation Council and the Central Works Council.¹⁰⁶

The Austrian licence fee system is not without its critics: in 2012, the ORF's Director General said he was in favour of introducing a household levy like the one imposed in Germany, which since 2013 has had a system of contributions no longer based on the possession of a reception device but on the existence of a household.¹⁰⁷

In the United Kingdom, the licence amount is determined through negotiations: the government and the BBC Trust, the BBC's governing body, have to agree on an appropriate amount, which is then set by the Department for Culture, Media & Sport (DCMS), the government department responsible, via an amendment to the Communications (Television Licensing) Regulations 2004.¹⁰⁸ As in the case of other states, the DCMS can also provide for exceptions or reductions for specific groups (currently for blind people and people over 75, for example).

Worth mentioning from among the tax-funded services is the Dutch system: in order to ensure programme quality, the law lays down that state funds to which the public media services are entitled must guarantee a high-quality media service and continuity of funding.¹⁰⁹ The umbrella organisation Nederlandse Publieke Omroep (Dutch Public Broadcasting, NPO) and the national public broadcasters belonging to it are funded from the "national media contribution", which is also used to finance other media services (e.g., the foreign broadcasting service and the regulator Commissariaat voor de Media (CvdM)).¹¹⁰ Every year before 15 September, the NPO submits a draft budget for the nationwide public media service to the Ministry of Education, Culture and Science and the CvdM. On the basis of the opinion received from the CvdM, the ministry draws up the budget for the national public media service before 1 December. Regional and local public media services receive their funds from the provinces and municipalities.¹¹¹

3.2.2. Amount payable

There are also considerable differences with regard to the amount of licence fee payable: apart from states with no obligation to pay a licence fee, owners of TV sets have to pay between EUR 100 (Walloon Region of Belgium) and approximately EUR 331 (DKR 2,460, Denmark) a year.

In Austria the amount payable varies according to the province. In addition, the fees contain not only the payment for funding the public service broadcaster ORF but also state levies and a contribution for the promotion of art. If a household only has one or more radios, the annual fee in Austria is between EUR 69.36 and EUR 88.56; if it also has a television set, the fee varies between

¹⁰⁶ Section 20 of the ORF Act.

¹⁰⁷ Cf. Inter-State Agreement on the TV and radio licence fee (Rundfunkbeitragsstaatsvertrag); current version available at https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&gld_nr=2&ugl_nr=2251&bes_id=19124&aufgehoben=N.

¹⁰⁸ Communications (Television Licensing) Regulations 2004, 2004 No. 692, p. 1, www.legislation.gov.uk/uksi/2004/692/contents/made.

¹⁰⁹ Section 2.143 of the Media Act (Mediawet) 2008; current version available at http://wetten.overheid.nl/BWBR0025028/geldigheidsdatum_29-05-2015.

¹¹⁰ Section 2.146 of the Media Act (Mediawet) 2008.

¹¹¹ Sections 2.170 and 2.170a of the Media Act (Mediawet) 2008.



EUR 237.36 and EUR 302.16. In the UK, the law provides for a reduced licence fee for black and white sets of GBP 49 (approximately EUR 68.50).

The Finnish broadcast reception tax is graduated according to the taxpayer's income: the tax rate is 0.68% but the maximum payable is EUR 140. No tax is payable on annual incomes below EUR 7,353, so the minimum payable is EUR 50.¹¹²

The available data do not permit the conclusion to be drawn that the introduction of online services in the past had any decisive influence on the amount of licence fee payable. In particular, in those countries where the amount is laid down by law,¹¹³ broadcasters' acute needs for funding to pay for new services probably have hardly any role to play. In the UK too, where the amount is set by the DCMS, there have been no changes since 2010 and the amount is due to remain stable until 2017. In Denmark and Italy too, a government body is responsible for setting the amount by decree. In those countries, there have, if at all, only been moderate fee increases in the last few years and the reasons for them is not known.¹¹⁴ On the other hand, no unusual fee increases have been observed in the countries surveyed, so it may be assumed that broadcasters mainly finance new online services from their current revenues and if necessary make cuts elsewhere. In all events, any additional expenditure incurred cannot be directly linked to an increase in the licence fee.

3.2.3. Group obliged to pay licence fees

The obligation to pay licence fees is currently mainly linked to the ownership of a television set or, more generally, a device for receiving broadcasts. However, differences exist in the actual system employed. In some cases, only private individuals are liable to pay and in others only businesses (for example in France¹¹⁵ and Sweden¹¹⁶). In most cases, the obligation is linked to the ownership (Walloon Region of Belgium, Denmark) or the reception readiness (Austria, Italy, Switzerland) of a device capable of receiving broadcasts or the possession of a television set (France¹¹⁷, Ireland, Sweden). In the UK a licence subject to payment must be obtained for the installation or use of a television receiver.¹¹⁸ Belgium's Walloon Region also levies the licence fee from those who deal in or rent out TV sets.¹¹⁹ A separate fee is payable for each device installed with the aim of making a profit.¹²⁰ In Denmark, the group of people obliged to pay the fee is not specified, the law merely

¹¹² www.vero.fi/en-US/Individuals/Payments/Public_broadcasting_tax.

¹¹³ For example in Belgium (Walloon Region), section 3 of the TV and Radio Licence Fees Act of 13 July 1987, as amended; current version available at <https://wallex.wallonie.be/index.php?doc=2682>; France (Article. 1605 III of the General Tax Code; current version available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069577>; adjusted according to the annual consumer price index); and Sweden (Section 7 of Act 1989:41; see fn. 4 above).

¹¹⁴ Cf. in the case of Denmark Bekendtgørelse om medielicens (Media Licence Notice) No. 1580 of 27 December 2014, available at www.retsinformation.dk/Forms/R0710.aspx?id=166986; in the case of Italy Ministerial Decree (Decreto ministeriale) of 17 December 2013, www.mise.gov.it/images/stories/normativa/canone_rai_2014_firmato_no_aumento.pdf.

¹¹⁵ Article 1605(2) of the General Tax Code (CGI), current version available at www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069577; see fn. 20 above.

¹¹⁶ Sections 4 and 5 of Act 1989:41; see fn. 4 above.

¹¹⁷ Liable to pay is everyone subject to the Residence Tax whose home is equipped with (at least) a TV set, which is assumed to be the case until proved otherwise (Article 1605(2)(1) of the General Tax Code), as well as any individual or legal person that has a TV set on business premises in the tax year (Article 1605(2)(2) of the General Tax Code).

¹¹⁸ Section 363(1) of the Communications Act 2003; consolidated version available at www.legislation.gov.uk/ukpga/2003/21/contents. Dealers who install or use a TV set on delivery to a buyer or for test, demonstration or repair purposes are exempt from the requirement to have a licence.

¹¹⁹ Section 3 of the TV and Radio Licence Fees Act; see fn. 20 above.

¹²⁰ Section 4 of the TV and Radio Licence Fees Act; see fn. 20 above.



stating that a fee “is to be paid” for devices capable of receiving and displaying television programme or services or receiving radio programmes broadcast to the public.¹²¹ Otherwise, a household levy payable irrespective of the ownership of a television set, such as that introduced in Germany in 2013, has so far only been discussed, but not implemented, in Austria.

The term radio or television receiver is generally clearly defined and therefore includes all devices capable of displaying linear broadcast or TV content.¹²² Although this can also comprise devices that receive this content via the internet, this also means that the question of the capability of receiving or calling up special online content currently plays no decisive role in the countries surveyed.

Many countries provide for exemptions for social reasons from the obligation to pay the licence fee, such as old age, visual impairments or low income (for example in Ireland, Poland und UK).

3.2.4. Fee collection

Licence fees are in some cases collected by state authorities (Walloon Region of Belgium,¹²³ France,¹²⁴ Italy¹²⁵) or companies (Ireland: the Irish postal service An Post) and in others by the public service broadcaster(s) or on their behalf. In Sweden, for example, this is the responsibility of Radiotjänst in Kiruna AB (RIKAB), a joint undertaking of the public service broadcasters Sveriges Television (SVT), Sveriges Radio and Sveriges Utbildningsradio (UR).¹²⁶ In Denmark, DR has the statutory task of collecting licence fees, including for the regional TV 2 programme providers,¹²⁷ while in the UK this work is carried out by companies under the BBC’s TV Licensing brand acting on the BBC’s behalf. In Austria, the fee contains a component that belongs to the state and a programme-related component and is collected by GIS, a joint undertaking of the Federal Republic of Austria and Österreichischer Rundfunk (ORF).¹²⁸

¹²¹ Section 69 I, II of the Radio and Television Broadcasting Act; see fn. 2 above.

¹²² For example, the definitions in France (Article. 1605 II of the General Tax Code; see fn. 22 above), Ireland (Section 140(1) of the Broadcasting Act 2009, available at www.irishstatutebook.ie/2009/en/act/pub/0018/), Sweden (Section 2 of Act 1989:41; see fn. 4 above) and the UK (Section 368 of the Communications Act 2003; see fn. 25 above; Section 9 of the Communications (Television Licensing) Regulations 2004; see fn. 15 above). In Denmark too, it depends on whether radio or TV programmes or services broadcast to the public can be received and displayed (section 69(1) and (2) of the Radio and Television Broadcasting Act; see fn. 2 above). However, the Ministerial Order setting the licence fee also understands this to mean computers, mobile telephones and other devices capable of receiving and displaying programmes or services available via the device’s internet access (cf. Section 1(2) of Media Licence Notice No. 1580 of 27.12.2014; see fn. 21 above).

¹²³ The fees are collected here by the “service appointed by the government” (currently the Operational General Directorate for Tax Affairs [Direction générale opérationnelle de la Fiscalité, DGO 7]), Specific Taxation Department, of the Walloon Region administration) in response to a written request (section 9 I of the Licence Fees Act) on the basis of the procedure laid down in the Walloon Decree of 6 May 1999 on setting the level of Walloon Region levies, their collection and the resolution of disputes (as amended); current version available at <http://environnement.wallonie.be/legis/dechets/DETAX003.htm>.

¹²⁴ The fees are collected by the tax authorities together with the Residence Tax; section 1605 bis of the General Tax Code; see fn. 22 above.

¹²⁵ The fees are collected by the Revenue Agency (Agenzia delle Entrate).

¹²⁶ www.radiotjanst.se/en/About-Radiotjanst/Owner-and-board/. SVT has a 61% stake in RIKAB, Sveriges Radio 34% and UR 5%.

¹²⁷ Section 69a(1) of the Radio and Television Broadcasting Act; see fn. 2 above.

¹²⁸ Sections 4(1) and 5(2) of the Licence Fees Act; see fn. 11 above.



3.2.5. Fee distribution

The shares each broadcaster is entitled to receive from the total proceeds and how shares are laid down differs from one country to another. In Austria, for example, the Federal Government and the ORF receive payments directly from their joint collecting agency GIS in accordance with their statutory share of the fees.¹²⁹ In France and Belgium (Walloon Region), on the other hand, the fees collected initially flow into the state budget. In France, it is the state parliament that decides on the amount and distribution of the contribution to fund the public service broadcasters,¹³⁰ whereas in Wallonia it is the regional parliament on the basis of data provided by the French- or German-speaking Community on behalf of the public service broadcasters operating in their area.¹³¹ In Italy, the licence fee is also collected by state authorities but is paid directly to the only broadcaster entitled to receive it, namely Radiotelevisione italiana S.p.A. (RAI), 99.56% of which is state-owned.¹³²

The Irish Post Office is obliged by law to remit the licence fees to RTÉ. However, a deduction is made for collection costs incurred by the Ministry for Communications, Energy and Natural Resources and in respect of an amount equivalent to 7% of the total yield, which is remitted to the Broadcasting Authority of Ireland (BAI). The BAI pays this amount into the Sound and Vision Fund for distribution to independent programme producers. TG4, which is also a public service broadcaster, is allocated the share of the fees to which it is entitled indirectly from the RTÉ budget.¹³³

In the UK, the licence fees are collected by the broadcaster entitled to them (the BBC), but are first paid to the Treasury and then released by Parliament.¹³⁴ The procedure is the same in Sweden, but several broadcasters are entitled to the fees there so the parliament (riksdag) decides at the same time on how to distribute them. To this end, the fees are transferred by RIKAB to the broadcasting account of the Swedish National Debt Office (Riksgälden) and then distributed to SVT, Sveriges Radio and UR in accordance with the distribution decision.¹³⁵ In Denmark, the decision on distribution lies with the Ministry of Culture, which makes the funds available to DR and the regional TV 2 broadcasters and for other media-related purposes (section 69(1) and (2) of the Radio and Television Broadcasting Act).¹³⁶

3.3. Conclusion

The results of the survey show a very mixed picture of regulatory practice in the various countries concerned. Whereas funding by means of licence fees has been abolished in some states in favour of

¹²⁹ See 3.2.2 above.

¹³⁰ Section 53(1) and (3) of Act no. 68-1067 on freedom of communication; current version available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930.

¹³¹ The Region provides the French- and German-speaking Communities with funds to enable them to make up the losses made by their public service broadcasters (Radio-télévision belge de la Communauté française (RTBF), Belgischer Rundfunk (BRF)).

¹³² 57% of RAI is funded from licence fees and 35% from advertising. It obtains other revenue from the sale of licences, for example.

¹³³ Sections 123(1) and 156(2) of the Broadcasting Act 2009; see fn. 29 above.

¹³⁴ The fees are actually remitted by TV Licensing to the British Government's Consolidated Fund (see section 365(7) of the Communications Act 2003), which then allocates the amount to the Department of Culture, Media and Sport pursuant to the Appropriation Act for transfer to the BBC.

¹³⁵ In 2013, of the revenue amounting to SEK 7.1 billion SVT received 57.7% (approx. SEK 4.1 billion), Sveriges Radio 37.2% (approx. SEK 2.7 billion) and UR 5.1% (approx. SEK 338.4 million).

¹³⁶ In 2013, DR received 84% of the total yield and the regional TV 2 companies 11.6%.



partial or full state funding (Belgium's Brussels-Capital and Flanders regions, Finland, Hungary, Netherlands), public service broadcasters are at least partly funded in most countries from fee revenues. However, in some cases there is no clear distinction from tax-funded models. In France, for example, the regulations are based on the possession of a television set but the fee is collected together with the Residence Tax. The Finnish tax, on the other hand, corresponds more to a fee collected by the state as the amounts involved are paid to the public service broadcaster for a designated purpose.

There are also very different approaches within the licence-fee based funding model with regard to calculating, collecting and distributing the funds. Although less state influence on the funding of public service broadcasting is to be expected in the case of funding through licence fees, state bodies are involved in many countries to varying degrees in these stages of the process. In none of the countries surveyed is there a system based on licence fees with no state involvement whatsoever. The Austrian, Danish and Swedish models can be considered relatively independent of the state.

It has emerged that the licence-fee based funding systems in the countries surveyed make hardly any distinction according to the type of content produced, the service provided or the means of distribution selected. Whether a public service broadcaster also makes online content available is, to judge by the statutory provisions in force, of only marginal significance for the structure of funding models. This seems only logical in a world of converging networks, services and content – not only with regard to the production of tri- and cross-media programme formats. If public service broadcasters are at all to be allowed to offer special online content, then granting statutory special treatment to that content and those services would seem likely to impede the continuation of these trends towards convergence.



4. Licence fee reform and online remit in Danish public service media

Christian Edelvold Berg and Anker Brink Lund

On 1 January 2007, an innovative transition from a radio and television fee to a so-called “media licence fee” was introduced in Denmark. The aim of this regulatory reform, supported by a wide majority in Parliament, was to avoid having technological developments erode the basis of funding of public service in Denmark. Leading up to the funding reform, the public service remit was changed in the year 2000 so as to add, to radio and television, Internet public service provision. Consequently, the public remit of the main public service media is now almost platform neutral; in fact, the leading Danish public service broadcaster DR is, according to the public service contract 2015-2018 between the Minister of Culture and DR, obligated to “offer public service-content on a technology neutral basis and support the Danes in making use of the Internet”.¹³⁷ This chapter will discuss these changes and evaluate whether the regulatory reforms have succeeded in securing stable public service funding that meets the technological challenges.

4.1. Introduction

Denmark has several public service broadcasters (DR, TV 2/Denmark A/S, the 8 regional TV 2 companies and Radio24seven). All of these, except TV 2/Denmark, are currently obliged by their remit to have an online presence, albeit in varying degrees. The main funding model for public service media is a licence fee, which is up-to-date, as it includes devices with Internet access capabilities, such as smart phones. Originally, the licence fee was based solely on radio and television sets, but the range of devices was extended in 2007, when the media licence fee was introduced.¹³⁸ In marked contrast to many other countries, the licence fee in Denmark is top-sliced and includes a 25% VAT paid by the licence fee payers. The figures used in this chapter are usually ex-VAT to reflect their actual turnover. Even with the top-slicing most of the revenue continues to go to DR (in 2014 83,5 % ex-VAT¹³⁹) and the eight regional TV 2 companies.¹⁴⁰ These companies are, for the most part, funded by the licence fee and are not allowed to have advertising. As the licence fee is top-sliced, part of the revenue is dedicated to fund other media and film.¹⁴¹ The actual distribution of the fee is decided by the political parties who have agreed on the media agreements for a specific period of time, usually four years; the latest agreement was signed in 2014 for the period of 2015-

¹³⁷ Ministry of Culture, “Media Agreement 2015-2018” (2014),

http://kum.dk/fileadmin/KUM/Documents/Kulturpolitik/medier/Mediaaftalen/Mediaaftale_2014/Mediaaftale_af_26_juni_2014endelig1.pdf, p. 5.

¹³⁸ Ministry of Culture, “Media Agreement 2007-2010” (2006), [http://kum.dk/uploads/tx_templavoila/mediaaftale%202007-2010\[1\].pdf](http://kum.dk/uploads/tx_templavoila/mediaaftale%202007-2010[1].pdf).

¹³⁹ DR (2015): “DRs annual report 2014”, published by DR 4. May 2015, http://www.dr.dk/NR/rdonlyres/CAFCEAE2-9BEB-484F-A3B0-0E7645284CF4/6099706/DR_%C3%83konomi_2014_300415.pdf.

¹⁴⁰ The distribution of the funds can be found in: Ministry of Culture, “Media Agreement 2015-2018” (2014), http://kum.dk/fileadmin/KUM/Documents/Kulturpolitik/medier/Mediaaftalen/Mediaaftale_2014/Mediaaftale_af_26_juni_2014endelig1.pdf.

¹⁴¹ Ministry of Culture, Act no. 255 of 20 March 2014, the Radio and Television Act, www.retsinformation.dk/forms/r0710.aspx?id=161625.



2018. The media agreement is agreed upon by a majority in Parliament. But a few times it has happened that the majority that agreed on a particular four-year media agreement no longer had a majority after an election, after which the agreement could be changed by the new majority. This can happen when there is a narrow media agreement (i.e. an agreement agreed upon by a narrow majority in Parliament), while if there is a broad media agreement, even if there is an election, it will continue for the remainder of the period. This for instance happened in 2011, with the media agreement for 2011-2014. The new Government - as none of the parties within the new majority had agreed on that particular media agreement of 2011-2014 - started negotiations for a new media agreement and established one for the period of 2012-2014. The newest media agreement for the period of 2015-2018 is a broad agreement between all current political parties in Parliament, meaning that even if there were a new majority in Parliament, the agreement may still not be changed without the agreement of the political parties which agreed upon the media agreement for that particular period. In the case of the current 2015-2018 media agreement, this would mean that a majority could be formed without any of the existing political parties, which is highly unlikely. The licence fee funding has in general been a quite stable source of funding with a high degree of certainty for public service companies during the agreement periods – four years, as mentioned above – which ensures security for at least mid-term planning.

The fact that public service media is online in Denmark is nothing new (for example, DR has had a website since 1996), but the main regulatory changes first occurred in 2000 when the definition of public service was changed in the Radio and Television Act,¹⁴² as well as the remit and, then again, in 2007, when the funding model was changed to secure continuity of funding and the principle of platform neutrality in the provision of public service content was enshrined in the media agreement of 2007-2010.¹⁴³

This chapter will describe the process and the changes that occurred to not only show how online services were included in the definition of public service and the public service remit, but also how the funding model was altered to ensure that connected devices are included. A first part describes the changes to the licence fee funding system and will show how the changes impacted the revenue. A second part describes the changes to the public service definition and remits and will discuss the consequences of these changes. A third part will provide a conclusion on the Danish situation from an overall perspective.

4.2. The Danish licence fee funding system

The Danish licence fee is a device dependent household fee, but the type of devices for which it has been required to pay the fee have changed over time in accordance with technological development. Originally, it was introduced 90 years ago in 1925 for radio devices (originally the crystal and lamp devices of that time) with the establishment of the public radio company, back then called Statsradiofonien (the current DR). The argument for using a licence fee funding model was that the state should not pay for a service used by relatively few citizens. It was not until later that some of the arguments used today, related to, for instance, political independence were considered. The licence fee today is a media licence fee, which includes connected devices. Having new devices introduced as being subject to the fee is nothing new. As new developments occurred over time, the

¹⁴² Act no. 1272 of 20 December 2000. Act amending the Radio and Television Act and Income Tax Act of limited companies, etc, www.retsinformation.dk/Forms/R0710.aspx?id=11793.

