

Plenary Session 2 >
Public Service Media in a Connected Environment
Different Shades of Using New Opportunities

Background Document
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Why is this an issue?

"Un jeune Français passe environ 1 450 heures par an devant ses écrans, 850 heures par an devant ses enseignants, contre 52 heures par an avec ses parents en temps de qualité."

Divina Frau-Meigs, Socialisation des jeunes éducation aux médias, 2011

"Media diversity is about people, and for people. A well-balanced diet of media content from different speakers, viewpoints, ideas and ideals is widely perceived as the matrix for cultural exchange, democratic participation and personal self-deployment. Yet, and paradoxically, today's diversity policies are increasingly detached from the way users actually find, access and consume media content."

Natali Helberger, Exposure Diversity as a Policy Goal, (2012) 4(1) Journal of Media Law 65-92.

"There is a large difference between the public interest and what interests the public."

Cass R. Sunstein, Television and the Public Interest, California Law Review 88, pp. 327-46, quoted in, Thomas Gibbons (ed.), Regulating Audiovisual Services, 2009

"[T]he fulfilment of the public service broadcasting's mission must continue to benefit from technological progress;...according to the definition of the public service remit by the Member States, public service broadcasting has an important role in bringing to the public the benefits of the new audiovisual and information services and the new technologies; ... 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;..."

Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 25 January 1999 (OJ C 30, 5.2.1999, p.1).

The CoE calls upon its members *"to guarantee public service media ... to enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions."*

Council of Europe Recommendation CM/Rec(2007)2, adopted on 31.1.2007

"It is therefore desirable that an appropriate authority or appointed body monitors its [referring to the entrusting act] application in a transparent and effective manner."

"Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligation."

Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01, quotes from points 53 and 54)

1. All roads lead to Rome

In as much as all roads lead to Rome, regulators dealing with on-demand interactive services will inevitably get down to the issue of quality programming. This paper traces some of the roads, focusing thereby on the regulation of public service media (PSM). While doing so it will mostly refer to the role of public service *broadcasting* given that, in our context, the discussion is largely about to what extent public service broadcasters (PSB) may engage in new media services or are even

obliged to do so. This is underlined by the many documents from the Council of Europe (CoE) and the European Union (EU) that address this issue. Where EU law plays a role, the paper may also refer to the term “service of general economic interest” (SGEI) because (especially) the 2009 Broadcasting Communication stresses the EU’s preference for this notion over the notion of “public service”. This language choice is quite telling in that it corresponds to the economic logic on which EU law is (and has to be) primarily based and it is a point that should be born in mind.

Most European-level approaches to “quality programming” emphasise the content-supply side and aim at fostering the diversity of sources. PSM are in this regard an important measure to promote structural pluralism. This is one of the reasons why they are a focus in the work of the CoE on diversity and pluralism. At the same time PSM are based on some form of state intervention and therefore “suspected” of the potential to meddle unduly with the logic of a free internal market. Commercial media service providers certainly don’t hesitate to stress this point thereby challenging the limits of scope of the public service remit – that is, of what services public service operators may be allowed to offer.

Another path to promote quality programming is to impose measures aimed at achieving a diverse composition of the programmes on offer. However, such diversity of content does not necessarily result in what might possibly matter most: a diversity of choice guaranteed by the real possibility to receive diverse content.

Access to quality content seems less addressed by European and national rules. Various reasons could account for this. Top of the list might be the prohibition of censorship or at least the *de facto* fear to censor content. As Natali Helberger points out this fear was justified in times of limited content offerings where the state was not meant to interfere with the Article 10 of the European Convention on Human Rights (ECHR) which granted the right to receive and impart information.¹ But do we still need to have the same concern when the content on offer has vastly multiplied and information has become abundant? Aren’t the real challenges for quality programming affordable access and the ability to identify and receive quality content from a huge and ever growing assortment of content providers?

Universal access rules and media literacy initiatives are examples of how access to quality content can be facilitated and how this may also involve National Regulatory Authorities (NRAs). To some extent, heightened attention paid to the use of new media services for the fulfilment of the public service remit may also be viewed as an approach to achieving the same purpose of reaching audiences with quality content. The PSM approach pays tribute to new user habits² and is nourished by the hope of attracting the younger audience in particular.