¹⁴³ Ministry of Culture, "Media Agreement 2007-2010" (2006), [http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010\[1\].pdf](http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010[1].pdf).



device dependent fee has changed as well, such as with the licence fee for black and white television which was introduced in 1952, as well as the colour TV licence fee introduced in 1967. The last major change happened on 1 January 2007, when the media licence fee was introduced, while the black and white and colour TV licence fee was discontinued.¹⁴⁴ The media licence fee was important, as it meant that households with computers and other devices with access to the Internet also became eligible to pay a fee.¹⁴⁵

4.2.1. Why was the media licence fee introduced?

The introduction of the media licence fee on 1 January 2007 was a consequence of a process started under the media agreement of 2001-2004. A working group was set up in 2000 with the purpose of identifying whether tax funding would be more beneficial than licence fee funding. Due to a change of government in 2001, the (narrow) media agreement of 2001-2004 no longer had majority support and was replaced with a new media agreement for 2002-2006. The agreement stated that the working group should continue, but it included a broader frame for potential funding models, for instance subscription funding or combinations of different funding types.¹⁴⁶ The mandate text as stated in the report gives an explanation of the reasons for the establishment of the working group in ensuring the “robustness of the current financing basis, i.e. opportunities – in view of convergence – in the long term to maintain a licence fee system based on a device fee.” The working group ended up discussing three overall models which could “future-proof” the funding:

- *Collection of a licence fee on all devices which can receive radio or television.* It was argued that a solution could be to change the device definition to include all devices able to receive radio and television signals. The change would make the fee independent of the method of distribution and the type of device, i.e. include mobile phones, computers etc.. This model would mean just a slight change in the existing licence fee system.
- *A fundamental change in the licence fee concept, in such a way that the licence fee can function as an obligatory licence fee/public service fee on a household level.* As almost all households in Denmark own a radio or television receiver, implementing an obligatory household fee could remove the device-dependent part of the requirement and at the same time ensure cheaper collection, while also stopping the problems concerning device definitions and evasion.
- *Transition to fiscal law funding.* Direct state funding would solve the challenges of convergence and evasion. At the same time, there could also be a risk of impacting independence from the state.

The 2004 report entitled “Licence fee or Tax¹⁴⁷” is important, as in it the working group argued that technological development and convergence would risk undermining the funding of public service,

¹⁴⁴ Ministry of Culture, “Media Agreement 2007-2010” (2006), [http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010\[1\].pdf](http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010[1].pdf).

¹⁴⁵ Lund, A.B., *et al*, “Udredning af den fremtidige offentlige mediestøtte”, København, Rambøll (2009) [www.kulturstyrelsen.dk/fileadmin/user_upload/dokumenter/medier/medieprojekter/udredning_mediestoette/Rapporter/Mediestoette_Slutrapport_2_Udgave_1 .pdf](http://www.kulturstyrelsen.dk/fileadmin/user_upload/dokumenter/medier/medieprojekter/udredning_mediestoette/Rapporter/Mediestoette_Slutrapport_2_Udgave_1.pdf).

¹⁴⁶ Ministry of Culture, “Licence fee or Tax – Report from the working group on the future funding of DR and the TV 2 (Regions) (2004), http://kum.dk/uploads/tx_templavoila/Licens%20eller%20skat.pdf.

¹⁴⁷ Ministry of Culture, “Licence fee or Tax – Report from the working group on the future funding of DR and the TV 2 (Regions) (2004), http://kum.dk/uploads/tx_templavoila/Licens%20eller%20skat.pdf.



due to potential problems of differentiation between “normal” television sets and new devices able to receive radio or television signals. The decision to implement the media licence fee was not solely based on the report, but was also due to the new obligations to have an online presence (i.e. an obligation of platform neutrality for public service provisioning) in the media agreement of 2007-2010.¹⁴⁸ In the media agreement of 2007-2010, it is stated that the purpose of implementing a media licence fee is to ensure a more technologically neutral licence fee and thus futureproof the licence fee funding of DR and the regional TV 2 companies. It was also a question of economic and budgetary robustness. Initially, the radio licence fee was kept as a separate fee.

Below the current media licence is briefly presented (note that this is based on the executive order of 2014¹⁴⁹ and that there have been a few changes in the executive order over time). In 2014, the Ministry of Culture also published a new report on possible alternative funding models for public service, where the issues from the 2004 report were revisited.¹⁵⁰ That report will not be discussed, but it should be emphasised that the funding issue remains in focus.

4.2.2. The current definition of devices included in the media licence fee

The media licence fee has functioned since 2007 and the purpose was to ensure a higher degree of technological neutrality. The definition¹⁵¹ of devices is based on the current Executive Order No. 1580 of 27 December 2014.

1. Pursuant to § 69, (1), of the Radio and Television Broadcasting Act, a media licence fee shall be payable for devices capable of receiving and reproducing television programmes or services broadcast to the public. Licence fees are collected by the Danish Broadcasting Corporation (DR), DR Licens.

(2) Devices capable of receiving and reproducing television programmes or services broadcast to the public shall mean:

(i) TV sets or similar projectors;

(ii) computers, mobile phones, tablets or similar devices capable of receiving and reproducing television programmes or services, provided that the device also has access to the Internet;

(iii) computers with receiver units capable of receiving and reproducing television programmes and services via radio waves (TV tuners).

Almost all devices currently relevant in relation to media consumption are included in this definition. The question is whether or not the change has influenced the robustness of the funding.

¹⁴⁸ Ministry of Culture, Media Agreement 2007-2010 (2006), [http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010\[1\].pdf](http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010[1].pdf).

¹⁴⁹ Ministry of Culture, Executive Order No. 1580 of 27 December 2014 on licence fees, www.retsinformation.dk/forms/R0710.aspx?id=166986.

¹⁵⁰ Ministry of Culture, “Possible alternatives to the current licence fee funding of DR and the regional TV2 companies etc. – Report from the working group set down in reference to the Media agreement 2012-2014” (2014), http://kum.dk/uploads/tx_templavoila/Licensrapport%20endelig.pdf.

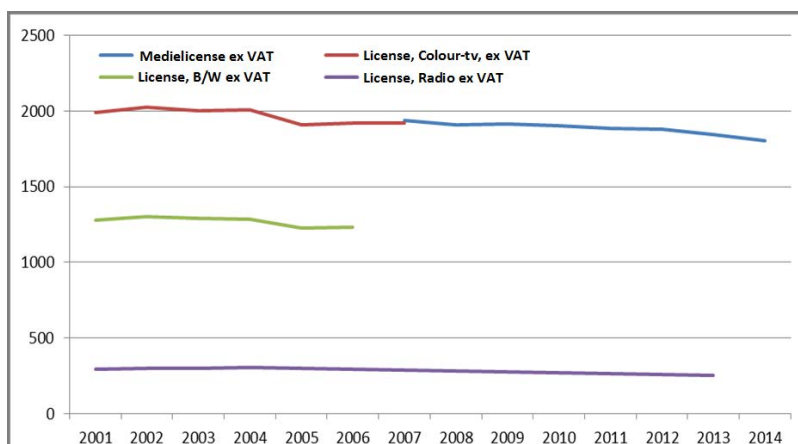
¹⁵¹ Author’s own translation.



4.2.3. Did the change ensure robustness of funding?

The current definition of payable devices includes all devices that can show or reproduce television programmes or services in so far as the device has access to the Internet. All connected devices are thus subject to the media licence fee. The height of the licence fee in Denmark has been stable since 2001 (measured by real 2012 prices), as is shown in Figure 1 below.

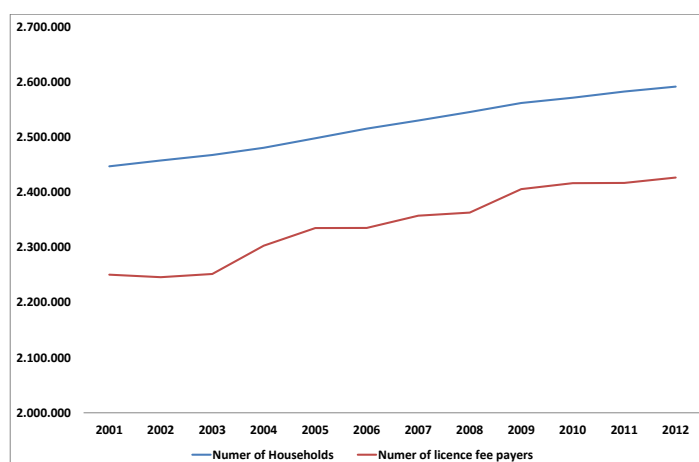
Figure 1: Development of the level of the licence fee for households in 2001-2014 (real 2012 prices, ex-VAT)



Source: Ministry of Culture (2014), "Possible Alternatives to the existing licence fee funding of DR and the regional TV 2-companies etc.", http://kum.dk/uploads/tx_templavoila/Licensrapport%20endelig.pdf.

Figure 1 shows that the licence fee has been remarkably stable when measured by constant 2012 prices, while the reduction in 2004-2005 was due to the removal of the licence fee revenue for TV 2/Denmark. In 2013, a radio-only fee was discontinued and on 1 January 2015 the licence fee on companies was also discontinued. It can be said that the licence fee funding has followed technological developments.

Figure 2: Development of the number of households and of the number of households paying the fee 2001-2012



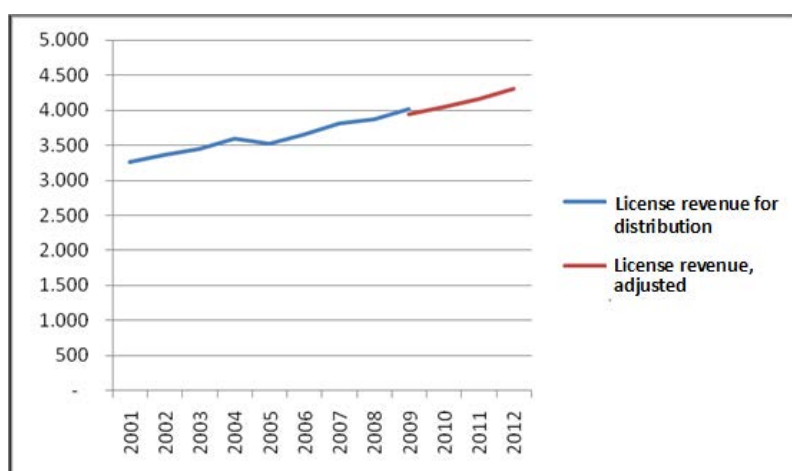
Source: Ministry of Culture (2014), "Possible Alternatives to the existing licence fee funding of DR and the regional TV 2-companies etc.", http://kum.dk/uploads/tx_templavoila/Licensrapport%20endelig.pdf.



Figure 2 shows that the number of households paying the licence fee increased roughly at a similar pace as the increase in the number of households. Even though the relative level of the fee is stable, this does not mean that the total licence fee revenue is unchanged; as the number of households increases, the collected revenue increases as well. The increase in the number of households is due to various reasons, like increases in single households, immigration etc., but also due to the continued work by DR to reduce evaders.

To illustrate the point on the amount of the collected licence fee revenue, figure 3 shows the development of the total collected licence fee revenue. The adjusted revenue is due to a change in accounting practices in 2009.

Figure 3: Development of total licence fee revenue 2001-2012, running prices¹⁵² (Mn. DKK)



Ministry of Culture (2014), "Possible Alternatives to the existing licence fee funding of DR and the regional TV 2-companies etc.", http://kum.dk/uploads/tx_templavoila/Licensrapport%20endelig.pdf.

The figure shows that there has been a small, but stable increase in the total licence fee revenue (in running prices), meaning that the funding system roughly follows the rate of inflation and indicating the relative stability of the system in securing continuity of funding. This increase is due to the increase in the number of licence fee payers, as well as the stable regulation of the level of the fee in accordance with inflation.

4.2.4. Summing up

Studying the changes in the licence fee system, it appears that it has fulfilled its purpose, by ensuring the robustness and continuity of revenue for public service. Interesting is also that the model implemented, for instance, in Germany (change from a device-oriented to a household-oriented fee) was also discussed in the 2004 publication for the Ministry of Culture as a model which could have been implemented in Denmark. The change in the system has ensured a more technological neutral licence fee, but still on the household level, i.e. even if a household owns more than one device, it

¹⁵² Note that in 2009 due to a change in accounting practice there was a technical reduction of the licence fee revenue for distribution; this led to a technical reduction of the total licence fee revenue, matched by corresponding smaller revenue for DR. This fact is reflected in Figure 3 with the adjusted line.



still only has to pay only one fee. The change obviously may also be explained by the public service definition, in which the Internet was also included. This was especially the case in the Media agreement for 2007-2010 for DR and the regional TV 2 companies,¹⁵³ where the principle on platform neutrality when provisioning public service was enshrined, but also in the following media agreement of 2011-2014¹⁵⁴ (as well as of 2013-2014¹⁵⁵ due to a change in Government) and in the media agreement for 2015-2018.¹⁵⁶

4.3. The Danish regulatory structure of public service

4.3.1. The regulatory structure

The regulatory structure for radio and television is defined in the Radio and Television Act¹⁵⁷ and in the related executive orders, which define the different areas in which radio and television are regulated, including public service. Each public service media has a related public service contract or permit which defines its public service obligations (i.e. a remit). Compliance with these obligations is audited annually by the independent radio and television board to ensure that the PSM live up to their obligations.¹⁵⁸

The primary public service definition is stated in the Radio and Television Act¹⁵⁹ as a frame definition. The public service providers are also mentioned in the Act. The Act states that public service in Denmark is provisioned by the Danish Broadcasting Corporation (DR), TV 2/Denmark A/S, the regional TV 2 companies and Radio24seven. Besides these institutional public service providers, there is also a news obligation attached to a national radio frequency (FM5) and a public service fund administered by the Danish Film Institute funded by licence fee revenue, which supports the production of Danish public service TV¹⁶⁰ (TV dramas, TV documentaries and children's and youth programmes).¹⁶¹

¹⁵³ Ministry of Culture, "Media Agreement 2007-2010" (2006), [http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010\[1\].pdf](http://kum.dk/uploads/tx_templavoila/medieaftale%202007-2010[1].pdf).

¹⁵⁴ Ministry of Culture, "Media Agreement 2011-2014" (2010), http://kum.dk/uploads/tx_templavoila/Aftaetekst_Medieaftale_2011-2014.pdf.

¹⁵⁵ Ministry of Culture, "Media Agreement 2012-2014" (2012), http://kum.dk/uploads/tx_templavoila/Endelig%20medieaftale%20af%209%20oktober%202012%20DOK1496920.pdf.

¹⁵⁶ Ministry of Culture, "Media Agreement 2015-2018" (2014), http://kum.dk/fileadmin/KUM/Documents/Kulturpolitik/medier/Medieaftalen/Medieaftale_2014/Medieaftale_af_26_juni_2014endelig1.pdf.

¹⁵⁷ Ministry of Culture, Act no. 255 of 20 March 2014, the Radio and Television Act, www.retsinformation.dk/forms/r0710.aspx?id=161625.

¹⁵⁸ Ministry of Culture, Executive order no. 1527 of 16 December 2013, Rules of procedure for the Radio and Television Board, www.retsinformation.dk/forms/R0710.aspx?id=160510.

¹⁵⁹ Ministry of Culture, Act no. 255 of 20 March 2014, the Radio and Television Act, www.retsinformation.dk/forms/r0710.aspx?id=161625. See also Ministry of Culture, Act no. 1517 of 27 December 2014 amending the Radio and Television Act, www.retsinformation.dk/forms/r0710.aspx?id=167277.

¹⁶⁰ Ministry of Culture, Executive order no. 1579 of 27 December 2014 on support for production of Danish public service TV (the public service fund), www.retsinformation.dk/forms/R0710.aspx?id=166289.

¹⁶¹ Support can be granted to on-demand services, as long as the content is also shown on a linear TV channel afterwards. The fund does not support beneficiaries of licence fee funded companies or non-commercial TV stations.



4.3.2. The definition of public service

The Radio and Television Act gives the framework conditions for the exercise of public service programming in Denmark and establishes the main concepts of the public service. Public service is defined broadly in article 10 of the Radio and Television Act and is defined in more detail in the remits, called public service contracts (for DR and the regional TV 2 companies) or public service permits (for TV 2/Denmark A/S and Radio24seven).

The current definition of public service given in the Radio and Television Act includes online activities:

Part 3, Public service activities

Article 10. The overall public service activities shall, via television, radio and the Internet or similar, provide the Danish population with a wide selection of programmes and services comprising news coverage, general information, education, art and entertainment. Quality, versatility and diversity must be aimed at in the range of programmes provided. In the planning of programmes, freedom of information and of expression shall be a primary concern. Objectivity and impartiality must be sought in the information coverage. Programming shall ensure that the general public has access to important information on society and debate. Furthermore, particular emphasis shall be placed on Danish language and culture. Programming shall cover all genres in the production of art and culture and provide programmes that reflect the diversity of cultural interests in Danish society.¹⁶²

The highlighted sentence shows that public service includes online activities in relation to all programmes and services offering news, general information, education, art and entertainment. Actual limitations on the public service activities are sparse in the Radio and Television Act, but can be more detailed in the terms of the actual contract or permit.

4.3.3. When and why was the current definition established?

The change in the law to include the Internet and similar services took place in the year 2000, when the media agreement for the period of 2001-2004 also included a statement concerning public service providers' online activities. In the agreement it was stated that "DR and TV 2's online activities and the rules related to the stations' traditional public service activities must also be in effect for this part of the public service provisioning (public service obligations, advertisement rules, rules on the protection of children and young people, etc.). As a supplement, DR and TV 2 can offer online activities commercially."¹⁶³ The Internet as a platform for public service was also included in the individual remits (i.e. public service contracts and permits). While the funding system was not changed until 2007, the change to allow online services happened fairly quickly.

The principle of platform neutrality when providing public services was enshrined in the same media agreement that led to the transition to the media licence fee funding system, the media agreement of 2007-2010, which was supported by a vast majority in Parliament.

¹⁶² Ministry of Culture, Act no. 255 of 20 March 2014, the Radio and Television Act, www.retsinformation.dk/forms/r0710.aspx?id=161625. Author's own translation and highlights.

¹⁶³ Ministry of Culture, "Media Agreement 2001-2004" (2000). The text is not available on the Ministry of Culture website, but can be found via the following link: http://projekter.au.dk/fileadmin/projekter/Mediepolitik/medieforlig_1991-2010.pdf.



4.3.4. Public service companies

Denmark has a set of public service media companies. This description will mainly revolve around PSM with online obligations. Currently, mainly DR, the regional TV 2 companies and radio24seven have obligations online. TV 2/Denmark A/S also has online services, but is not obligated to have them. Each of the public service providers has either a public service contract (DR and the regional TV 2 stations) or a public service permit (TV 2/Denmark A/S and Radio24seven). Both the public service contracts and the public service permits are public service remits. The difference is that the public service contracts do not contain sanctions, while the permits do provide potential sanctions if the obligations they set out are not met. This is especially the case for Radio24seven. The companies must meet certain public service obligations, as laid down in a public service contract/permit between each company and the Minister of Culture. While the public service definition pursuant to Article 10 of the Radio and Television Act is broad, the actual obligations can be more narrowly defined.

4.3.4.1. DR

DR is the largest public service provider in the Danish media market. It started radio broadcasting in 1925. DR is organised as an independent public institution. DR's activities are financed through DR's share of licence fees and income from the sale of programmes and other services. The public service contract clarifies the tasks DR is expected to meet for the licence fee funds granted for the media agreement period. DR's current public service contract for the period of 2015-2018 was concluded on the basis of the media agreement for 2015-2018, which is supported by all the current parties in Parliament.

The premise for public service, as per paragraph 2 in DR's public service contract, is as follows:

*To ensure public service offers to all, **DR must follow the media development and reflect Danish media use** by delivering programmes and services of high quality on the relevant channels and platforms that correspond to different target groups. **DR must take advantage of the new technological and digital opportunities** by making editorial mediated and generally available programmes and services that can make viewers, listeners and users familiar with the technology and inspire them to use it.*

*For democratic, social and cultural reasons **DR must have the necessary resources available and the right and obligation to provide public service content on all relevant platforms to the entire population***¹⁶⁴

The premise of public service sets the basis of the purpose of the content delivered by DR as per the contract. The contract is technology neutral and establishes a focus on securing that the provision of public service content is in line with media development. DR even has to take up new technologies and digital opportunities to inspire use. This is a traditional driver argument, but a version that is heavily in favour of allowing DR to engage in the use of new opportunities on all relevant platforms. The focus in the contract is not on restrictions, but on how the highest value may be generated.

¹⁶⁴ Ministry of Culture (2014): "DRs Public Service Contract 2015-2018". Author's own translation and highlights.



The contract also sets the framework for the provision of services. Besides TV and radio services, there is a section on providing “Internet etc.” services. Selected services that DR shall offer online according to the public service contract are the following:

*DR shall offer public service content on a **technology neutral basis and support the Danish use of the Internet**. DR must provide public service content via the Internet for reception using different consumer-relevant reception equipment.*

DR shall, on DR’s website, offer content with a focus on high quality, which contributes to DR’s public service purposes and which is editorially justified on par with content on other platforms. [...]

*DR must make DR’s radio and television programmes available on the Internet using same time distribution (simulcast) and on-demand possibilities. **Purchased foreign widely popular cinema may not be made available on-demand and purchased European films, as well as sections of foreign fiction series that are not DR-contracted productions, may only be made available for a period of 8 days after the content was shown.** [...]*¹⁶⁵

DR’s obligations are broad and there are few limitations. Nonetheless, it is not allowed to provide widely popular cinema on demand and other content may only be available for 8 days after it was shown, if it is not DR-contracted content. DR must have a news offer online; text news are in accordance with its responsibilities. DR has a contract with quite specific responsibilities, but this also allows the PSM to actually be online and take advantage of new opportunities.

4.3.4.2. The regional TV 2 companies

The regional TV 2-companies are eight independent regional public service institutions that broadcast regional television programmes. They are editorially and financially independent from TV 2/Denmark A/S. However, historically they have been part of TV 2 and they continue to have close cooperation with TV 2/Denmark A/S. In their public service contract¹⁶⁶ it is stated that the regional TV 2 companies shall provide regional public service not only on television, but also on the Internet and other platforms used by viewers and users. The regional companies are obliged to have Internet activities which contribute to their public service purpose and which can be justified editorially. They are also obligated to offer specific services online, such as news and productions with image, sound and text. The content must be made available online in the form of simulcasts and webcasts and on-demand. The scope of the regional PSM responsibilities online is narrower than that of the national PSM DR. Nonetheless, the regional PSM also have an obligation to provide public service content online, including in text format.

4.3.4.3. TV 2/Denmark A/S

By law, TV 2/Denmark A/S, was converted in 2003 into a public limited company. 100% of the company is owned by the Danish state. TV 2/Denmark A/S has not received annual government funding since June 2004 and, since then, has financed its operations exclusively with advertising

¹⁶⁵ Ministry of Culture (2014): DRs Public Service Contract 2015-2018. (Author’s own translation and highlights)

¹⁶⁶ Ministry of Culture (2014): “Public service contract between TV2/Lorry and the Minister of Culture for the period 2015-2018”.



revenues and revenues (subscription and advertising) from its niche channels, which are not public service channels, but, like the company, are publicly owned. The niche channels are part of the pay-TV packages in DTT, cable and DTH. TV 2/Denmark A/S, as of 1 January 2012, was also permitted to charge a subscription fee for the public service channel TV 2 (i.e. as a pay-TV channel).¹⁶⁷ The amendment also removed the must-carry status of the channel, as the public service channel became part of the basic pay-TV packages. The change was due to the economic situation of the company. The change in the funding model was agreed upon in 2011 in a supplementary agreement to the media agreement of 2007-2010.¹⁶⁸ Even with the change in funding model, the public service channel TV 2 (the main channel) had an economic deficit of DKK 92 million in 2014 (not including the film support requirement in the contract). That was an additional increase of the deficit of 33 million measured against the result in 2013. The company TV 2/Denmark is not threatened, as the niche Channels (TV 2 ZULU, TV 2 CHARLIE, TV 2 FRI, TV 2 NEWS, TV 2 Sport and TV 2 FILM) had profits before tax of DKK 360 million in 2014, an increase of DKK 85 million from 2013, when the profits were DKK 275 million.¹⁶⁹ The public service permit till 2014 includes an average investment of DKK 60 million to strengthen Danish film production. The media agreement of 2015-2018 includes an increase in TV 2's contribution to Danish Film production to an average of DKK 65 million from 2015.¹⁷⁰ The niche channels in a sense contribute to secure the finances of the main channel.

Programme offerings include news, sports, information, art and entertainment. TV 2/Denmark A/S does not have an obligation to be online as part of its public service remit. The public service obligations are focused on the public service TV channel TV 2. The company does however, have a website with news, a pay-on-demand service (TV 2 Play) and non-public service TV channels. The company is not prevented from provisioning online services, as it functions as a commercial state owned company, except for its public service channel TV 2. TV 2 has one of the most frequently visited websites.

4.3.4.4. Radio24seven

Radio24seven is a privately owned, but almost completely publicly funded public service radio channel. The radio channel was launched on 1 November 2011. The radio station is almost completely funded by licence revenue (around EUR 12.4 million annually for an eight year period). The company has a public service permit which defines a wide and detailed range of responsibilities with regard to provision on all relevant platforms and has made all programmes available online for on-demand listening.

¹⁶⁷ Ministry of Culture (2011): "Model for subscription funding for TV 2" (2011) [http://kum.dk/uploads/tx_templavoila/Model%20for%20abonnementsbetaling%20for%20TV%20\[1\].pdf](http://kum.dk/uploads/tx_templavoila/Model%20for%20abonnementsbetaling%20for%20TV%20[1].pdf).

¹⁶⁸ Ministry of Culture, "Supplementary agreement to the Media Agreement 2007-2010" (2011), http://kum.dk/uploads/tx_templavoila/Tillagsaftale%20af%2011%20marts%202011%20om%20indforelse%20af%20abonnementsbetaling%20for%20TV%202.pdf.

¹⁶⁹ TV 2/Denmark A/S, "Annual report 2014" (2015), http://omtv2.tv2.dk/fileadmin/user_upload/pdf/aarsrapporter/Aarsrapport_2014-web.pdf.

¹⁷⁰ Ministry of Culture, "Media Agreement 2015-2018" (2014), http://kum.dk/fileadmin/KUM/Documents/Kulturpolitik/medier/Mediaftalen/Mediaftale_2014/Mediaftale_af_26_juni_2014endelig1.pdf.



4.3.5. The public service value test

The public service broadcasters in Denmark generally have an online presence, the main national broadcaster and the regional broadcasters have obligations to provide public services online and can start new digital services if relevant. But there is also an instrument that is established to secure that the public service value of new services or significantly altered existing services is higher than the market distortion: a public service value test.

As in several other European countries, there has been a public discussion on competition between public service and private media companies. In Denmark there has, since 1 January 2007, been an ex ante public service value test, as per the media agreement of 2007-2010.¹⁷¹ The test was revised with the media agreement of 2011-2014¹⁷² and slightly adjusted with the media agreement of 2013-2014.¹⁷³ The original test was an internal test by DR to ensure that new services fulfilled cultural, democratic or social needs.¹⁷⁴

According to the internal test, DR had to present the value test of the new services and their results to the independent regulatory authority, the Radio and Television Board (RTB), for an opinion. DR had to await RTB's opinion before the new service could be implemented. The final decision had to be taken by DR's leadership. The old test was used three times to evaluate two online services and once to evaluate the provision of services in public spaces. All the services were approved by the RTB.

With the media agreement of 2011-2014 a new test was introduced, as defined in an executive order. The current public service value test is no longer done internally by DR, but has to be carried out by the RTB. The test covers both DR and the eight regional TV 2 companies. As in the old test, only new services or services that have been significantly changed have to be tested, but only in so far they are not covered by the public service contract. The new public value test can be started either by application by DR or by the RTB itself, if the board finds it relevant. The regional TV 2 companies do not themselves initiate a value test, as this may happen only at the initiative of the Board. The intention is to balance the public service value of the new service to society with the impact on other services in the market. The test requires getting the opinion of an independent external consultancy and a public consultation. There is an 18-week time limit for scrutiny of the Board's decision. Note that the remit can be revised and in practice there have been supplementary agreements to the media agreements, which then would allow a new service without a public value test. The new test has not yet been used and thus there are no experiences with the process. Information on the detailed process can be found on the website of the Danish Agency for Culture.¹⁷⁵

¹⁷¹ Ministry of Culture, "Media agreement 2007-2010" (2006), [http://kum.dk/uploads/tx_templavoila/mediaaftale%202007-2010\[1\].pdf](http://kum.dk/uploads/tx_templavoila/mediaaftale%202007-2010[1].pdf).

¹⁷² Executive order no. 198 of 9 March 2011 on approving DR's and regional TV 2 companies' new services, www.retsinformation.dk/Forms/R0710.aspx?id=136134.

¹⁷³ Ministry of Culture (2012), "Media agreement 2012-2014", http://kum.dk/uploads/tx_templavoila/Endelig%20mediaaftale%20af%209%20oktober%202012%20DOK1496920.pdf.

¹⁷⁴ Note that only services not covered by the public service-contract have to be tested.

¹⁷⁵ Available at, www.kulturstyrelsen.dk/medier/tv/dr/vaerditest/.



4.3.6. Summing up

Studying the figures on actual online users shows that the public broadcasters have been successful in (some) of their online strategies.

Table 1: Danish Users in February 2015 divided by platform and daily user average

Type	Publication	Publisher	Users (DK)				Average daily users
			Total	Desktop	Mobile	Tablet	Total
Public service	1 dr.dk	DR	2 688 123	2 007 742	1 256 538	1 229 609	671 820
Public-owned	2 tv2.dk	TV 2 Danmark A/S	2 475 275	1 670 653	1 495 183	1 057 495	650 373
Private news	3 ekstrabladet.dk	JP/Politikens Hus	2 349 497	1 661 125	1 522 816	990 212	926 249
Private news	4 bt.dk	Berlingske Media	2 095 777	1 362 938	1 320 299	885 086	639 120
Other	5 krak.dk	Eniro Danmark A/S	2 079 270	1 833 136	641 426	587 715	296 020
Private news	6 politiken.dk	JP/Politikens Hus	1 847 754	1 292 270	1 057 019	727 273	370 132
Other	7 dba.dk	Ebay Classifieds	1 648 173	1 372 781	735 353	700 037	319 032
Private news	8 jp.dk	JP/Politikens Hus	1 266 736	830 481	715 115	532 133	271 684
Private news	9 berlingske.dk	Berlingske Media	1 178 133	815 866	640 396	486 409	185 252
Private news	10 dagens.dk	Nyhedsgruppen Aps	1 159 097	561 942	897 837	380 989	216 773
Public service	65 tveast.dk	TV2 Regionerne	252 748	96 925	137 839	80 019	25 520
Public service	76 tv2lorry.dk	TV2 Regionerne	213 465	76 840	80 654	78 254	22 466
Public service	84 tv2oj.dk	TV2 Regionerne	188 950	83 167	86 678	57 254	20 496
Public service	89 tvsyd.dk	TV2 Regionerne	164 151	65 616	73 305	50 566	15 201
Public service	90 tvmidtvest.dk	TV2 Regionerne	159 739	74 077	62 958	52 007	17 530
Public service	98 tv2nord.dk	TV2 Regionerne	138 294	66 629	64 398	43 803	14 448
Public service	117 tv2fyn.dk	TV2 Regionerne	104 171	49 789	31 987	26 439	7 860

Source: Danish Media Research & Gemius, <http://fdim.dk/statistik2014/toplisten>.¹⁷⁶

The table includes the 10 highest ranked websites and the 7 regional TV 2 companies measured by number of users in total and divided by platform. DR and TV 2/Denmark A/S take the two top spots measured by monthly users, but not if measured by daily average. Note that the TV 2 website is publicly owned, but not included in the public service permit. The regional TV 2 stations are somewhat divided as regards their success, but that is reasonable as they are regional players. Note that this list does not include Google and Facebook, but only the websites that pay to be measured. The table underscores the role of DR as a strong provider of online public services.

4.4. Conclusions

The Danish public service system has strong public service broadcasters, with DR as the national market leader online and in radio and TV2 in a similar position in terms of television. This dominance has led to objections from private market players. The majority of Danes recognise the importance of having strong public service media offline, as well as online and the current media agreement of 2015-2018 is supported by all political parties in Parliament.

The strong support is the case now and it was the case back in 2000, when the decision was taken to include the Internet or similar services in the definition of a public service, as part of the media agreement for 2001-2004. The principle of platform neutrality when providing public service

¹⁷⁶ Author's type definition and highlight of PSM websites.



was enshrined in the media agreement of 2007-2010 and was supported by a strong majority in Parliament. Strong political support for public service, combined with a focus allowing remits with a strong emphasis on enabling PSM to explore and exploit possibilities online, has formed the Danish media landscape we have today.

Debates on competition between private news providers and public service media are also part of the Danish landscape. There are discussions on fencing DR's online activities, especially with regards to (text) news. But the debates have not yet resulted in limitations on the online remit.

The funding system for Danish public service continues to be robust with relative low levels of evasion. All households with TVs or connected devices are eligible to pay the media licence fee. The transition of the funding scheme in 2007 has been a success. Nonetheless, there continues to be a focus on investigating the licence fee funding system to make sure that no alternative funding system, for instance funding by tax, would be more efficient.

The question of the future of public service is discussed frequently in Denmark and in December 2014 the Minister of Culture, as part of the media agreement of 2015-2018, established a public service committee, which, among other issues, is intended to establish some potential scenarios for public service in the future. The question of the future of public service media remains relevant in Denmark and continues to play an important part in the debate.

In short, it can be concluded that the Danish method of regulating the media naturally leads to a focus on media development, as the media agreements have a duration of four years, after which a new agreement must be decided on by a majority in Parliament. The procedure for the media agreement often leads to questions, which then lead to requests in the media agreements for reports and information – as was the case with the public service committee mentioned above. This method has – as all others – both strengths and weaknesses. Nonetheless, it is evident that it has ensured that public service provision is based on a principle of platform neutrality and the opportunity to explore digital opportunities.



5. Funding of public service media in Germany

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5.1. Introduction

Public service media (PSM) are essential for modern and democratic societies: they are of central importance to free and open discussion. They support social cohesion and contribute to cultural diversity. The digital media world has not changed this role. On the contrary, despite – or rather because of – the quantity of content available of unknown origin on all kind of platforms, PSM have become more important than ever as a trusted source of objective and impartial information, independent of state and economic influence.

In order to fulfil this public service remit, in Germany the appropriate funding of PSM organisations is constitutionally guaranteed.

PSM in Germany are mainly funded by licence fees. Fee revenues account to about 85% of the total PSM revenue, with other revenues coming from advertising, sponsoring and other sales.¹⁷⁷ The level of the licence fee and the rules governing it are set out in statutes.¹⁷⁸

The fee is paid to finance the regional PSM organisations ARD, ZDF and Deutschlandradio.¹⁷⁹ With their programmes on TV and radio and with their online services, these offer high quality content that aims at educating, informing, giving advice and entertaining the public.

5.2. Reasons for the change in German funding

Until the end of 2012, the licence fee was linked to the possession of a working radio, television device or Internet capable computer. The ability alone to receive public service media was sufficient to trigger the obligation.

The full licence fee for radio, television and Internet capable computers amounted to EUR 17.98 per month. For radio and Internet capable computers, citizens and enterprises had to pay EUR 5.76 per month. In private homes, the full fee only had to be paid once by each person of full age; second devices (even in privately used cars) were free of charge.

This worked well for many years, but more recently there was a discernible increase in evasion rates from the obligation to pay, possibly due to a declining acceptance of the licence fee.

¹⁷⁷ 19th KEF report, point 273 ff., www.kef-online.de/inhalte/bericht19/kef_19bericht.pdf.

¹⁷⁸ The level of the licence fee is set in § 8 Rundfunkfinanzierungsstaatsvertrag. Since 1 January 2013 the rules on the licence fee are contained in the Rundfunkbeitragsstaatsvertrag, that replaced the Rundfunkgebührenstaatsvertrag, www.rundfunkbeitrag.de/e175/e800/15terRundfunkbeitragsstaatsvertrag.pdf.

¹⁷⁹ ARD is an association of nine regional broadcasters and the international broadcaster Deutsche Welle. ARD transmits the nation-wide TV programme Das Erste. The member broadcasters transmit their own regional TV, radio and online services. ZDF transmits a national-wide general TV-programme. In addition to the main TV channels, the PSM organisations of the ARD and the ZDF also offer 3sat, ARTE, Phoenix and KiKA, as well as several digital channels, such as tagesschau24 or ZDFNeo. Deutschlandradio is a national broadcasting cooperation that offers the radio programmes Deutschlandradio Kultur, DRadio Wissen und Deutschlandfunk.



There were concerns that the sustainable funding of PSM, as protected by the Constitution, could no longer be guaranteed.

At the same time, PSM were facing the challenges of a new media environment, with a fundamental change in technologies and audience behaviour. The distinction between device categories had become increasingly difficult, since television and radio broadcasts could be received by many different devices in addition to the traditional TV set and radio receiver (smartphones, tablets etc.). Thus, it was no longer feasible to attach the payment of the licence fee to the ownership of a reception device. It instead seemed to be more logical and justifiable for the fee to be attached to a person or user group or to the premises where they gather rather than a device. The funding needed to be adapted to the digital age, with online media gaining significance.

5.3. The new household orientated licence fee

With this in mind, the German Länder (which are responsible in Germany for enacting rules on broadcasting) decided to change the funding scheme. In consideration of the constitutional right of broadcasting (Article 5 of the German Constitution), the Länder set the following requirements:

- Funding must grant a reliable, safe and sustainable basis for public service media.
- Funding must be independent from state influence.
- Funding must provide for an independent fee-determining procedure.
- Contribution of the private sector (citizens) and the non-private sector (businesses, institutions and public interest bodies) to the revenues must remain at the same ratio as before.
- Revenue neutrality for the PSM organisations must be guaranteed.
- No increase of the licence fee may be imposed only due to the change in funding (fee stability).
- Enhancement of the protection of privacy interests must be achieved.
- Funding must be simple, fair and socially balanced.

The changes to the funding scheme were introduced with the 15th Amendment to the Interstate Treaty on Broadcasting.¹⁸⁰ The new law, called the Rundfunkbeitragsstaatsvertrag¹⁸¹ entered into force on 1 January 2013.

The “new licence fee” has modernised the funding of PSM. The obligation to pay is no longer linked to the possession of broadcasting devices. The licence fee is instead household orientated, as it has to be paid for each residence or each business site, as well as for non-privately used cars. Initially, the licence fee was kept at a monthly amount of EUR 17.98. As a consequence of an increase in revenues, for the first time ever the licence fee was reduced to EUR 17.50 in April 2015.

¹⁸⁰ 15. Rundfunkänderungsstaatsvertrag, www.rundfunkbeitrag.de/e175/e226/Fuenfzehnter_Rundfunkaenderungsstaatsvertrag.pdf.

¹⁸¹ Available at: www.rundfunkbeitrag.de/e175/e800/15terRundfunkbeitragsstaatsvertrag.pdf.



5.3.1. The private sector

Citizens only have to pay once for each residence. The assumption is that broadcasting content (TV and radio) is typically consumed at home and each home is equipped with at least one technical device permitting access to PSM content.¹⁸² The fee is independent of how many persons live in a residence and how many broadcasting receiving devices are there. Since the fee is no longer linked to a device, complicated enquiries about the type and number of devices are not necessary anymore. Where several people share a residence, only one person is liable to pay the fee.

The licence fee for the residence also covers the car radios of all individuals; in the private sector no extra fee has to be paid for privately used cars. Owners of second homes have to pay extra – there is no difference between first and second homes. As before, only persons of full age have to pay the licence fee.

The level of the fee is the same for all citizens. However, the existing exemptions for recipients of welfare benefits have been retained. As before, people have to apply for exemption and need to submit documentary evidence from the relevant authorities (i.e. welfare office). Recipients of student loans can also be exempted by application. Handicapped people that were exempted before now pay a reduced fee (one third of the full licence fee). The deaf and the blind continue to be exempt.

5.3.2. The non-private sector

In the non-private sector, the number of licence fees payable by a company or public institution depends on the number of business premises, the number of employees and the number of cars. The assumption is that broadcasting content is also consumed at these locations, although possibly to a lesser extent than in the private sector.

Businesses have to pay one third of the full licence fee (EUR 5.99, reduced to EUR 5.83 as of 1 April 2015) for each commercial site on a sliding scale based on the number of employees. All full-time and part-time staff liable for social insurance contributions, as well as public service workers are relevant. Trainees are not included as employees liable for social insurance contributions. In addition, businesses pay one third of the fee for every motor vehicle used for commercial purposes (the first motor vehicle is exempt). One third of the full fee also has to be paid for each hotel room or holiday residence.

Public interest bodies (e.g. schools, the police or non-profit facilities such as facilities for disabled persons or for youth welfare) benefit from a capped fee. They pay a maximum fee of EUR 17.98 (as of 1 April 2015, EUR 17.50) per month per site, motor vehicles licensed in the public interest body's name included. Sites with up to eight employees only pay one third of the full fee per month.

¹⁸² Statistics show that in 99.3% of all private homes there is at least one TV set, while 64.3% also have at least a radio receiver, see *Verbrauchs- und Medienanalyse 2005-2014*,

www.ard.de/home/intern/fakten/ard-mediendaten/Unterhaltungselektronik_Geraeteausstattung/409302/index.html.