From the various angles that matter to NRAs in addressing how PSM can or should be instrumental in making available quality content in a connected environment, this article will focus on the framework set by European bodies for extending the public service remit to include new media services, followed by examples of how countries have or are about to implement this European framework.

2. The Council of Europe

In over 30 years the Council of Europe (CoE) has continuously explained and developed its expectations concerning the legal framework for PSB as well as on corresponding engagements envisaged for CoE members.³ As early as in 1975, the Parliamentary Assembly adopted its first “broadcasting” Recommendation, entitled “on the role and management of national broadcasting”.⁴

¹ In this vein, Natali Helberger, *Exposure Diversity as a Policy Goal*, in (2012)4(1) *Journal of Media Law* 65-92, at point 2.1.

² This reasoning is apparent in Art. 6.1. b) 3. of the recent service contract of the Belgian PSB, which reads: “*la RTBF assure, par le biais de tout moyen de communication électronique approprié compte tenu des modes de consommation les plus usuels, en ce compris l’internet et les appareils de réception mobile, l’accès le plus large à ses services audiovisuels et veille à ce que chacun puisse, dans le respect du principe d’égalité entre les usagers, avoir accès, sous forme de « service universel », à toutes les chaînes généralistes en clair de la RTBF relevant de sa mission de service public visées à l’article 42. 2, a) et b), du présent contrat de gestion au moins par voie hertzienne en radio (FM) et en télévision et par le biais de la distribution par câble en télévision ; en fonction de l’évolution des modes de consommation des publics, ce service universel peut être adapté, à la demande de la RTBF, moyennant l’autorisation du Gouvernement*”.

³ For an additional overview of the CoE’s approach to PSB, see also Susanne Nikoltchev, *European Backing for Public Service – Council of Europe Rules and Standards*, in IRIS Special “The Public Service Broadcasting Culture”, European Audiovisual Observatory 210, pages 7-15.

⁴ Recommendation 748 (1975), adopted by the Parliamentary Assembly on 23 January 1975, available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta75/erec748.htm>

The Annex of the Recommendation sets out minimum requirements for national broadcasters, among which we already find: "Flexibility to introduce new techniques (such as viewer-selected superimposed subtitling)" [lit. g]. Likewise, the Recommendation on the guarantee of the independence of PSB does not only insist on editorial independence and institutional autonomy of public service broadcasting organisations, but also opens the door for PSB to use new communications technologies.⁵ The Recommendation on public service broadcasting underlines the importance of providing an appropriate framework for the upgrade of PSB to the digital era.⁶ The Declaration on Public Service Media Governance and the similarly-named Recommendation contain the most recent formalised statements in this regard.⁷ Both documents take it for granted that in the new media environment PSBs have to transform into PSM in order to counter risks that would otherwise challenge "pluralism and diversity in the media and, in consequence ... democratic debate and engagement" [point 14. of the Declaration].

Accordingly, the question is not whether to widen the scope of PSB activities but rather to what extent and to what end.

The Recommendation on the remit of public service media in the information society⁸ adapts the public service remit (as it had originally be determined for PSB by the Recommendation on public service broadcasting) to "fit" PSM. As was the case for PSB, "the remits of individual PSM may vary within each member state". It is up to them to decide which of the Recommendation's principles they wish to adopt. The basic approach envisaged by the CoE is, however, to maintain the already established key elements for the public service remit but to extend them to cover the provision of appropriate content also via new communication platforms [points 1 and 2 guiding principles]. The Recommendation stresses that it is crucial to "ensure that PSM can be present on significant platforms and have the necessary resources for this purpose" [point 3 guiding principles].⁹ It also underlines in several of the guiding principles, especially in point 1, the expectation that PSM will be able to use "state-of-the-art technology appropriate for the purpose", a notion that other principles outline to include new digital and online technologies, and interactive services. Member states are asked to establish the necessary legal framework in order "to enable PSM to exercise, as effectively as possible, their specific function in the information society and, in particular, [to allow] them to develop new communication services" [point 26 guiding principles].

Other parts of the guiding principles of the Recommendation on the remit of public service media in the information society recall the traditional view that PSM are there to compensate for market failures and that member states shall maintain this tradition in the new digital environment [point 9] and that PSM are charged with promoting "digital inclusion" [point 11].