In about 84% of private homes, there also is at least one Internet capable computer with which broadcasting can be received, see *Statistisches Bundesamt, Wiesbaden 2015*,

www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/EinkommenKonsumLebensbedingungen/AusstattungGebrauchsguetern/Tabellen/ZeitvergleichAusstattung_IKT.html.



5.4. State independent funding

Public funding is regarded as a predictable source of funding that enables PSM organisations to have a long-term strategy for content and innovation. In Germany, funding of PSM has to be independent from state influence, meaning that PSM are constitutionally not allowed to be funded by taxes or other funds that directly arise from the state budget or are dependent on parliamentary approval.

Some citizens and businesses have claimed that the new licence fee is in fact a hidden tax, since in practice everybody is supposed to pay it. However, all administrative courts, as well as two regional constitutional courts, have clarified that the licence fee is not a tax but a “contribution” that is paid for the general ability to receive PSM content.¹⁸³ The level of the licence fee is determined by and dependent on the financial needs of the PSM organisations.

State independence also requires that the Länder cannot be entrusted with unilaterally deciding on the amount of funding. Otherwise there would be a permanent danger of manipulation of broadcasting content for non-journalistic purposes via decisions about the level of the licence fee. It is obvious that freedom of programming is closely linked to funding. Thus, as before, the level of the licence fee is verified by an independent body, the Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten (commission for determining the financial needs of PSM organisations – KEF), that conducts an analysis of the needs of PSM with regard to fulfilling their remit. Every two years, the KEF publishes its recommendations in a report¹⁸⁴ and recommends the level of the licence fee for the (next) broadcasting period of four years.

The procedure for determining the level of the licence fee consists of several steps that are set out in statute:¹⁸⁵

- First, the broadcasters calculate their financial needs and submit this calculation to the KEF.
- Second, the KEF analyses the submission. The analysis includes assessing whether the programme decisions of the PSM organisations are compatible with the public service remit and whether the financial need is determined in accordance with the principles of efficiency and economy. By doing so, the KEF respects the freedom of programming of the PSM organisations. It then gives a recommendation on the level of the licence fee to the Länder.
- Third, the Länder jointly decide on the level of the licence fee.

The Länder only have limited possibilities to deviate from the recommendation of the KEF. They are in particular not allowed to make changes for reasons of programme or media politics. Thus, the influence of the Länder on the level of the licence fee is restricted.

In addition to the fee-determining procedure, the collection and enforcement of the new licence fee is also state independent. As before, the fee is collected directly by the public broadcasters rather than by a third party agency. For this purpose the PSM have established an agency that is called Beitragsservice von ARD, ZDF und Deutschlandradio (Beitragsservice).

¹⁸³ The constitutional courts of Rhineland-Palatinate (VGH B 35/12 (www.mjv.rlp.de/icc/justiz/nav/699/broker.jsp?uMen=6993f3be-a512-11d4-a737-0050045687ab&uCon=8aa304a9-44f3-f541-1797-4c3077fe9e30&uTem=aaaaaaaa-aaaa-aaaa-000000000042) and Bavaria (Vf. 8-VII-12, Vf. 24-VII-12, www.bayern.verfassungsgerichtshof.de/8-VII-12u.a.-Pressemitt.-Entscheidung.htm) stated with decisions of 13 and 15 May 2014 that the new licence fee is in accordance with their respective regional constitutions. In particular, the Rundfunkbeitrag was decided to be a contribution (“Beitrag”), for which the German Länder have legislative competence. The courts also found the specific rules for the private and the non-private sector to be constitutional.

¹⁸⁴ The reports are published on the Internet, www.kef-online.de/inhalte/berichte.html.

¹⁸⁵ §§ 1 ff. Rundfunkfinanzierungsstaatsvertrag.



5.5. Two years later – experiences with the new law

The reform of the German licence fee funding has brought about far-reaching legal, organisational and administrative changes for PSM organisations. The reaction of the public to the reforms has been neutral in general, with however some strong individual opposition predominantly from those that have been adversely affected. There has been continuous extensive press coverage, often directed by particular interests. In the non-private sector, complaints were especially strong from businesses with multiple premises or many cars. Towns and municipalities also complained about an increase in the licence fee obligation.

A number of legal actions were launched by individuals, as well as businesses. Some claim that the fee is in fact a hidden regulatory tax and therefore unconstitutional (see above IV); others contest specific points of law. However, all courts have declared the new funding scheme to be constitutional.¹⁸⁶ It is possible that the Federal Constitutional Court will also be asked to decide on the rules.

5.5.1. Increase in licence fee revenues

According to the German Constitution, funding must grant a reliable, safe and sustainable basis for the operation of PSM organisations. With the gradual erosion of PSM revenues that had been seen over the last years, such a funding of PSM could not be guaranteed. With the introduction of the “new licence fee” that downward tendency has been stopped. The licence fee ensures a stable funding base for PSM organisations to fulfil their remit. Compared to the previous year, 2.5% more revenue was generated in 2013.¹⁸⁷ In 2014, revenues further increased.¹⁸⁸ This was mainly due to the legal authorisation of the broadcasters, on a once-only basis, to compare the official data of the registry offices with their data for the purpose of enforcing the licence fee.¹⁸⁹ On the basis of this comparison, PSM organisations were able to gain information about other citizens that are obliged to pay the licence fee.

Thus, the revenues mainly increased, because today there are more people paying the licence fee than before.¹⁹⁰ By linking the obligation to pay to residences, it has become more difficult to escape the fee. People who were not previously registered and could be assigned to a residence were automatically registered by the Beitragsservice. In this way, the lack of effective enforcement previously experienced (which was lately also highlighted by several courts)¹⁹¹ was remedied.

It is important to note that PSM organisations are not allowed to keep excess revenues. ARD, ZDF and Deutschlandradio are only allowed access to the income that corresponds to their financial needs, as recognised by the KEF in its latest report for the years 2013 to 2016 (19th KEF report).

¹⁸⁶ For an overview, see

www.rundfunkbeitrag.de/informationen/aktuelles/oberverwaltungsgericht_muenster_erklaert_rundfunkbeitrag_fuer_rechtmaessig/index_ges.html.

¹⁸⁷ Annual Report of the Beitragsservice of 2013, www.rundfunkbeitrag.de/e175/e814/Geschaeftsbericht_2013.pdf.

¹⁸⁸ Annual Report of the Beitragsservice of 2014, to be shortly published at www.rundfunkbeitrag.de.

¹⁸⁹ The so-called “einmaliger Meldedatenabgleich” is provided for by § 14(9) Rundfunkbeitragsstaatsvertrag.

¹⁹⁰ At the end of 2014 there were about 3 million more residences registered in comparison to twelve months earlier, cf. Annual Report of the Beitragsservice of 2014, page 38 ff.

¹⁹¹ Cf. Bundesverwaltungsgericht (BVerwG 6 C 12.09), decision of 27 October 2010, point 52,

www.bverwg.de/entscheidungen/pdf/271010U6C12.09.0.pdf.



Income that exceeds their financial needs has to be put in reserve funds that the broadcasters cannot access. It is then credited against the financial needs of the next funding period.

5.5.2. Effects on the private and non-private sector

The new scheme of financing did not make a difference for most of the people. About 90% of citizens have to pay the same – or less – as before, as the level of the licence fee has not been increased. Payments have been lower for families, unmarried couples and flat-shares, who had to pay individually under the old licence fee scheme. The objective of the reform that most citizens should not pay more than before has therefore been fulfilled.

A minority has to pay more today, i.e. especially those who previously only paid the radio-only or computer-only fee. Disabled persons, who were previously exempted, now have to pay a reduced fee equalling to one third of the full licence fee.

The new licence fee has brought significant changes to some businesses. As in the private sector, the changes go in both directions. Small and medium-sized businesses have benefited the most. For a permanent site with up to 8 employees, business enterprises pay only one third of the full fee. Businesses with up to 19 employees pay one full fee. Overall, about 77% of all businesses fall in the first scale and about 90% fall in the first and second scale and thus have to pay the maximum of one full rate. On the other hand, businesses which operate many premises and cars have experienced increases in their licence fee obligations.

This is also the case for towns and municipalities that are also obliged to pay depending on the number of premises and cars. In contrast to businesses, they often were not obliged to pay under the old scheme, since they often had any broadcasting devices deliberately extracted from the cars.

5.5.3. Involvement of the non-private sector

A key objective of the reform was to have everybody involved in the funding of PSM organisations: citizens, businesses and public interest bodies. In particular, the non-private sector should contribute the same amount to the funding of PSM as before (in 2012: 9.6%). The figures for 2014 confirm that this objective has been achieved: as before, approximately 9% of the licence fee revenue is paid by the non-private sector (in 2013 the equivalent was 9.8% and in 2014 9.3%).

It can be assumed that under the old licence fee several companies did not have any car radios registered, even though most cars had radios installed.¹⁹² The same applied to Internet capable computers or radios on business sites, for which a radio fee had to be paid. These companies now have to pay a fee dependent on the number of sites and employees at these sites, as well as for each car – independent of whether they possess any broadcasting devices. Under the new scheme, evasion from payment is more difficult – the new licence fee is fair, since everybody pays what they are legally obliged to.

¹⁹² In 2013, 98% of new cars and 97% of all inventory cars had installed a radio, see Deutsches Kraftfahrzeuggewerbe, page 29, www.kfzgewerbe.de/fileadmin/user_upload/Presse/Zahlen_Fakten/Zahlen_und_Fakten_2013.pdf.



5.6. The “new licence fee” in terms of state aid law

The European Commission considered the “old licence fee” in Germany to be state aid within the meaning of Article 107(1) TFEU (ex. Article 87(1) EC Treaty).¹⁹³ However, it was considered to be justifiable under Article 106(2) TFEU (ex. Article 86(2) EC Treaty), in particular on the basis that the public service remit is sufficiently precise with regard to new media activities (i.e. additional digital channels and teledmedia) and there is regular and effective control of these services.¹⁹⁴

5.6.1. Amendment of the public service remit?

With the change in the funding scheme at the beginning of 2013, the definition of the public service remit remained unchanged. As before, PSM are entrusted to offer radio and television programmes, as well as online services, according to the rules set out in the Rundfunkstaatsvertrag and the legal statutes of the regional broadcasting organisations.¹⁹⁵

The current rules governing online media were introduced with the 12th Amendment of the Interstate Treaty on Broadcasting in 2009.¹⁹⁶ According to those rules, PSM organisations are allowed to offer teledmedia that are journalistically and editorially initiated, as well as journalistically and editorially arranged.¹⁹⁷ The public service remit includes the webcasting of television and radio programmes on the Internet, as well as programme-related teledmedia for up to seven days after transmission, with the exception of major sporting events, which are only allowed for up to 24 hours.¹⁹⁸ Programmes and programme-related teledmedia are allowed on the Internet for more than seven days when this has been approved by the Broadcasting Councils in the context of a three-step test that is carried out on the basis of a concept (Telemedienkonzept) that also includes statements on the duration of these teledmedia (Verweildauer).¹⁹⁹ PSM are prohibited from advertising and sponsorship on the Internet.²⁰⁰ The same applies to non-programme-related press-like teledmedia,²⁰¹ as well as to universal local coverage,²⁰² according to rules that have been introduced especially with regard to press interests. In addition, PSM are not allowed to place purchased TV-feature films and series online.²⁰³ Finally, the 12th Amendment of the Interstate Treaty on Broadcasting contains a so-

¹⁹³ European Commission, “State aid E3/2005 (ex-CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 and CP 195/2004) – Financing of public service broadcasters in Germany”, C (2007) 1761 final, point 141 ff. (191),

http://ec.europa.eu/competition/state_aid/cases/198395/198395_678609_35_1.pdf.

¹⁹⁴ State aid E3/2005, point 359 ff.; Communication from the Commission on the application of State aid rules to public service broadcasting (2009) OJ C 257/1, 27 October 2009, www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Initiatives%20-%20Policy/Topical%20Issues/Funding/27%2010%202009%20Communication%20from%20the%20Commission%20on%20the%20applicatio%20of%20State%20aid%20rules%20to%20public%20service%20broadcasting.pdf.

¹⁹⁵ § 11(1) Rundfunkstaatsvertrag.

¹⁹⁶ 12. Rundfunkänderungsstaatsvertrag, www.ard.de/download/138948/index.pdf;

for a consolidated text of the Rundfunkstaatsvertrag, see www.media-perspektiven.de/publikationen/dokumentation/.

¹⁹⁷ § 11d(1) Rundfunkstaatsvertrag.

¹⁹⁸ § 11d(2) no. 1, no. 2 Rundfunkstaatsvertrag. For programme-related teledmedia there are further conditions that PSM organisations have to meet, cf. § 11d(2) no. 2 Rundfunkstaatsvertrag.

¹⁹⁹ § 11d(3) no. 3 Rundfunkstaatsvertrag.

²⁰⁰ § 11d(5) sentence 1 Rundfunkstaatsvertrag.

²⁰¹ § 11d(2) no. 3 Rundfunkstaatsvertrag.

²⁰² § 11d(5) sentence 3 Rundfunkstaatsvertrag.

²⁰³ § 11d(5) sentence 2 Rundfunkstaatsvertrag.



called “negative list” that explicitly bans certain content for PSM, such as networking services or chats that are not programme-related.²⁰⁴

PSM organisations are obliged to carry out a three-step test for all new and all modified telemedia in order to show that the online service is covered by the public service remit.²⁰⁵ All telemedia (Telemedienbestand) that already existed in 2009 also had to be approved according to a three-step test.²⁰⁶ Responsible for the tests are the Broadcasting Councils of the respective PSM organisations. The three steps are outlined in the Rundfunkstaatsvertrag²⁰⁷ and include statements of the PSM organisations about:

- the extent to which the online service is part of the public service remit and thus corresponds to the democratic, social and cultural needs of society;
- the extent to which the online service contributes to the quality of media competition;
- the expenditure planned for providing the online service.

After the transfer of the Telemedienbestand, that was completed in August 2010,²⁰⁸ the PSM organisations have carried out five more three-step tests, most recently by the Broadcasting Council of the Bayerischer Rundfunk with regard to the online service “BR-Klassik”.²⁰⁹ Further preliminary procedures were performed, in order to see whether a three-step test is necessary. These indicated that, after weighing up all the relevant criteria as set out in the relevant regulations,²¹⁰ the planned changes did not give rise to a need to carry out a three-step test.

The rules on the public service remit, including those on online media, have not changed with the introduction of the “new licence fee”. Furthermore, in Germany entrustment for PSM has no fixed time limit. While the rules defining the remit are reviewed regularly, this does not happen at predetermined intervals, but rather as the need arises. A three-step test is conducted, if a PSM considers it vital to introduce new online services. Naturally, changes to the remit will then be reflected in the determination of the level of the licence fee by the KEF (see above IV). Apart from that, the procedure for adjusting the level of the licence or the underlying rules on funding is separate from the procedure and instruments altering the remit. Therefore, alterations in the funding rules do not necessarily lead to changes in remit and vice versa. In this case, the change from a device-orientated to a household-orientated funding scheme in 2013 has had no immediate impact on the online services of PSM organisations.

²⁰⁴ “Negativliste öffentlich-rechtlicher Telemedien”, annex to § 11d(5) sentence 4 Rundfunkstaatsvertrag, <http://www.ard.de/download/138948/index.pdf>, page 58.

²⁰⁵ § 11f Rundfunkstaatsvertrag.

²⁰⁶ For the transfer of the online services of Westdeutscher Rundfunk Köln, see www1.wdr.de/unternehmen/gremien/rundfunkrat/rundfunkrat-dreistufentest104.html; for the online services of Norddeutscher Rundfunk, see www.ndr.de/der_ndr/unternehmen/rundfunkrat/Der-Drei-Stufentest,dreistufentest135.html.

²⁰⁷ § 11f(4) Rundfunkstaatsvertrag.

²⁰⁸ Article 7(1) 12 Rundfunkänderungsstaatsvertrag, www.ard.de/download/138948/index.pdf, page 24.

²⁰⁹ Cf. www.br.de/unternehmen/inhalt/rundfunkrat/rr-drei-stufen-test-br-klassik-100.html.

²¹⁰ The Broadcasting Councils of the PSM organisations refer to the regulations set out for the preliminary procedure in the “Rules of approval for new and modified online services”, para. I, cf.

<http://www1.wdr.de/unternehmen/gremien/rundfunkrat/dreistufentest116.pdf>.



5.6.2. Significant modification in the funding scheme?

An alteration of existing aid is, according to Article 4(1) of Regulation 794/2004,²¹¹ defined as “any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market”. However, not every alteration to existing aid is regarded as changing the existing aid into new aid that would have to be notified to the European Commission (Article 108(3) TFEU). The existing aid is rather only transformed into new aid when the alteration affects the actual substance of the original funding scheme, i.e. where the alteration is significant.²¹² This implies that the new scheme is not clearly severable from the initial scheme, otherwise the new measure itself would already constitute new aid.²¹³

The Commission’s practice shows that alterations to the funding scheme are significant if the main elements of the system have been altered, such as the nature of the advantage, the objective of the measure, the legal basis, the beneficiaries or the source of funding.²¹⁴

Considering these criteria, the change in the scheme of the German funding itself did not qualify as new aid. With the introduction of the “new licence fee” there was no significant alteration of the funding scheme in terms of the relevant criteria: as before, the licence fee is a “contribution” that is paid for the possibility of receiving public service media. The revenue from the licence fee is destined to serve for an appropriate funding of PSM and beneficiaries of the “new licence fee” are the same PSM organisations as before. Even though the licence fee is no longer attached to the possession of broadcasting devices, as before the fee is paid by those that are potentially able to receive public broadcasting content.

Even a further increase of revenues would not turn the “new licence fee” into new aid. It is guaranteed by law that potential additional revenues are not allowed to be kept by the PSM organisations (cf. § 3(2) Rundfunkfinanzierungsstaatsvertrag).²¹⁵

This assessment is supported by the recent decision of the Commission in a state aid case against Belgium.²¹⁶ In addition, several German courts that have already issued decisions on the rules of the Rundfunkbeitragsstaatsvertrag have confirmed this opinion.²¹⁷

²¹¹ Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 on the implementation of Council Regulation (EC) No 659/1999 on implementing provisions for Article 93 of the EC Treaty CE (2004) OJ L 140/1, 30 April 2004, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32004R0794>.

²¹² State aid No C38/2009 (ex NN 58/2009) – Spain, point 25 ff.,

http://ec.europa.eu/competition/state_aid/cases/234157/234157_1028662_15_1.pdf.

²¹³ State aid E3/2005, point 199, http://ec.europa.eu/competition/state_aid/cases/198395/198395_678609_35_1.pdf.

²¹⁴ State aid E 8/2006 (ex CP 110/2004 and CP 126/2004), point 121,

http://ec.europa.eu/competition/state_aid/cases/215958/215958_825339_70_2.pdf; state aid E3/2005, point 199.

²¹⁵ Cf. Oberverwaltungsgericht Nordrhein-Westfalen (2 A 2422/14, 6 K 7543/13), decision of 12 March 2015, www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2015/2_A_2422_14_Urteil_20150312.htm, point 30 f.; cf. Article 4 of Commission Regulation No 794/2004, according to which an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid.

²¹⁶ State aid SA.32635 (2012/E) – Funding of RTBF Belgium, point 116 ff.,

http://ec.europa.eu/competition/state_aid/cases/247174/247174_1555382_256_2.pdf.

²¹⁷ Bayerischer Verfassungsgerichtshof (Vf. 8-VII-12, Vf. 24-VII-12), decision of 15 May 2014,

<http://www.bayern.verfassungsgerichtshof.de/8-VII-12u.a.-Pressemitt.-Entscheidung.htm>; Oberverwaltungsgericht Nordrhein-Westfalen (2 A 2422/14, 6 K 7543/13), decision of 12 March 2015,

http://www.ovg.nrw.de/behoerde/presse/pressemitteilungen/14_150312/index.php; Verwaltungsgericht Stuttgart (3 K 4897/13),

decision of 1 October 2014, page 7 f.,

<http://vgstuttgart.de/pb/,Lde/Klagen+gegen+Rundfunkbeitrag+abgewiesen+ +Die+Urteilsgruende+ .>



5.7. Conclusion and outlook

In summary, the changes to the funding scheme in Germany has been successful, as the expectations of the Länder on the new licence fee were fulfilled. The decrease of the revenues necessary to fulfil the public service remit has been halted. The involvement of the private and non-private sector in the revenues has remained about the same, as had been intended. The new scheme is fair, as it is more difficult to evade the payment obligation.

The change of the funding scheme did not have any immediate impact on the online service of PSM, as the procedure of amending the rules on funding and the level of the licence fee are independent from the procedure and instruments that define the public service remit.

Already in December 2010, in a protocol to the 15th Amendment of the Interstate Treaty on Broadcasting, the Länder agreed on the Rundfunkbeitragsstaatsvertrag to be evaluated two years after its entry into force. The evaluation is supposed to include a review of the law itself, giving recommendations as to whether changes are needed. Furthermore, an analysis of the level of revenue from the fee and its distribution across the various sectors (private, commercial, non-profit) shall be made.²¹⁸ The evaluation process officially started with a consultation of the Länder in February 2015. The essential decisions about changes in the law might already be made by the summer 2015, while changes in the legal text are expected at the beginning of 2016. So far, it appears that no substantial changes in the rules of the funding scheme are intended.

The evaluation process is closely linked to the question of the future level of the licence fee. During the past months, the Länder have repeatedly stated that fee stability until 2020 is a desirable policy objective. However, in the end the level of the licence fee will mainly depend on the recommendation of the KEF in its next report (20th KEF report). This report, that will already consider the possible decisions of the Länder within the evaluation process, is expected to be published in spring 2016.

²¹⁸ Protokollerklärung aller Länder, page 26,

www.rundfunkbeitrag.de/e175/e226/Fuenfzehnter_Rundfunkaenderungsstaatsvertrag.pdf.



6. Funding of the Hungarian Public Service Media

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6.1. The organisation of Hungarian public service media

Public service broadcasting has undergone substantial changes since 2010 and there are still major changes ongoing. The institutional background of the public media system was changed significantly with the media laws of 2010²¹⁹ and the result is a centralised system. Previously distinct public service media providers were merged into the Media Service Support and Asset Management Fund (hereinafter MTVA).²²⁰ The law states that this Fund exercises the ownership rights and responsibilities of public service media assets, and – among other things – it is also in charge of producing or supporting the production of public service broadcasting items.²²¹ At the head of the Fund is a CEO, who can be appointed and recalled by the president of the Media Council without providing reasons for the dismissal and whose work is not subject to review by any public body.²²² The competences of the supervisory bodies of the public service institutions do not include control of MTVA. These bodies control only the corporations that provide public media services. However, these providers have no production capacities of their own, so their latitude is limited to ordering programs from the MTVA. As a result, the institutional system of public service media has become a powerfully centralised organizational system.

The law assigned the task of providing public media services originally to four private limited companies: Magyar Televízió Zrt. (Hungarian Television), Duna Televízió Zrt. (Duna Television), Magyar Rádió Zrt. (Hungarian Radio) and Magyar Távirati Iroda Zrt. (Hungarian News Agency). An amendment to the law was adopted by the Hungarian National Assembly in December 2014, primarily aimed at the transformation of the institutional framework of public media services.²²³ As a result of this amendment, Duna Médiaszolgáltató Részvénytársaság (Duna Media Service Company Limited by Shares) was established as the legal successor to the aforementioned companies. Duna Médiaszolgáltató Részvénytársaság has become the provider of all public service television, radio and online content services, as well as public service news agent's activities with effect from July 2015.

The companies are – or, from July 2015, the company is – owned exclusively by the Public Service Foundation and supervised by its Board of Trustees (hereinafter, Board or Public Service Board). The Board is the only body within the system of media supervision that has members

²¹⁹ Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content; Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter referred to as Mttv in accordance with the Hungarian abbreviation). The laws are available at: http://mediatanacs.hu/tart/index/662/2010_evi_CLXXXV_torveny_Mttv and

http://mediatanacs.hu/tart/index/663/2010_evi_CIV_torveny_Smtv. A detailed analysis of the laws see Polyák, G., Nagy, K., "Hungarian Media Law", volume 1, (Mertek Booklets), <http://mertek.eu/en/reports/mertek-booklets-vol-1>.

²²⁰ Mttv. Sections 136-137/E.

²²¹ Mttv. Sections 100 and 136.

²²² Mttv. Section 136.

²²³ Act CVII of 2014, www.complex.hu/kzldat/t1400107.htm/t1400107.htm.



delegated by the opposition. Elected for a term of nine years under the law, half of the members are delegated by the ruling parties and half by parties of the opposition. They are elected by a two-third majority vote in Parliament.²²⁴ However, even in this body, a majority is guaranteed for the ruling parties, since another two members and the chair are delegated by the Media Council.

The Board is vested with general regulatory powers in connection with the public service media companies, most notably including the appointment of executive directors to the public media service providers. The executive directors and the terms of their future employment contracts are proposed by the president of the Media Council for approval by the Media Council. The provision of the selection process makes no mention of tendering, professional qualifications or the presentation of a professional concept. In the next step, the Board decides between the candidates by a two-third majority vote in the first round and, in the event of an unsuccessful first round, by a simple majority in a second round. The Board has no competence on the activity of MTVA.

The so-called Public Service Council, which comprises members delegated by organisations defined by the Media Act,²²⁵ is supposed to implement broad-based social control. Journalists' and human rights organisations are absent from the list of entities delegating members to it. The Media Act authorises the body to propose that the executive director be removed from office if it refuses to accept his annual report. The law fails to articulate the criteria for making such a proposal.

As part of the ongoing comprehensive transformation of the structure of public media, the public service providers also launched new channels. Dankó Rádió, which broadcasts traditional Hungarian music, began operating in December 2012. In December 2013, a new television channel, M3, appeared, which broadcasts shows from the archives of Hungarian public television. This is targeted primarily at elderly viewers. MTVA has already officially announced that new television channels will be launched shortly: M4 will be a sports-themed channel. An even greater change is that as of March 2015, M1, which was hitherto the main public television channel, has become a 24-hour news channel. M1's previous position as the flagship channel is taken over by Duna Televízió, which whose main mission had previously been service provision to ethnic Hungarian viewers across the border.

6.2. The funding of Hungarian public service media

6.2.1. The licence fee in Hungarian media regulation

A licence fee was part of the funding scheme for financing the operations of the Hungarian public media between 1996 and 2002. Act I of 1996 on radio and television broadcasting services (hereinafter referred to as Rttv in accordance with the Hungarian abbreviation) compelled all those who were in possession of a device capable of receiving television broadcasts to pay this fee. The amount of the fee was set by Parliament and annually specified in the act on the central budget. In 2002, the fee was 740 forints (approx. EUR 2.5)²²⁶ a month.²²⁷

²²⁴ Mttv. Section 86.

²²⁵ Mttv. Section 97.

²²⁶ Values in Euro have been calculated on the basis of an exchange rate of 1 HUF = 0,0033 Euro according to that of 7 April 2015.

²²⁷ Act CXXXIII of 2000 on the annual budgets of the Republic of Hungary in 2001 and 2002, <http://net.jogtar.hu/jr/gen/hjegy.doc.cgi?docid=A0000133.TV>.



Each household had to pay the fee as long as they owed at least one “device suitable for receiving television broadcasts”, but the regulation did not specify what was meant by term. Nor was there a technical debate on this issue, since at the time when the fee was abolished neither the technical nor the economic environment indicated a need for rethinking what devices qualify as receivers. At the same time, one of the reasons for abolishing the fee was that the share of those who did not pay was high, at 35%,²²⁸ and this had already previously given rise to the idea that the fee ought to be collected independent of appliances, as part of a public utility fee payable by households.

The obligation to pay the fee was laid down in the Rttv, whose amendment was contingent on a majority requirement of two-thirds present, which the governing parties at the time lacked. Thus, the government “assumed” the payment under its own general budgetary obligations, with the result that it was no longer directly paid by audiences, but was defined as a budget item by the government.²²⁹ The sum of the fee assumed by the government was defined by the budget act based on the sum actually collected from the fee in 2001 – that is at a level that was considerably lower than the one specified in the media law – and, until 2011, this basis for the calculation was not adjusted. Hence, until 2011 the amount of this funding source remained practically unchanged at a level of ca. 20-25 billion forints annually (approx. EUR 66.8 to 83.5 million). In 2007, the law stipulated that the owners of hotels and restaurants have to pay a licence fee, with the result that the amount of the fee funded through budget allocations was reduced by the sum collected from hotel and restaurant owners.²³⁰ In addition to assuming the payment of the licence fee, Parliament also awarded public service broadcasters with an additional ad hoc budget funding each year. In 2002, such funding amounted to 42 billion forints (approx. EUR 140.3 million) in total, while in 2010 53.5 billion forints (approx. EUR 178.8 million) in state subsidies were approved. The licence fee therefore equalled roughly half the annual amount of ad hoc state funding.

The amount of the fee was decided by Parliament yearly and played no role whatsoever in Parliament’s recurring funding determinations. The law failed to specify a procedure to consider the responsibilities and funding needs of public service broadcasters. All the relevant provisions said was that the amount of the licence fee should be determined with regard to the competitive and cost-effective operation of public service broadcasters, the maintenance of the broadcasting system and the funding requirements of public service programmes.²³¹ Further, the revenue from the fee had to be topped up each year by ad hoc budget subsidies in the national budget.

The Constitutional Court did not deem this solution unconstitutional. It held that Parliament does not wield decisive influence over the content of public service radio and television services merely by specifying the sources of funding for the latter in the budget act: “It is true that budget funding and the determination each year of the operating costs as part of the budget process could to some extent constitute financial influence (...) with respect to broadcasters. Yet such an impact is only indirect and does not give rise to a violation of press freedom”.²³² The decision failed to address

²²⁸ Kitta, G., “A magyar média történetének fordulatos évei 2002-2010” (The most eventful years in the history of Hungarian media) in Paál, V. (ed.), *A magyarországi médiaháború története. Média és politika 1989-2010* (A history of the media war in Hungary. Media and politics, 1989-2010) (Budapest 2014), 199-291.

²²⁹ Article 104 (4), Act LXII of 2002 on the annual budget of the Republic of Hungary in 2003, www.complex.hu/kzldat/t0200062.htm/t0200062.htm.

²³⁰ Article 80, Act CII of 2008 on the annual budget of the Republic of Hungary in 2009, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0800102.TV.

²³¹ Rttv. Article 79.

²³² Constitutional Court decision No. 47/1994. (X. 21.), <http://public.mkab.hu/dev/dontesek.nsf/0/02A3ADC958209401C1257ADA0052B39C?OpenDocument>.



the way in which the amount of the licence fee was determined or the criteria or procedures used in that process, as well as its impact on the independence of public service media.

The Constitutional Court also examined the government's assumption of licence fee payment obligations. It held that the decision had no impact on either "the right of disposal emanating from the payment of the maintenance fee or the right to oversee how this fee is used" and that "it did not give the Government any right to have a say in the uses of the maintenance fee".²³³ As long as independence from the government is safeguarded when it comes to the use of the fee, in the Constitutional Court's assessment it is irrelevant from whence the funds allocated are obtained. The significance of these Constitutional Court decisions stems from the fact that they specify assessment criteria that continue to prevail in the assessment of the currently effective regulations, which are unchanged in terms of their underlying approach.

In the period between 1996 and 2011, public service media also drew substantial funding from two other sources. The law allowed public service broadcasters to air advertisements, although the airtime they were free to allocate for such purposes was less than half the amount commercial broadcasters were authorised to set aside for advertising. In addition, public service broadcasters also received a legally defined portion of the so-called broadcasting fee collected from commercial television and radio outlets.²³⁴

6.2.2. Public service media funding in the new media law

The media law adopted in 2010 also reformed the regulation of public service media funding. The new regulation did not change the position of central budget funding allocations as the primary source of funding for public service media. The legislator also did not bring back the licence fee, but determined the amount of funding available by multiplying an amount payable by each household with the number of households. The state pays a public service contribution each year based on the number of households using equipment suitable for receiving linear audiovisual media services. Public service contributions are paid by the state in twelve equal instalments, in advance by the third day of each month, by way of transfer to the MTVA's bank account.²³⁵ The law fails to define the concept of equipment suitable for receiving linear audiovisual media services. In defining the amount of the fee, the law specifies the number of households in Hungary through statistical data;²³⁶ in other words, it assumes that some type of receiving set is available in each and every household. Based on a calculation assuming 4 million Hungarian households, each contributing a monthly amount of 1 350 forints (approx. EUR 4.5), the amount of the public service contribution in 2012 was 64.8 billion forints (approx. EUR 216.6 million). This amount shall be indexed annually, at least on the basis of the Hungarian index of consumer prices.²³⁷ For 2015, the central budget has set the level of the public service contribution at 69.86 billion forints (approx. EUR 233.5 million).

This regulatory solution therefore legally enshrines the amount of state funding for public service media. The legislator argues that this model provides public service broadcasters with "reliable normative funding (...) which provides a better basis for reliable budgetary planning."²³⁸ In

²³³ Constitutional Court decision No. 766/B/2002, ABH 2004, 1664-1674.

²³⁴ Rttv. Article 131.

²³⁵ Mttv. Section 136.

²³⁶ According to the 2011 census there are 4.106 million households in Hungary, see www.ksh.hu/nepszamlalas/.

²³⁷ Mttv. Schedule No. 4.

²³⁸ Mttv. Opinion.



reality, however, the determination of the amount was not preceded by an analysis of public service responsibilities and a genuine assessment of funding needs. Since the law establishes the amount itself and does not provide a procedure for its regular review, there will be no opportunity to conduct such analyses and reviews in the future either. Until Parliament sees fit to amend the law with a two-thirds majority, this is the sum public service media will have at their disposal in terms of public funding, regardless of whether in actuality they need considerably less or more support. Moreover, the practice of allocating ad hoc state subsidies persists.

The MTVA's business plan and annual report are approved by the Media Council, partly published on the MTVA's website.²³⁹

At the same time, the CEOs of the public service media providers – as of July 2015, the CEO of the single public service media provider – are obliged to report to two further bodies, namely the Public Service Board and the Public Service Council. The report submitted to the Public Service Board contains data on financial management and the Board decides about approving the balance of payments and financial results by certifying the report.²⁴⁰ The law fails to specify what happens in the event that the body refuses to certify the reports and the reports are not available on the websites of either the Board or the public service media broadcasters. Moreover, despite managing public funds, the MTVA is not subject to the Board's oversight. Nevertheless, the Board's protocols reveal that, even in the absence of such an obligation, the MTVA's CEO regularly informs the Public Service Board,²⁴¹ but does not need the approval of the latter. The CEOs have to report to the Public Service Council as to whether in their assessment the public service media providers have met the requirements set out in law concerning the goals of public media services and the underlying principles.²⁴² A refusal to approve this report might result in the Public Service Council asking the Public Service Board to relieve the CEO of his/her position, but the report does not extend to issues involving financial management.

In addition to determining the amount of state funding, the law also makes provisions regarding the distribution of the available funding between individual public service media providers and public service activities. The media law provides that the Public Service Fiscal Council²⁴³ has the authority to decide on the distribution of funds between public service media providers or, as of July 2015, between the different public service activities (television, radio, online, news agency). The members of this committee are the CEOs of the public service shareholding companies and the MTVA respectively, as well as two delegates from the State Audit Office. Under the new institutional framework applicable as of July 2015, this Committee includes the CEOs of Duna Médiaszolgáltató Rt and the MTVA. As of July 2015, the Committee only retains a right to comment on proposals drafted and adopted by the MTVA. In allocating budgetary funds, the MTVA is not obliged to consider the Committee's opinion. This means that the authority to apportion state funds allocated for discharging public service responsibilities between different types of public service mandates rests with the Authority. Indeed, the delegates of the State Audit Office are always in the minority, so they do not have real power to influence the decision. Hence, in practice, no external control or social needs are considered in decisions regarding the distribution of funding allocations.

²³⁹ Available at, <http://mtva.hu/hu/kozerdeku-adatok/4171-mtva-altalanos-koezeteteli-lista-tartalomjegyzek-uj>.

²⁴⁰ Mttv. Section 108.

²⁴¹ See, for example, the Advisory Board's protocol of 15 October 2014, www.kszka.hu/dokumentumok/a-kuratorium-dokumentumai/491-k2014/kuratoriumi-ules-2014-oktober-15.

²⁴² Rttv. Section 97.

²⁴³ Mttv. Section 108.



6.2.3. Transparency of financing

The law specifies public service responsibilities in very general terms, more along the lines of general principles which cannot be used to justify the funding needs of individual public service activities. The law also provides that a so-called Public Service Code²⁴⁴ must be adopted, which could theoretically serve to lay out public service responsibilities in detail. Actually, this document serves as a sort of ethical code, rather than providing an in-depth definition of the law's generic public service objectives in the form of specific responsibilities on the basis of which providers could be held accountable. The Code was adopted by the Media Council in 2011.²⁴⁵ It can be revised and compliance therewith is monitored by the Public Service Council.²⁴⁶

The failure of the Code to spell out specific public service tasks the performance of which could be enforced in practice should have special significance for the Public Service Fiscal Council. The Council's decisions on the distribution of funds can be only based on the definition of public service remits. Despite its legal obligation to publish its decisions on the Internet,²⁴⁷ the content of these are not available on the website of MTVA.²⁴⁸ Following a freedom of information request to access the Public Service Fiscal Council's agenda, its decision-making documents and the memoranda of its sessions, the documents were disclosed pursuant to an order of the Metropolitan Tribunal²⁴⁹ and of the Metropolitan Regional Court²⁵⁰ and have been published on the website of an NGO.²⁵¹

It emerged that the documents did not contain information on the methods and basis of the programme cost calculations or on the aspects of programming. Several documents featured the same graphs and tables and, moreover, these had no titles that would have shown what data they actually present and what period they apply to. The background documents also contained scant financial information. They mainly provide information about the audience shares of the public service channels and programme minutes by genre. Furthermore, the few financial tables and detailed tables of by-the-minute broadcasting time did not feature the same system of categories, which makes it impossible to calculate the average costs of individual genres. There was no information on the activity of the news agency and on online services. It also emerged from the documents that the delegates of the State Audit Office criticised the deficient information repeatedly, but also voted for the acceptance of the resolution.²⁵²

²⁴⁴ Mttv. Section 95.

²⁴⁵ Available at, http://mediatorveny.hu/dokumentum/5/kozszoalati_kodex.pdf.

²⁴⁶ Mttv. Section 97.

²⁴⁷ Mttv. Section 108 (4).

²⁴⁸ MTVA published only a press release on the fact that the Public Service Fiscal Council made the decision, without any information on the content of the decision, see: <http://mtva.hu/en/kozerdeku-adatok/egyeb-kozerdeku-kozlemeny/kozlemeny-a-kozszoalati-koeltsegvetesi-tanacs-doenteserol-2015-03-06>.

²⁴⁹ Court Decision Nr. 22.P.21.718/2013/7, http://mertek.eu/sites/default/files/files/mertek_kozszoalati_elsok_0.pdf.

²⁵⁰ Court Decision Nr. 2.Pf.21.585/2013/6, http://mertek.eu/sites/default/files/files/mertek_kozszoalati_masodfok_jogeros_0.pdf.

²⁵¹ The documents are available at <http://atlatszo.hu/wp-content/uploads/2015/05/MTVA-KKT.zip>.

²⁵² See the minutes of Council's meetings of 8 February 2012, 28 September 2012, 13 December 2012, 8 March 2013 and 12 July 2013. The minutes are parts of the disclosed documents cited in a previous footnote.



6.3. “New media” services of Hungarian public service media

The production of online content provided by public service media – similarly to the operations of the institution as a whole – could raise some concern as to transparency requirements: there are no annual reports, no exact information is available on costs or on what is produced in-house and what is ordered by the MTVA from third-party producers. The public also does not know what performance indicators (e.g. number of online visitors, mobile applications downloaded) are being used. There are general news portals and sites with online archives and company information among the new media services, as well as corresponding mobile and Facebook applications.

6.3.1. “New media” content

Users can find a portion of the content designated for the general public on a news portal called “hirado.hu” (“híradó” is the Hungarian name of the television news programme). The site is like a general news portal and it is the most important online service of the public service media. Besides the most important sections (home, abroad, sports, science, economics, tech, culture, etc.), there are also blogs, which are typically written by well-known Hungarian right-wing intellectuals and functionaries, financed by the MTVA.²⁵³ The video section offers videos of news programmes and the political prime-time programmes of the public service channels, which can be accessed using the catch-up TV function.

The other important site is “Médiaklikk”, which offers – in addition to the live streaming of the shows aired on public service television and radio – any content for which the MTVA has a copyright licence. Video and audio materials are available on the site for 60 days and are then transferred into a special Hungarian online archive.²⁵⁴

The mtva.hu domain also features company information and press releases which are, however, not relevant to the wider public. The public service television media providers do not have their own website; the online offerings of these providers are available on the MTVA’s website. At the same time, public service radios have a separate website called radio.hu. In addition to a brief description of radio media services, it is possible to listen to live broadcasts and there is also an archive of the broadcasts aired over the past three weeks. The Hungarian Television’s (Magyar Televízió) teletext service is available on the site at teletext.hu.

The public media also operate about ninety regional sub-sites, in addition to the abovementioned sites. These contain local news only to a limited extent; they mostly provide the same national selection of broadcasts which are available on the news portal hirado.hu. In addition to local news portals, there are also thematic sites, e.g. the site profit7.hu, which is aimed at small and medium-sized companies.

Besides the online sites, there are also mobile applications which were developed for the MTVA’s major programmes. Among the latter are news programmes, some of the popular self-produced shows and large foreign sporting events, the broadcasting rights of which were bought by the public media (most recently the 2014 FIFA World Cup).

²⁵³ The contracts with the bloggers are available at

<http://mtva.hu/hu/sajtoszoba-main/sajtokozlomenyek/vallalati-sajtokozlomenyek/10660-szerzodesek-blog-irokkal>.

²⁵⁴ National Audiovisual Archive of Hungary (<http://nava.hu/>).



The public media websites cannot be characterised as particularly popular. According to data provided by Alexa, in terms of real users, hirado.hu was the 96th most popular site in May 2015.²⁵⁵ It lagged behind practically all news portals. Mediaklikk.hu, which features public media broadcasts, ranks 285th.²⁵⁶ According to Gemius,²⁵⁷ a company providing online traffic measurement in Hungary, hirado.hu is 43rd and mediaklikk.hu 97th.

Public media institutions also have several sites on Facebook. MTVA's Facebook page has 13,190 likes, hirado.hu is much more popular (77,400 likes), but by far the most popular is "MR2-Petőfi Rádió", a music radio (184,000 likes).

6.3.2. Conditions for launching new public media services

The legal status of online and other "new media" services is not clear, as the Media Act does not define the public service mandate that these services have to fulfil nor does it expound on the conditions for launching such services. In respect of these services, the Act only provides the following: "Public media services shall strive to (...) use new technologies and broadcasting methods boldly, play a pivotal role in discovering new digital and online media services and put them to use in the public interest".²⁵⁸ Neither the Act nor other documents provide any guidelines as to the realisation of this objective or the possible content of such services. Those television and radio broadcasting public media services whose provision is legally mandated are defined by the Media Act.²⁵⁹ However, the law includes no provisions concerning the public service media providers' online services.

The law determines the conditions for launching new services primarily with respect to traditional linear services. According to the law, the Media Council "may supervise the system of public media services on an annual basis and may decide whether to maintain the public media services that it has provided for the public media provider to date or to change the system thereof".²⁶⁰ Public media services are media services provided by public media service providers;²⁶¹ pursuant to the AVMS Directive, media services include linear and on-demand audiovisual media services, as well as radio services. Thus, the regulation in force actually excludes online text services from the range of activities performed by public service media, which are available all the same. This situation was corrected by the 2014 amendment of the Media Act. As of March 2015, the definition of the term "public media service" was also changed. From this date on, the term public media services includes in addition to the audiovisual and radio media services and the news agency service,²⁶² also the Internet-based services of media content .

Therefore, in accordance with the Media Act, the Media Council decides whether public media services can be launched or terminated and does so in consultation with the MTVA's CEO, also having regard to considerations of economic efficiency, budgetary planning for the next year

²⁵⁵ Available at www.alexa.com/siteinfo/hirado.hu.

²⁵⁶ Available at www.alexa.com/siteinfo/mediaklikk.hu.

²⁵⁷ Available at <http://dkt.hu/hu/menu/ola.html>.

²⁵⁸ Media Act, Section 83 (2).

²⁵⁹ Media Act, Section 98 (5).

²⁶⁰ Media Act, Section 98 (8).

²⁶¹ Media Act, Section 203.

²⁶² The public service media system provides news agency service in the new structure, as well. The news agency lost its organisational autonomy, it became a pure service of the integrated public media provider.



and the fulfilment of the public service objectives set forth in the Act. Under the terms defined in the Act, until March 2015 this competence of the Media Council has not included online services that consist exclusively of textual content.

The relevant Media Council decisions were disclosed as a result of a freedom of information request.²⁶³ Before 2013, these decisions did not even mention online streaming versions of linear media services. Moreover, even since 2013, the online platform appears only as a distribution platform. Neither on-demand media services nor other online/“new media” services are referred to in these decisions. On the whole, the frames of operation of the new media services remain largely unsettled.

6.3.3. Financing new media content providers

The publicly available documentation does not provide precise information as to the costs of developing or operating new media content nor does the institution publish any data on access, visits to the sites or application downloads.

There is also a so-called New Media Office, which operates within the MTVA and is directly supervised by its CEO.²⁶⁴ The only responsibility assigned to the Office under the Organisational and Operational Rules of the MTVA is to supervise the Fund’s New Media and Teletext Ltd. The management team of the Office and the executive management of MTVA-owned New Media and Teletext Ltd are the same; owing to this fact, information about their expenditures is available in public databases.

According to the information of the MTVA,²⁶⁵ the MTVA pays 35.2 million forints (approx. EUR 118 000) monthly for the New Media and Teletext Ltd in order to run the online services. The income from the utilisation of the online advertisement surfaces was 25.4 million forints (approx. EUR 85 000) in 2014.

The realised revenue of New Media and Teletext Ltd was 561 million forint (approx. EUR 1.9 million) in 2013. A significant portion of its expenditures (approx. 80 per cent) is devoted to covering personnel costs. The company's responsibilities include the following:²⁶⁶

- continuous editing and operation of the online platforms of the public media organisation;
- continuous operation of the teletext service of television channels;
- promoting the programmes of television channels on the web and teletext platforms;
- developments relating to new media;
- technical operation of the teletext and internet platforms of television channels;
- continuous provision of the content (news, programmes and commercial information) that appears on mobile internet services;

²⁶³ See the request at, <http://kimittud.atlatszo.hu/request/a-kozszojalati-mediaszolgalata>.

²⁶⁴ Médiaszolgáltatás-támogató és Vagyonkezelő Alap Szervezeti és Működési Szabályzata (Organisational and Operational Rules of the Public Media Asset Management Fund),

www.mtva.hu/images/download/kozerdeku/kozveteteli_lista/altalanos/2015/mtva_szmsz_20141101.pdf.

²⁶⁵ See the freedom of information request for the answer, http://kimittud.atlatszo.hu/request/kozszojalati_mediaszolgalatok.

²⁶⁶ Az Új Média és Teletext Kft. 2013. évi kiegészítő melléklete (Supplementary annex to the annual report of the New Media and Teletext Ltd for the year 2013), <http://e-beszamolo.kim.gov.hu/>.



- rendering the news and other programmes of television channels accessible to deaf and hard-of-hearing viewers.

The regional versions of the site hirado.hu were originally launched by Magyar Híradó Kft, but they were later bought by the New Media and Teletext Ltd. Though on most sites the provided information has been corrected, in some one may still find the name of the former publisher, Magyar Híradó Kft (Hungarian News Broadcast Ltd). The Hungarian News Broadcast Ltd ended its operation at the end of 2014, but until then it was owned by Attila Várhegyi, a former politician affiliated with the current governing party of Fidesz, who was convicted in a binding judicial decision in 2002 for misappropriating funds in 2002.²⁶⁷

In 2012, the MTVA entered into a contract with another company owned by Attila Várhegyi, the communication agency Prestige Media, concerning the performance of some communication tasks.²⁶⁸ According to media reports, the MTVA also concluded a contract with a third company owned by Attila Várhegyi, Myself Consulting Ltd, under the terms of which the latter is to carry out certain functions relating to the organisation of a music show programme.²⁶⁹ As a consequence, it is not possible to determine precisely how much the MTVA spends on the development and operation of new media in its own productions compared to projects commissioned in the framework of external contracts.

Appsters Mobile Content Management Ltd, the company that develops the mobile applications of public media programmes, has specified both MTVA and New Media and Teletext Ltd as its partners. Appsters Ltd develops mobile applications not only for public service media, but also for other state institutions and local governments.

6.3.4. A three-step test for Hungarian PSB?

An amendment in 2014 added to the Hungarian Media Act a chapter entitled “Strategic Plan of the Public Service Media and the Measurement of Public Service Value”. According to this amendment, distinct strategies will be developed for each public service media provider which “creates a basis for the operation of the public service media, as well as for cooperation between the public service media providers and the MTVA”. Pursuant to the Act, public media service providers are obliged to prepare a general strategic plan for each year.²⁷⁰ In this plan they shall identify and evaluate the possible directions and ways of improvement of the quality of public media services, taking into account, among other things, international and Hungarian media market trends, technological developments and innovations and data relating to media consumption. In addition to the general strategic plan, on an ad hoc basis, public media service providers are also obliged to prepare strategic plans on certain sub-areas involving media services. According to the Act, strategic plans serve as the basis for the operation of the public media service and they also underlie the cooperation between public media service providers and the MTVA; however, their detailed content is not defined by the Act.

²⁶⁷ Available at, <http://index.hu/belfold/varhegyiitel/>.

²⁶⁸ Available at, www.mediapiac.com/marketing/Kommunikacios-ugynokseget-igazolt-az-MTVA/17171/.

²⁶⁹ Haszán, Z., “Tízmilliókat kapott tanácsadásért a közmédiától a Fidesz volt pártigazgatója” (Former party director of Fidesz has received dozens of millions for counselling) 8 July 2014, <http://444.hu/2014/07/08/varhegyi-attila-a-kozmedia-tanacsadoja/>.

²⁷⁰ Media Act, Section 100/A.



However, the strategy does not affect the amount of state subsidies specified in the law. The law determines exactly the amount of the public money available for the public service media and the strategy does not have any consequence on this amount.

Further, the strategy has no impact either on whether public service media should launch new content services. This decision will continue to be made by the Media Council, which, as mentioned, is authorised to supervise the system of public media services. Strategy will play a role in only one scenario: when the Public Service Budget Committee comments on the budget drawn up by the MTVA it will take this strategy, among other things, into account.

The introduction of procedures aimed at “measuring public service value” is encouraged by the European Commission, primarily because by relying on these, it can be guaranteed that a new public media service does not disproportionately limit or distort the operation of the online and digital content markets. However, the Hungarian regulations require the assessment of already existing services and no consequences are attached to the outcome of such an appraisal. Pursuant to the Act, the public service media provider is obliged to examine and review the public service nature and value of its services, as well as their impact on the diversity of the media market.²⁷¹ The detailed rules of the procedure will be defined by the internal regulations of the public service media provider.

According to the amendment, the development of the strategy and the assessment are both performed by the public service media provider itself. There is no mention of any public consultation or objective external review in the regulation.

6.4. Concluding remarks

To sum up, the regulation of the financing of Hungarian public service media is based on a fixed sum determined in the media law. The financial sources appear to be independent of the real demands and performance of the providers and the transparency of their use is in practice not always guaranteed. The control powers in the complex system of institutions are not clearly regulated and, although the last amendment of the law regulates the making of strategy and the measuring of public service values, the rules do not seem to add particular consequences to the result of these procedures. The conditions of launching of New Media services are not regulated.

²⁷¹ Media Act, Section 100/B.





The Public Value Test





7. The Public Value Test and its implementation

Gianna Iacino, EMR

In its Broadcasting Communication 2009 the European Commission requested that member states introduce a prior evaluation procedure for significant new services and significant changes to existing services envisaged by public broadcasters. This test should, on the one hand, consist of a value assessment of the democratic, social and cultural needs of society, which is referred to as the public value test. On the other hand, the test should include an ex ante assessment of the potential effects on competition and cross border trade. This part of the test is referred to as the market impact assessment. In a next step, the added value for society should be balanced with the potential negative effects of the market impact.²⁷²

The Commission does not foresee many detailed requirements in the Communication regarding the implementation and execution of the test. It does not determine what should be considered a significant new service and merely suggests that whether or not a service is to be defined as “new” might depend on its content and the modalities of its consumption. The significance of a new service might be determined by the financial resources required for its development and the expected impact on demand.²⁷³

As to how and by whom the evaluation should be conducted, the Communication also does not foresee specific requirements. Regarding the procedure of the test, it only states that the evaluation should be based on an open public consultation and stakeholders should have the possibility to give their view. The outcome of the consultation, its assessment, as well as the grounds for the decision should be made publicly available. The responsible institution for conducting the public value test should be effectively independent from the management of the Public Broadcaster.²⁷⁴

Since further details, beyond the above-mentioned general requirements, have not been foreseen by the Commission, the implementation and execution of the public value test varies from member state to member state. Many countries have not yet implemented the test (e.g. France and Hungary), some countries have implemented the test in their legislation, but have not yet actually conducted a test (e.g. Belgium), sometimes due to their very strict idea of what qualifies as a new service, while e.g. Austria and Germany have already executed several tests.

In order to provide for an overview of the different implementations of the test throughout Europe, this article will take a closer look at the details of the implementation of the public value test in different member states. It will identify the responsible institutions for the execution of the test, see whether expert help is involved in the market impact assessment, compare the execution procedures foreseen by national legislations and assess the duration and costs of already executed tests.

²⁷² European Commission, Broadcasting Communication 2009, no. 84.

²⁷³ European Commission, Broadcasting Communication 2009, no. 85.

²⁷⁴ European Commission, Broadcasting Communication 2009, no. 87, 89.



7.1. Responsible institutions

Since the Communication does not make any suggestion as to who should conduct the public value test, the responsible institutions vary widely in the different member states. It should be clear that what is referred to here is those institutions making the final decisions. Ultimately, in all cases more than one body is involved in the execution of the test, at least in an advisory manner.

7.1.1. Governing body of the Public Broadcaster

While the Broadcasting Communication states that the responsible institution for conducting the public value test shall be effectively independent from the management of the public broadcaster, some countries have given the task of conducting the test to the supervisory body within the public broadcaster or governing the public broadcaster. The BBC Trust for example, being the governing body of the BBC, is also the responsible institution for the execution of the test.²⁷⁵ We find the same situation in Germany, where the responsible supervisory board of each public broadcaster has been put in charge,²⁷⁶ as well as in Finland, where the Administrative Council of the Yleisradio is responsible.²⁷⁷ It should be mentioned, however, that the Administrative Council of the Yleisradio is comprised of Members of Parliament²⁷⁸ and could therefore also be integrated within the next category.

7.1.2. Governmental representative

In other countries the government or a ministry is in control of the test. In Ireland, the Minister for Communications needs to approve a new service before it can be launched²⁷⁹ and in the Netherlands the new service has to be approved by the Minister of Education, Culture and Science.²⁸⁰ The Flemish Government has to give its prior approval to new services of the Belgian public broadcaster,²⁸¹ but it should be mentioned that the conduct of the public value test in Belgium is done by the Media Regulatory Body Vlaamse Regulator voor de Media (VRM).

7.1.3. Independent regulator

In some countries an independent regulator has been put in charge of the test: in Denmark, for example, the Media Regulatory Body of Radio and Television Board (RTB) conducts the test.²⁸² In

²⁷⁵ Clause 23 – 33 of the Broadcasting Act (An Agreement between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation, Presented to Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty, July 2006), http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf.

²⁷⁶ § 11 f (6) 1, Staatsvertrag für Rundfunk und Telemedien, 31 August 1991,

www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/15_RStV_01-01-2013.pdf.

²⁷⁷ Section 6 a (474/2012), Act on Yleisradio (Finnish Broadcasting Company), www.finlex.fi/fi/laki/kaannokset/1993/en19931380.pdf.

²⁷⁸ J. Hildén, "European Public Service Broadcasting Online", p. 22,

http://yle.fi/yleisradio/sites/yleisradio/files/attachments/european_public_service_broadcasting_online_report2013.pdf.

²⁷⁹ Article 103, Broadcasting Act 2009 (No. 18 of 2009), www.irishstatutebook.ie/2009/en/act/pub/0018/.

²⁸⁰ Mediawet 2008, http://wetten.overheid.nl/BWBR0025028/volledig/geldigheidsdatum_27-04-2015.

²⁸¹ Article 18 § 1, Mediadecreet, www.vlaamseregulatormedia.be/sites/default/files/mediadecreet.pdf.

²⁸² § 44 b, Broadcasting Law no. 477 of 06 May 2010; Bekendtgørelse om godkendelse af DR's og de regionale TV 2-virksomheders nye tjeneste (decree by the Ministry of Culture), www.retsinformation.dk/Forms/R0710.aspx?id=136134.



Austria, the responsibility for the tests lies with KommAustria, which has established a new advisory board for the purpose of conducting the public value test.²⁸³

7.2. The procedure foreseen by national legislation

The procedures foreseen by national legislations vary in detail from each other, yet a general overview of the procedures in place can be given, since the tests share similarities.

7.2.1. Initiation of a test

Every test starts with either the submission of an application for the launching of a new service by a public broadcaster (e.g. Austria, Belgium, Germany)²⁸⁴ or by an initiative of the responsible institution for the execution of the test (e.g. the UK).²⁸⁵ In some countries both options are possible and therefore a test can be started either on the request of the public broadcaster or by the initiative of the responsible institution (e.g. Denmark²⁸⁶ and Finland²⁸⁷).

As determined by the Communication, all legislations foresee that the public value test has to be implemented only for significant new services and for significant changes to existing services. In some cases, the law foresees an additional condition requiring that the test must only be executed for those new services that are not already covered by the public contract (Belgium).²⁸⁸ What qualifies as a significant new service or a significant change to an already existing service is therefore the deciding factor for the execution of a prior assessment before the launching of a service.

In most countries the definition of the term “significant new service” or certain criteria for the evaluation of services as new and significant have been introduced into the legislation. Again, the conditions laid down in national legislation as to when a new service is given differ in detail, but some repeating criteria will be mentioned: the financial resources required for the development of the service play an important role in many legislations (e.g. in Austria, Denmark, Finland, Germany, Ireland and the UK),²⁸⁹ as well as the form of technology of the service in question (e.g. Austria,

²⁸³ §§ 6 a ff, ORF-Gesetz, www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000785.

²⁸⁴ M. Bohdal & R. Belfin, “Öffentlich-rechtliche Angebote auf dem Prüfstand”, Schriftenreihe der Rundfunk und Telekom Regulierungs-GmbH, Band 1/2014, p. 96, www.rtr.at/de/komp/SchriftenreiheNr12014/31850_Band1-2014.pdf.

²⁸⁵ D. Coyle, “Public Value in practice – restoring the ethos of public service”, pp. 64 – 78, http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/pvt/public_value_practice.pdf.

²⁸⁶ M. Bohdal & R. Belfin, “Öffentlich-rechtliche Angebote auf dem Prüfstand”, Schriftenreihe der Rundfunk und Telekom Regulierungs-GmbH, Band 1/2014, p. 86, www.rtr.at/de/komp/SchriftenreiheNr12014/31850_Band1-2014.pdf.

²⁸⁷ Section 6 a (II) (474/2012) Act on Yleisradio.

²⁸⁸ Article 18 § 1, Mediadecreet.

²⁸⁹ § 6 (III) Nr. 2, ORF-Gesetz; § 4 Bekendtgørelse om godkendelse af DR’s og de regionale TV 2-virksomheders nye tjeneste; Section 6 a (I) (474/2012), Act on Yleisradio; § 11 f (6) 1 Staatsvertrag für Rundfunk und Telemedien, 31 August 1991; Article 103 (VIII) lit c, Broadcasting Act 2009 (No. 18 of 2009); Clause 25 of the Broadcasting Act.



Belgium and Ireland).²⁹⁰ Other indicators can be the novelty (e.g. Denmark and UK)²⁹¹ and duration (e.g. Denmark, Finland and the UK)²⁹² of the service.

7.2.2. Open public consultation

If a public value assessment has to be conducted, most responsible institutions undertake a consultation. While some institutions only have to give certain stakeholders the possibility to share their views (e.g. Finland, Ireland),²⁹³ other institutions start an open consultation with the public. Therefore, the application of the test to the new service is usually published on the public broadcaster's website and all concerned parties have the opportunity to submit their comments (e.g. Austria, Germany, the UK).²⁹⁴ Belgium, however, has not introduced into law an obligation to conduct any consultation.²⁹⁵

7.2.3. Market impact assessment

Most countries which have introduced the public value test into their national legislation will have also introduced an obligation to conduct a market impact assessment. Some countries however, e.g. Belgium and the Netherlands, have not introduced such an obligation into their national legislation.²⁹⁶

As an advisory to KommAustria, the Austrian competition agency gives its opinion on the market impact of the new service in question, while the RTR ultimately conducts the test itself.²⁹⁷ In the UK, where the responsibility for the evaluation of new services lies within the governing body of the BBC (the BBC Trust), the market impact assessment is conducted by Ofcom, the independent regulator and competition authority for the UK communications industries.²⁹⁸ The Broadcasting Authority of Ireland (BAI) has to conduct a sectoral impact assessment for the Minister for Communications,²⁹⁹ whose approval is needed for the launch of a new service. BAI itself however, has obtained external expert help for the market impact assessment, while not being obligated by law to seek external help. The Media Regulatory Body in Denmark, RTB, on the other hand is obligated by a regulation of the Minister of Culture to get an independent, external opinion.³⁰⁰ In

²⁹⁰ § 6 (III) Nr. 1, ORF-Gesetz; Article 18, § 3, Mediadecreet; Article 103 (VIII) lit g, Broadcasting Act 2009 (No. 18 of 2009).

²⁹¹ § 4 Bekendtgørelse om godkendelse af DR's og de regionale TV 2-virksomheders nye tjeneste; Clause 25 of the Broadcasting Act.

²⁹² § 4 Bekendtgørelse om godkendelse af DR's og de regionale TV 2-virksomheders nye tjeneste; Section 6 a (I) (474/2012), Act on Yleisradio; Clause 25 of the Broadcasting Act.

²⁹³ Section 6 a (IV) (474/2012), Act on Yleisradio; Article 103 (IV) lit a, Broadcasting Act 2009 (No. 18 of 2009).

²⁹⁴ § 6 a (II), ORF-Gesetz; § 11 f (5) Staatsvertrag für Rundfunk und Telemedien, 31 August 1991; Clause 26 (V) of the Broadcasting Act.

²⁹⁵ Article 18, Mediadecreet.

²⁹⁶ J. Hildén, "European Public Service Broadcasting Online", p. 35,

http://yle.fi/yleisradio/sites/yleisradio/files/attachments/european_public_service_broadcasting_online_report2013.pdf.

²⁹⁷ M. Bohdal & R. Belfin, "Öffentlich-rechtliche Angebote auf dem Prüfstand", Schriftenreihe der Rundfunk und Telekom Regulierungs-GmbH, Band 1/2014, p. 33, https://www.rtr.at/de/komp/SchriftenreiheNr12014/31850_Band1-2014.pdf.

²⁹⁸ D. Coyle, "Public Value in practice – restoring the ethos of public service", pp. 73 – 75,

http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/pvt/public_value_practice.pdf.

²⁹⁹ Article 103 (IV) lit b Broadcasting Act 2009 (No. 18 of 2009).

³⁰⁰ § 5 Bekendtgørelse om godkendelse af DR's og de regionale TV 2-virksomheders nye tjenester.



Germany as well, the supervising body of the public broadcaster has to obtain an external expert assessment.³⁰¹

Thus, where the market impact assessment is required by law, it is often delegated to a third party. In some cases such a delegation of the market impact assessment is mandatory, in other cases it is not. Austria is a notable exception, since it only requires an advisory opinion from an external expert; KommAustria conducts the assessment itself.

7.2.4. Decision

In any case, the final decision on the balancing of the public value assessment with the result of the market impact assessment – while taking into consideration the results of the open consultations – stays within the responsible institution for the execution of the test.³⁰²

In most countries the law requires that the decision and its reasoning be published (e.g. Austria, Germany, Ireland, the UK),³⁰³ as foreseen by the Broadcasting Communication.³⁰⁴ Belgian law, however, only requires the VRT to publish its advisory opinion, while legislation does not require the Flemish government to publish their final decision.³⁰⁵

7.3. Duration and cost

Austria has completed four public value tests with an average duration of 5 months and average costs of approximately EUR 12 250. Germany, in comparison, has completed 45 tests with an average duration of eleven months and average costs of approximately EUR 220 000. In Ireland, a test takes an average of 4 months and the external expert assessment obtained by the BAI costs an average of EUR 50 000. In the UK, the duration of the test has been determined by law, according to which it can take a maximum 6 months. The UK has spent approximately EUR 580 000 on average for each public value test, while overall conducting four tests.³⁰⁶

Since the amount of tests that have been completed by different member states (varying from zero to 45), the average duration of a test (between approximately 4 months and a year) and its average cost (between approximately EUR 12 000 and EUR 1 000 000) vary so widely in the different member states, no useful information can be gained by the calculation of the average duration and average cost of a public value test in the member states.

³⁰¹ § 11 f (V) 4 Staatsvertrag für Rundfunk und Telemedien, 31 August 1991.

³⁰² J. Hildén, “European Public Service Broadcasting Online”, p. 18,

http://yle.fi/yleisradio/sites/yleisradio/files/attachments/european_public_service_broadcasting_online_report2013.pdf.

³⁰³ § 6 b (IV) Nr. 2, ORF-Gesetz; § 11 f (6) Staatsvertrag für Rundfunk und Telemedien, 31 August 1991; Article 103 (IV) lit d Broadcasting Act 2009 (No. 18 of 2009); D. Coyle, “Public Value in practice – restoring the ethos of public service”, pp. 77.

³⁰⁴ European Commission, Broadcasting Communication 2009, no. 87.

³⁰⁵ Article 18 § 2, Mediadecreet.

³⁰⁶ M. Bohdal & R. Belfin, “Öffentlich-rechtliche Angebote auf dem Prüfstand”, Schriftenreihe der Rundfunk und Telekom Regulierungs-GmbH, Band 1/2014, pp. 78, 111, 135, 129, www.rtr.at/de/komp/SchriftenreiheNr12014/31850_Band1-2014.pdf.



7.4. Conclusion

Since the request of the Commission for the implementation of a public value test in the member states is neither a formal nor a detailed requirement, the national implementations, as far as they exist, vary widely. Naturally, the implemented tests all share certain similarities, where they transpose the terms suggested by the Commission. But not all suggestions have been transposed into all national legislations and therefore the differences – especially in the details – outweigh the similarities.

The most important requirement for the execution of a test lies with the understanding of the term “significant new service”. The definition of this term decides whether or not a public value test has to be executed for the service in question. As for all other aspects of the public value test, the transposed definitions of the term “significant new service” share certain similarities in most national legislations. Nevertheless, their interpretation in the member states differ widely, as is shown by the number of tests executed so far.



8. Public value test: fit for purpose?

Dr Richard Burnley,³⁰⁷ EBU

“The system of Public Value Tests, which take at least six months each, was designed for a different world – and needs revisiting.”

Rona Fairhead, Chairman of the BBC Trust, 4 March 2015³⁰⁸

Public Service Media (“PSM”) was established as a “merit good” for society to serve democracy, social cohesion and national cultural objectives. In order to fulfil its democratic role, PSM must operate independently of political and economic power (i.e., the PSM broadcaster must have full editorial independence over all its content output).³⁰⁹ Indeed, the European Court of Human Rights has held that member states have a positive obligation to ensure the independence of PSM.³¹⁰ In all EU member states, PSM is therefore operated at arm’s length from the executive and legislative powers.

Unlike certain other crucial not-for-profit public services (e.g. education), PSM thus falls within the scope of the EU state aid rules. However, given PSM’s cultural and democratic sensitivity, the member states adopted the so-called Amsterdam Protocol to safeguard its specific status.³¹¹ In this context, the European Commission issued specific guidance on the application of the EU state aid rules to PSM. The Broadcasting Communication 2009 is a non-binding instrument that nevertheless indicates how the European Commission will approach the public funding of PSM in individual cases.³¹² It was first introduced in 2001 and then revised to take into account, among other things, the evolving media markets. The 2009 Communication includes specific guidance on the launch of new (online) PSM services and the introduction of public value tests.

8.1. PSM in the digital age

PSM performs a crucial function in society as a trusted source of objective and impartial information, a reliable provider of quality and diverse media content and a guardian of European values, providing a broad spectrum of views. Its democratic, cultural and social role in the dual broadcasting

³⁰⁷ All views expressed in this article are personal and do not reflect those of the European Broadcasting Union or its Members.

³⁰⁸ Available at: www.bbc.co.uk/bbctrust/news/speeches/2015/oxford_media_convention.

³⁰⁹ Council of Europe Recommendation 1996 (10), [www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1996\)010&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1996)010&expmem_EN.asp).

³¹⁰ *Manole a.o. v Moldova* of 17 September 2009. See further, PSM Under Article 10 ECHR, Commissioned by the EBU, <http://www3.ebu.ch/contents/publications/public-service-media-and-article.html>.

³¹¹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Protocol annexed to the Treaty of the European Community, Protocol on the system of public broadcasting in the Member States, OJ C 340/109 of 10 November 1997.

³¹² Communication from the Commission on the application of State aid rules to public service broadcasting, 2009/C257/01 (hereafter: “Broadcasting Communication”).



system has been recognised in many international texts and court judgments. The new media world does not change this role. On the contrary, PSM's role is reinforced in an environment in which the viewer is faced with a vast and confusing array of information of unknown origin and intent. However, in order to carry on fulfilling its role effectively and stay relevant, PSM must have the flexibility to be able to innovate and launch new services.

8.2. New PSM online services within the public service remit

The starting point for considering new PSM services remains the Amsterdam Protocol on public service broadcasting that provides that the public service remit is “conferred, defined and organised by each member state.”³¹³ The primary responsibility therefore remains with member states to determine what new services a PSM should be allowed to launch. However, the member state must at the same time ensure that any public funding for the new service “does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.”³¹⁴

In this context, the Broadcasting Communication provides that the definition of the public service remit should be “as precise as possible”. It should be sufficiently clear, whilst at the same time taking into account the need for PSM to adapt quickly to market realities, given that PSM remits are normally fixed for a set period of years (whether by law, in a management contract or both).

There has recently been pressure in state aid cases for PSM public service remits to be drafted in more concrete and “precise” ways, particularly with respect to online services.³¹⁵ Indeed, some advocate the inclusion of a restrictive and exhaustive list of new media activities. However, such a focus on legal certainty in the market place can have the unfortunate by-product of constraining PSM from launching new services that do not fit squarely into the definition. PSM can find itself “straight-jacketed” and unable to adapt its services to the fast-moving digital environment.

It should not be necessary for PSM to have to wait a number of years until the next legislative cycle (and remit renewal) to launch a new service for the public. In fact, the General Court has expressly confirmed that for all platforms “the Member States’ power to define broadcasting Services of General Economic Interest in broad and qualitative terms, so as to cover the broadcasting of a wide range of programmes, cannot be disputed.”³¹⁶ The Court recognised that challenging the latitude left to the broadcaster to launch new programming services can infringe a PSM's editorial independence from public authority, in breach of the principles of freedom of expression as set out in Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.³¹⁷

³¹³ Protocol on public service broadcasting, Amsterdam Treaty 1997.

³¹⁴ Protocol on public service broadcasting, Amsterdam Treaty 1997.

³¹⁵ Compare, e.g., the recent Decision SA.32635, *Financing of the Radio-Télévision belge de la Communauté française (RTBF)* of 7 May 2014 (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_32635) with Cases T-309/04, T-317/04, T-329/04 and T-366/04, *TV2/Danmark A/S v. Commission* [2008] ECR II (<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-309/04>).

³¹⁶ Cases T-309/04, T-317/04, T-329/04 and T-366/04, *TV2/Danmark A/S v. Commission* [2008] ECR II, paragraph 113 and 115. In this case, the Court was satisfied that a wide remit “to offer the entire Danish population varied television programming which aims to provide quality, versatility and diversity” was “perfectly clear and precise”, paragraph 117, <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-309/04>.

³¹⁷ Case, *ibid*, paragraph 118.



Legally, the key question under the EU state aid rules is whether the remit has been defined with sufficient precision for the Commission to exercise its jurisdiction to check for a “manifest error” when determining whether public funds are “used to finance the public service or rather commercial activities”.³¹⁸ In short, the Commission must be able to determine whether the remit includes tasks that do not constitute a public service. This does not mean that it is necessary for member states to include a specific and exhaustive list of new media services in the PSM remit; a more qualitative approach is equally valid.

8.3. Amending the public service remit to include new PSM online services

However the public service remit is ultimately defined (whether in a detailed way or more broadly), every PSM needs some kind of mechanism allowing it to launch innovative new media services outside the scope of its formal remit in a timely manner, whilst at the same time ensuring that the market is informed and not disproportionately distorted as a result.

In some cases, new PSM services may be introduced by an amendment of the legal instrument setting out the public service remit. For example, in countries where a management contract (between broadcaster and the state or between broadcaster and Broadcasting Council) is used to set out the remit in detail, it is often possible to amend the contract at any time. The amendment procedure involves a public consultation to ensure that market and third party views are taken into account.

Another approach used in many member states is to have a specific test to assess the public interest and impact of a proposed new PSM service. The origin of such tests can be traced back to the public value test announced in the UK in 2004 (and subsequently included in the 2006 BBC Charter) to measure how a proposed new service contributes to the public purposes of the BBC. The BBC model served as the inspiration behind the proposal in the Broadcasting Communication 2009 that, in the European Commission’s view, member states should introduce a specific test to assess and balance the public interest of a “significant new service” with its impact on the market – the so-called “public value” or “ex ante” test. In this way, member states can ensure that the launch of the new service is compliant with the EU state aid rules regulating the public funding of PSM.

More than half of the member states have now adopted a public value test in their relevant legislation. Their approaches naturally vary, in line with the member states’ discretion under the Amsterdam Protocol and, as reflected in the Broadcasting Communication, “it is within the competence of the Member State to choose the most appropriate mechanism.”³¹⁹ The different approaches take into account in particular the different constitutional and broadcasting systems throughout Europe: “Member States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster.”³²⁰

In spite of the variation in approaches, there are a number of basic principles that are common to all such tests for significant new PSM online services.

³¹⁸ Commission Decision E 5/2005, *Dutch public service broadcasters*, 26 January 2010, paragraph 143, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_E5_2005.

³¹⁹ Broadcasting Communication, paragraph 86

³²⁰ Broadcasting Communication, paragraph 89.



8.4. Public value test for significant new PSM online services

8.4.1. Platform neutrality

The fundamental EU principle of platform neutrality provides that PSM should be able to use the opportunities offered by digitisation to offer public interest services over different distribution platforms. Broadly, it can be argued that any PSM service fulfilling the democratic, social and cultural objectives set out in the Amsterdam Protocol should be available on any platform.³²¹ The Broadcasting Communication expressly provides that the transfer of existing (linear) services onto new platforms, such as broadband, may be included within the remit of PSM without raising any state aid concerns.

8.4.2. Fairness: balancing public value and market impact

Certain significant new PSM services may not fall so obviously within the remit and objectives of the organisation. In such cases, it is necessary to assess, first, whether the service falls within the scope of the PSM's public service objectives and, second, whether the launch of the new service will have a more disproportionate effect on the market that is not necessary for the fulfilment of that specific objective.³²² In short, the market impact must be balanced with the public value; the funding of the significant new service should not distort trade and competition to an extent contrary to the common interest.³²³

In the event that the launch of the significant new PSM service is considered by the competent body to have “predominantly negative effects on the market”, it must be justified by the value that it adds in relation to PSM's social, democratic and cultural objectives for society (taking into account the existing overall PSM offer).³²⁴

In carrying out this balancing exercise, the competent body should always be mindful of the complexity of any *ex ante* evaluation of the market impact and the sensitivity in general of *ex ante* regulatory intervention, which is normally only used as a last resort to address severe market failure (when no commercial or *ex post* regulatory curbs on economic power can be anticipated).³²⁵ Given in particular that audiovisual markets are so fast moving and dynamic, very careful consideration must be given before any decision is made to prohibit a new service that is in the public interest. In addition, the relevant body should take into account that PSM often innovates and produces new services that would not be commercially viable or interesting for the private sector. PSM can lead the way with new concepts and ideas that later can be taken up and even improved by commercial broadcasters and other sectors.

³²¹ Broadcasting Communication, paragraph 84.

³²² Broadcasting Communication, paragraphs 81 and 84.

³²³ Broadcasting Communication, paragraph 87.

³²⁴ Broadcasting Communication, paragraph 88.

³²⁵ See for example the three stage test for *ex ante* regulation in the EU Telecoms Package: European Commission, Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications and service, OJ L344/25 of 28 December 2007. See also the Explanatory Note, “Accompanying document to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications and services”, SEC (2007) 1483 final, <https://ec.europa.eu/digital-agenda/en/telecoms-rules>.



It is also vital to take potential competition into account in the assessment. Technology convergence is increasingly accompanied by sector or industry convergence, with new (often global) players moving into new markets and beginning to offer audiovisual services online that traditionally have been the preserve of broadcasters (e.g., online newspapers offering moving images).

8.4.3. Transparency

In order to ensure that stakeholders and third parties always have the opportunity to be informed about this assessment and to make their views about the proposed significant new PSM service known, the Broadcasting Communication suggests an open consultation. The outcome of the consultation, its assessment and the grounds for the final decision are always public.³²⁶ Transparency ensures the correct substantive and procedural discipline by the relevant body carrying out the assessment and fairness for all stakeholders.

8.4.4. Independence

The Broadcasting Communication also provides that the body carrying out the assessment should be effectively independent from the management of the PSM and have sufficient capacity and resources to carry out its duties.³²⁷ Again, member states may have different solutions depending on their constitutional structures. In some countries, the public value assessment and the market impact assessment may be carried out by the same body, which is understandable given the overall balancing that must take place. In other countries however, the market impact assessment may be carried out by a different expert body (e.g., Ofcom in the UK), which feeds in its report on the market to the body carrying out the overall balancing assessment.

There is another aspect to independence: any public value test must be carefully configured so as not to interfere with the editorial independence of the PSM. The type of services covered should not put the authority or body carrying out the test in conflict with the fundamental principle of freedom of expression.

8.4.5. Proportionality

If a public value test is introduced by a member state, it is vital that it is proportionate and tailored not only to the local constitutional system, but also to market conditions. Of course, the procedure chosen must be sufficiently thorough and expert to ensure a reasoned decision. However, it should also be considered that a requirement to undergo an expensive and cumbersome procedure could completely stifle the launch of new, often low budget, PSM services that could be of great value to society. Moreover, third party innovators will be put off collaborating with PSM if they know that their new concept will be made public months before any decision can be made about whether it will be launched or not.

³²⁶ Broadcasting Communication, paragraph 87.

³²⁷ Broadcasting Communication, paragraph 89.



Again, a balance must be struck. It is imperative that the threshold to determine “significant” when assessing what significant new services qualify for a public value test is not set too low. The threshold can usefully be based on a percentage of the cost of the new service relative to the individual PSM’s total budget. Similarly, the procedure should not be disproportionately lengthy given the pace at which digital markets evolve. Different conditions and rules will suit different member states. It would be absurd for example to implement a public value test designed for a larger country in the same way in a very small member state.

If the public value test nevertheless ends up being relatively expensive and lengthy, it is vital that the PSM is at least permitted to launch a pilot service in advance of the procedure, so the PSM can test the market and audience demand. Otherwise, many smaller niche PSM services will never get off the ground.

8.5. Conclusion

PSM must be able to adapt and evolve to the digital media age. Its pivotal role for society remains unchanged, irrespective of the platform on which it is delivered. Nevertheless, a balance must be struck between awarding PSM sufficient flexibility to keep up with change and affording sufficient certainty and protection to market stakeholders who compete with similar services. It is a balance between not stifling innovation with regard to services in the public interest and not impacting third party competition disproportionately. PSM encourages and stimulates competing offers from the commercial sector to improve quality and overall viewer/consumer satisfaction. PSM online media should be enabled to flourish in a “race to the top” with competing stakeholders for important new services in an embodiment of the European broadcasting dual system model.

As described above, there are different ways of amending the PSM public service remit to secure the launch of new PSM services. The preferred approach from the European Commission’s point of view currently is the public value test. Such tests involve a thorough examination of the new service and can offer PSM important legal certainty before the launch of a specific service, ensuring no undue impact on competition. However, given the very dynamic and fast-moving audiovisual markets, it may legitimately be questioned whether the public value test is really fit-for-purpose any more. A good case can be made that in an environment that is increasingly populated by huge global conglomerates (with apparently limitless resources), there is now less need for strict public value tests that can constrain and delay public interest innovation.

If such a test is used, it is clear that it must be very carefully designed and applied to suit the specific national context, taking into account unique constitutional, legal, societal and market aspects. Above all, the public value test must not become “yesterday’s instrument” that denies audiences innovative new public interest services online and pushes PSM into the margins.



9. The *ex ante* test and its characteristics in national legislation

Ross Biggam, ACT

9.1. Introduction

Like many British residents of Brussels, the author of this piece takes a keen interest in Belgian beer. Among the more unusual discoveries on the shelves of his local supermarket is Tournée Générale, a very pleasant amber beer. The surprising thing about this particular beer is not its alcohol content – 8.5% alcohol by volume, strong but not unusually so for Belgium – but rather the identity of its brewer: prominently displayed on the label is the logo of Eén, the main channel of Flemish public broadcaster VRT. The beer is apparently a spin-off of a popular reality TV talent show.

This anecdote illustrates the diversity of ways in which public broadcasters are moving into new business activities far removed from their core public broadcasting remit, a move which drove the European Commission to begin work, in 2007, on revising the 2001 Communication on State Aid to Public Broadcasting.

Writing in early 2015, it is difficult to make an in-principle case against publicly-funded³²⁸ broadcasters diversifying from their core remit of linear television. The Amsterdam Protocol to the Treaty of the EU gives member states the choice (but not the obligation) to intervene in their national media markets by giving public money to certain operators in exchange for delivery of a public service remit. And if a member state then chooses to extend that policy choice into the digital age, then clearly there is an argument that publicly-funded broadcasters may also wish to operate digital and online services.

However there are structural reasons why competition issues are almost inevitable as a consequence of extending the notion of public broadcasting to cover new digital services.

In so doing, public broadcasters are entering areas of business and thereby encountering potential competitors far removed from broadcasting, whether in the admittedly niche example of Belgian brewing or, more usually, from newspapers who were and remain keen to derive revenues from the online distribution of news to counter declining sales and advertising revenue in their historic model. But the internal logic of public broadcasters has dictated that their online news services are free-of-charge to the consumer (who has, after all, already paid for much of the content via the public funding of the broadcaster). Additionally, not only do public broadcasters offer content free-of-charge online, they do so on a massive scale, utilising the full armoury of cross-promotion from their broadcast outlets, thereby making it even more difficult for print media groups to build a commercial model for online news. This is perhaps unavoidable – even in sectors other than the media (education, health, national defence), the state tends to intervene precisely to

³²⁸ The phrase “publicly-funded broadcaster” is used in the interests of clarity, as it is misleading to speak here of “public service broadcasters”. There are public service broadcasters in the EU which are in private sector ownership and are entirely commercially funded (France, UK, Scandinavia) and at least one public service broadcaster (Channel 4 in the UK) which is in the public sector, but commercially funded. The state aid issues at stake in the 2009 Communication and its implementation at national level are issues of public funding, not of public service, and clearly do not apply to this subset of European public service broadcasters.



provide a broad universal service, rather than to develop the sort of niche, start-up businesses which characterise the digital economy.

By the time the European Commission began drafting, in 2007, a possible State Aid Communication on Public Broadcasting and New Media, it already had a trusted template on which to base its work. An earlier 2001 Communication on State Aid and Public Broadcasting had been instrumental in resolving a series of long-running cases filed by private broadcasters in the early 1990s, i.e., shortly after the arrival of meaningful competition in most European broadcasting markets. The filling of these cases quickly gave rise to an impasse in which the European Commission was placed in a very uncomfortable position. The Commission was faced with entirely conflicting demands from other EU institutions: on the one hand, the European Court condemning the Commission for failure to act,³²⁹ on the other hand, the member states reasserting their prerogatives over all questions of public service remit. While the 2001 Communication itself broke little new ground in terms of legal theory – its restatement that the definition of the public service remit was an obligation for the member states, but that proportionality of state financing for those public service broadcasters receiving state aid fell under the competence of the EU institutions is not controversial – the mere existence of this text assisted the Commission to break the logjam and take decisions, sometimes eleven years after the original case, on the first wave of cases filed by commercial broadcasters. However, as the 2001 text spoke only of broadcasting services, there was a clear logic in updating the 2001 rules in order to cover new media ventures.

9.2. The Adoption of the 2009 Communication

The key paragraph, for the purposes of this article, is paragraph 88 on the ex ante evaluation of public broadcasters' new media activities:

... in order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess ... the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service.

The Commission, mindful of the high-profile political opposition to earlier initiatives to regulate public broadcasting, was proceeding cautiously by suggesting an ex ante evaluation which was already in line with prevalent thinking in national and European law. At European level, in the “state aid compromise”³³⁰ of 2007 between DG Competition and Germany, following a complaint from commercial operators about the online expansion of German pubcasters, the Commission had been innovative in insisting on the introduction of a national procedure – ex ante evaluation, known in German media circles as the three-step test – for the examination of the proposed new service's connection with the cultural, social or democratic needs of a society (sometimes described as the “Amsterdam criteria”, after the wording in the Protocol). The German precedent was immediately followed by DG Competition in settling Flemish and Austrian³³¹ cases. At national level as well, there

³²⁹ European Court of Justice, Case T-95/96, *Gestelevision Telecinco v Commission*, judgment of 15 September 1998, <http://curia.europa.eu/juris/celex.jsf?celex=61996TJ0095&lang1=en&type=TXT&ancre=>.

³³⁰ Commission Decision of 24 April 2007, COM (2007) 1761.

³³¹ European Commission, “State aid: Commission closes investigation into financing of Flemish public service broadcaster VRT”, Press release, 27 February 2008, http://europa.eu/rapid/press-release_IP-08-316_en.htm?locale=fr.



had been a similar initiative undertaken in the UK, with the 2006 introduction of a public value test for new media ventures proposed by the BBC, although this was introduced with no involvement from the EU institutions, but rather as a result of domestic reforms of the BBC's remit and governance.

Despite the proposal for ex ante evaluation following existing case law and national policy in a number of markets, the Commission proposal found a sceptical reception from public broadcasters and a hostile one from many member states.

Public broadcasters argued that "it seems doubtful whether there is a legal basis for incorporating requirements regarding ex ante evaluation into the Broadcasting Communication".³³² More substantively, they questioned whether introducing a market impact assessment "would not run the risk of defining public broadcasters' new media activities with reference to "market failure". The fear of European public broadcasting coming to resemble the US model, in which public intervention in media markets is restricted to a marginal, niche player, has been a constant, if entirely hypothetical, feature of discussions around the remit and regulation of publicly-funded broadcasters in Europe.

The public broadcasters' lobby was most visible at a Conference on "Public Service Broadcasting in the Digital Age", convened by the French Presidency of the EU in July 2008. A non-paper drafted by the Dutch Ministry of Culture entitled "Main Principles for a Revision of the Broadcasting Communication (BC)" gained support from a number of member states, both at the Conference and afterwards.³³³ This took as its starting point that "there is no need for a change in substance of the current Communication" and went on to restate the clear belief of the member states that all questions of remit are a national prerogative. Closely echoing the public broadcasters' response, the paper commented that:

the BC may invite the Member States to consult on the public service remit but should not limit member states' options for ex ante evaluation by requiring them to perform a broad, independent market impact assessment before approving any new activities of public service media.

At various times, the number of member states understood to support the Dutch initiative, either partially or entirely, ranged from 13 to 21. However, the paper was never formally discussed by the Council of Ministers, as by the time of the relevant Council meeting a second draft of the Communication was available. On ex ante regulation, the Commission retained the essential features of the original draft, though concessions were made, notably in weakening the language of the first draft about the need for the regulator carrying out the ex ante regulation to be independent. Crucially, the Dutch opposition to a market impact assessment was not accepted by the Commission, which insisted on retaining both parts of the ex ante evaluation in the draft text.

These concessions were evidently enough to satisfy the member states, as the final version adopted³³⁴ on 2 July 2009 (and published in the Official Journal in October) did not contain any further substantive changes from the April draft. Despite these concessions, not all public

³³² European Broadcasting Union, Response to the Commission's questionnaire on the revision of the Broadcasting Communication (2008). See also ARD presentation at Presidency Conference in Strasbourg, July 2008, http://ec.europa.eu/competition/state_aid/reform/comments_broadcasting/ebu_en.pdf.

³³³ As a "non-paper" this was not officially published.

³³⁴ "Communication from the Commission on the application of State aid rules to public service broadcasting" [2009] OJ C257/1, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2009:257:TOC>.



broadcasters were happy with the outcome, with the European Broadcasting Union issuing a statement that it “regrets the introduction of a single mechanism for new services”³³⁵ and Dutch pubcaster NPO warning that there was a “clear risk that the functioning of public broadcasting will be threatened”³³⁶ by the new rules.

9.3. The impact of the new Communication: how has the ex ante test worked in practice?

Six years on, has the State Aid Communication fulfilled its purpose? From today’s perspective, it is possible to argue that the Communication changed relatively little. For all the fears that public broadcasters would be marginalised or their new services forced to comply with a market-driven logic, the majority of Europe’s publicly-funded broadcasters have retained a strong position in their national media markets, online and offline, and continue to enjoy broad political support and reasonably generous levels of financing, although both the political support and the financing may come under pressure from time to time in different member states.

There are a number of possible reasons why the Communication may be thought to have had only a marginal impact.

- Most importantly, the timing. The Communication was adopted at a time when the global economic crisis was already taking hold – the period from late 2008 to mid-2009 saw an unprecedentedly sharp downturn in commercial media revenues, possibly stoking fears among commercial players that the public sector, with long-term guarantees of public funding, could foreclose new media markets. But publicly-funded broadcasters were not to be immune from the effects of the global recession: as government finances subsequently came under pressure, austerity measures in public financing meant reductions in the funds available to public broadcasters, including in markets such as the UK and the Netherlands where the local PFBs had been particularly ambitious in their earlier digital expansion;
- National implementation also appears to have been patchy. As this is a Communication rather than a Directive, there is no obligation on member states formally to notify the Commission of their implementing measures. From information currently available to the author, it appears that around half of the member states have in fact implemented such a test. These appear to be predominantly from Northern and Western Europe, i.e., markets where public broadcasters have traditionally enjoyed particularly high levels of political support and of public financing. This may however also be a reflection of the fact that some public broadcasters in markets which have not implemented the Communication have been in no position to consider launching new services (e.g., Greece);
- Even when ex ante tests have been introduced, the wide scope afforded to member states in their design can produce unexpectedly complex outcomes. For example, there are notable quirks in the running of the BBC public value test.³³⁷ First, the BBC management has in the past chosen to classify some initiatives – e.g., BBC participation in the Freesat platform – as being “non-services”, apparently on the grounds that they would not commission any new

³³⁵ Quoted in “New EU Guidelines on Broadcasting”, *The Financial Times*, 3 July 2009.

³³⁶ Quoted in “Strengere regels voor publieke omroep”, *Het Financieel Dagblad*, 2 July 2009.

³³⁷ Available at: http://www.bbc.co.uk/bbctrust/governance/tools_we_use/public_value_tests.html.



content.³³⁸ But there may also be a tendency in the UK system for some PVTs to produce unexpected results. An example is in the launch of BBC Alba, a dedicated channel aimed at the Gaelic-language speaking community in Scotland, a target audience probably too small to be sustainably attractive to free-to-air commercial broadcasting and certainly significantly smaller than its counterparts in the Irish or Welsh languages, each of whom are served by a full national broadcast channel (TG4 and S4C respectively). While the “market failure” arguments for such a service from the public broadcaster are strong, the original BBC Trust review found that, on grounds of value for money, BBC Alba should not in the first instance be allocated any terrestrial spectrum, but rather should start as a cable and satellite channel (in practice, it has been limited to a satellite channel, as much of the core Gaelic audience is in rural areas not served by cable). After a subsequent positive review of its early operation, the BBC Trust did agree in principle that the channel could also benefit from terrestrial distribution in Scotland.

- This example of an evidently public service proposal encountering difficulties in passing the public value test was echoed in the most high-profile initiative to fail a public value test, namely the 2008 proposal for a network³³⁹ of 65 local news websites with video content. Although recognisably delivering public value – neither the BBC nor the commercial sector were able to provide local, as opposed to regional television – the proposal was strongly criticised by local newspaper publishers and commercial radio stations. In its Market Impact Assessment,³⁴⁰ OFCOM largely sided with these criticisms, noting an immediate negative revenue impact of 4% and concluding that BBC local video services could also deter local commercial media from further innovation in online local news, sports and weather services. The BBC withdrew the proposed service.
- The examples of BBC Alba and the local news initiative show that there is little evidence that public broadcasters are being pushed into “market failure” programming by the requirement to undergo ex ante scrutiny – if anything, the way the public value test is constructed in the UK may discriminate against distinctive projects meeting a demonstrable³⁴¹ gap in the market, while allowing for rather more populist initiatives. The launch of BBC3, a channel aimed at the already very well-supplied youth entertainment market could stand as an interesting counterpoint to the difficulties in launching services with an element of market failure.

Yet, although national implementation to date has contained an element of “learning by doing”, there should be no dispute as to the intentions of introducing ex ante scrutiny to deal with increasing moves from public sector players into online media in national capitals rather than Brussels. One possible conclusion from the precedents accumulated since 2009 might be that the debate at EU level, focussing as it did on the ex ante test, probably underestimated the extent to which ex ante scrutiny is only a meaningful step if it is part of a wider regulatory toolkit designed to ensure fair competition. This is particularly so as ex ante tests – by definition – do not cover

³³⁸ In fairness, more detailed information as to how the PVT operates has subsequently been made available in the Guidance document to the BBC Trust assessment processes:

http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/pvt/assessment_processes_guidance.pdf.

³³⁹ BBC Trust, “BBC Trust rejects local video proposals”, Press release, 23 September 2014,

http://www.bbc.co.uk/bbctrust/news/press_releases/2008/local_video_prov.

³⁴⁰ Ofcom, “Market Impact Assessment of the BBC’s Local Video Service”, 21 November 2008,

<http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/bbc-mias/mia-local-video/>.

³⁴¹ Available at: <http://www.bbc.co.uk/bbcthree>.



controversial activities in linear media, such as what many in the commercial sector regard as overbidding in tenders for key sports rights. The German experience is instructive here: the German three-step test has been much discussed in industry and EU circles, possibly as the decentralised nature of German media regulation leads to a proliferation of ex ante tests in different Länder, sometimes giving the impression that compliance with EU competition law is administratively onerous in the German system. But in practice it may not be the test itself, but rather a lack of clarity in the public broadcasting remit which is the source of the continuing controversy in Germany around the pubcasters' expansion plans. So proposals to move away from a seven-day catch-up window (debated in various Länder parliaments) or different regional iterations of the online youth programming offer mentioned in the current German inter-state broadcasting treaty (German abbreviation: RStV) have been queried by commercial competitors as going beyond the terms agreed in the original DG COMP decision (the "state aid compromise"). Commercial players are therefore expected to call during hearings to amend the RStV for a more precise definition of the public broadcasters' online mission, which will include a prohibition on extending the commercial offer in publicly-financed platforms and the retention of current rules limiting the sport and entertainment offer.

In other words, the focus will be as much on the definition of a clearer remit for the new activities of publicly-financed players as it will around the mechanisms used to scrutinise and regulate those activities. It is also instructive to note that the high-profile decision in September 2013³⁴² by public broadcasters ARD and ZDF to close their online joint venture "Germany's Gold" came after the German competition authority Bundeskartellamt had expressed doubts³⁴³ about the joint venture. In other words, this restriction on the public broadcasters' online activity was a result not of ex ante scrutiny ("Germany's Gold" had passed its three step test in September 2011), but rather of a conventional enquiry by a national competition authority (an enquiry which had begun as soon as the ex ante test was complete).

Austria shows how an ex ante test can help establish fairer competition in a media market, if it is entrusted to an entirely independent regulator as part of a wider package of reforms. The Austrian version of the ex ante test³⁴⁴ requires evidence, inter alia of the legal basis, content, desired audience and qualitative criteria for proposed new services or major alterations to existing services, although services already in place could continue as before.

The independent regulator, KommAustria, consults widely, including with the national competition authority, but remains the final adjudicator. However, the ex ante test is not the only regulatory tool available to the regulator. KommAustria is responsible for the overall financial supervision of the Austrian pubcaster ORF, with ex post financial regulation powers, including market competitive behaviour (e.g. costs of rights acquisition) and supervising ORF's compliance with principles of cost efficiency and the private investor test (notably, whether a private operator would pay similar prices for content acquisitions) and of transparency – ORF is required to publish all spot advertising prices. KommAustria also has significant powers of oversight in linear broadcasting, as is evidenced by the recent decision of the Austrian Verwaltungsgerichtshof upholding a KommAustria ruling that there was insufficient cultural content and too many entertainment shows in ORF's schedules.³⁴⁵

³⁴² "Germany's Gold": ARD und ZDF stoppen geplante Online-Videothek", Spiegel Online, 16 September 2013, www.spiegel.de/netzwelt/web/ard-und-zdf-beerdigen-onlinevideothek-germany-s-gold-a-922475.html.

³⁴³ Bundeskartellamt, "Fallbericht: ARD und ZDF Online-Plattform 'Germany's Gold'", Press release, 23 February 2015, www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2015/13_03_2015_Fallbericht_Germanys%20Gold.html.

³⁴⁴ Available at: www.rtr.at/de/m/ORFG.

³⁴⁵ Available at: <https://www.vwgh.gv.at/medien/2013030064.pdf?4xf4u7>.



9.4. Next steps?

The 2009 Communication is now six years old, the same age by which the 2001 Communication was clearly in need of an update. The 2009 text has stood the test of time rather better, despite a rather patchy implementation and some structural flaws, such as the weak commitment to the independence of the regulatory body carrying out the ex ante test. There is probably little need at present for a revision, although that may change in the event of, say, a major move by pubcasters into an obviously commercial area, such as the subscription video-on-demand market where the “Amsterdam criteria” of social cohesion are not applicable.

And there are risks in the status quo for all players. For commercial operators, ex ante scrutiny in markets where the public broadcaster is financially and politically secure may become mere legitimisation of the public broadcasters’ expansion plans, if carried out by regulators that are less than fully independent of the public broadcasters themselves. For public broadcasters, and indeed member states, there is a risk that further cases will be filed at DG Competition from those markets which do not have ex ante scrutiny. Given the clear precedents from 2007 onwards and the unambiguous wording of the Communication (paragraph 88 reads “Member States shall ...”), it seems likely that the Commission would have serious doubts about the compatibility of any state-aided venture into new media which was launched without ex ante evaluation.

As an interim measure and to help ensure this does not happen, the European Commission could usefully provide some form of guidance as to how to introduce an ex ante test. This will probably be met with the usual chorus of protest... unless it were phrased as a request from one or more smaller member states.

So for the time being, the main lesson to be drawn is that the ex ante test is not and was not intended to be the entire solution, but can play a useful role, if applied by an independent regulator measuring against a well-defined remit.





Conclusion

Peter Matzneller, EMR

The European Union and the Council of Europe often stress, initially in theoretical terms, the role that public service broadcasters also have to play in the context of online services to ensure that the public in a democracy are provided with varied and balanced information. The different regulations applying in the member states surveyed here also take this objective into account.

The case law of the European courts and the decisions of the European Commission thus unmistakably point in one direction: services provided by public service media are of general economic interest and may therefore receive (either direct or indirect) financial support from the member states.

The various systems for funding public service broadcasting – whether by means of licence fees, taxes and/or advertising – have no impact on the question of the extent to which a public service broadcaster must make online content available. This is because they do not differentiate according to the nature of the content produced, the service offered or the means of distribution chosen. Rather, the scope of permissible activities depends on the actual description of the service remit, which in some countries even expressly calls on public service broadcasters to have an online presence that is as extensive as possible.

With its Broadcasting Communication 2009 and the public value test contained in it, the European Commission describes an instrument that enables the member states to ensure the further development of services available from public broadcasters, and at the same time protect the interests of commercial competitors; thus providing a sound basis for assessing in individual cases in what way and with what services public broadcasters may or should respond to the development of digital technology.

However, the assistance provided by the Commission has not led to any further harmonisation across national borders, but this fact has deliberately not been discussed here. The incorporation of the public value test into domestic legislation is not binding, and up to now only about half of EU member states have drawn up provisions in this connection. Moreover, the scope of application of this test in all those countries that have introduced it has resulted in different approaches because the Commission, in referring to “significant” and “new” services, chose two terms that are themselves very much open to interpretation.

Public service and commercial broadcasters nonetheless agree in principle that such a public value test can by its very nature be an effective tool for defining the public service remit as far as the online world is concerned. However, while one side regards it as important for such a system of rules not to be seen as the only valid, standardised instrument, the focus of any critical assessment is the call for the setting up of a body to conduct the tests that is as independent as possible.

In purely mathematical terms, the fact that a number of years passed between the 2001 and 2009 Broadcasting Communications may lead in 2015 to the assumption that the Communication needs to be revised once again, even though this does not automatically have to mean resolving the questions facing the member states in the event of the public service remit for online media being appropriately defined. Not least because the development of the digital technologies is far from being linear in nature, it is hard to forecast whether and to what extent a revised and slightly more detailed and binding test would lead to a fairer solution. Sufficient approaches that enable content



produced by public service broadcasters to be transferred to modern information media without damaging competition can perhaps be inferred from the extensive statements received from European institutions on this subject.



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
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European Audiovisual Observatory

Set up in December 1992, the European Audiovisual Observatory's mission is to gather and distribute information on the audiovisual industry in Europe. The Observatory is a European public service body of 40 member states and the European Union, represented by the European Commission. It operates within the legal framework of the Council of Europe and works alongside a number of partners and professional organisations within the industry and with a network of correspondents.

Major activities of the Observatory are

- the publication of a yearbook, newsletters and reports:
<http://www.obs.coe.int/publications>
- the provision of information through the Observatory's Internet:
<http://www.obs.coe.int>
- and contributions to conferences:
<http://www.obs.coe.int/events>

Legal Information Services from the Observatory are

- **IRIS Newsletter** (10 yearly issues) provides a monthly selection of legal developments across Europe and feeds the Merlin database which now counts more than 8.000 articles from 1995 onwards.
- **IRIS Special** (2 yearly issues) offers in-depth information and the most detailed analysis on major topics, with involvement of experts in a given field through the Observatory's partner institutions.
- **IRIS Plus** (3 yearly issues) provides information produced in-house on issues at stake in the future reforms of the relevant European legal framework organised around six standard sections so as to ensure a comprehensive and readable digest of the regulatory framework at European and national level.
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Online activities of public service media: remit and financing

This IRIS *Special* has been prepared by the Institute of European Media Law (EMR) in Saarbrücken and brings together contributions from various authors. It discusses the public service broadcasters' offerings in the digital environment and focuses on a selection of European countries: Austria, Belgium, Denmark, Finland, France, Hungary, Ireland, Italy, the Netherlands, Poland, Sweden and the UK. The countries have been chosen with the intention of providing a set of different approaches, whereas a comparative table enclosed in the Annex allows for a complete picture of the 28 Member States.

An introductory overview of requirements to be met at the level of the Council of Europe and the European Union is followed by a comparative legal analysis of the public service broadcasters' remit for the provision of online media. Following on from this, a comparison of selected European funding systems will provide the basis for three detailed country reports that will highlight the impact of the specific funding structure on the extent of public service broadcasters' online activities. The publication will then go on to compare the implementation of the public-value test in selected EU member states and conclude with two observations on the success of the test from the different points of view applying in each case.