With regard to **quality programming**, PSM continue to be expected to provide added public value by offering news, information, educational, cultural, sport and entertainment programmes and content aimed at the different groups of society [point 4. guiding principles]. These goals (as well as the necessary means) shall be clearly defined, for example, in order to allow regular evaluation and review by "relevant bodies" [point 6 guiding principles].

Unless noted otherwise, official CoE documents as well as summarising reports are assembled in the following Observatory publications, edited by by Susanne Nikoltchev, European Audiovisual Observatory, and Tarlach McGonagle, IViR. (02/2012): Freedom of Expression and the Media: Standard-setting by the Committee of Ministers of the Council of Europe, available at: http://www.obs.coe.int/oea_publ/legal/ebook_committeeministers-coe.pdf.en and Freedom of Expression and the Media: Standard-setting by the Parliamentary Assembly of the Council of Europe, available at: http://www.obs.coe.int/oea_publ/legal/ebook_ParliamentaryAssembly.pdf.en

⁵ Committee of Ministers' Recommendation No. R (96) 10 on the guarantee of the independence of PSB of 11 September 1996. See in particular points 70-73 (VII. Access by public service broadcasting organisations to new communications technologies) of the Explanatory Memorandum to the Recommendation. The Memorandum thereby follows up on the Prague Resolution No. 1 on the future of PSB (of 1994). It is available at: http://www.coe.int/t/dghl/standardsetting/media/doc/CM/Rec%281996%29010&ExpMem_en.asp#TopOfPage

⁶ Recommendation 1641 (2004) of the Parliamentary Assembly on public service broadcasting of 30 September 2004.

⁷ The Declaration of the Committee of Ministers on public service media governance and Recommendation CM/Rec(2012)1 on public service media governance, both of 15 February 2012, available at : <https://wcd.coe.int/ViewDoc.jsp?id=1908241> and <https://wcd.coe.int/ViewDoc.jsp?id=1908265>

⁸ Recommendation CM/Rec(2007)3 on the remit of public service media in the information society of 31 January 2007.

⁹ Similar concerns about establishing the necessary conditions for new public services were already voiced in Recommendation Rec(2003)9 on measures to promote democratic and social contribution of digital broadcasting of 28 May 2003, where the Committee of Ministers recommends that PSB obtain the financial support as well as legal, economic, technical and other conditions necessary to be present on the different digital platforms.

PSM are also expected to contribute actively to audiovisual creation and production and the preservation of cultural heritage [points 19-24 guiding principles]. In the digital context, this translates in particular into an "obligation" to generate content in formats suitable for the new communication services, to digitise archives and where feasible make them accessible online.

The Appendix to the Recommendation on measures to promote the public service value of the Internet,¹⁰ adds another goal, namely to encourage PSM to use user- and community-generated content.

These are the pillars on which member states shall ideally build the public service remit and formulate specific goals for PSM. They also indicate what roles regulators may play in ensuring that PSM serve the public interests.

Additional expectations towards regulators are linked to the **management of the transition** from PSB to PSM for which the Committee of Ministers lays the main responsibility on member states. They shall accompany the switch by adapting legislation/regulations for the remit of PSM with regard to the new communication services with a view to "enabling these media to make full use of their potential".¹¹ Appropriate governance is a key concept in this regard.

According to the Declaration on public service media governance **an appropriate system of governance** should (also) include

- the legal frameworks through which the State ensures an appropriate balance between independence and accountability of public service media;
- the regulations and practices through which public service media ensure that their processes and culture are the most appropriate to fulfil their remit and best serve the public interest;
- an active and meaningful dialogue with its wider stakeholders including new levels of interaction, engagement and participation [point 11 of the Declaration].

While the first point clearly comes within the **responsibilities** of legislators and/or regulators, the other two imply an active role of the PSM organisations. The *Guiding principles for public service media governance* appended to the similarly-named Recommendation expand on the particular challenges PSM organisations face in the transformation process. They are expected to "look afresh at their public purpose and determine, within their remit, the correct balance of broadcast and other services that will best match audience needs with available resources" [point 5 of the guiding principles]. The Guiding principles [point 8] also note that PSM organisations are under increasing scrutiny as to where they strike this balance, not least because of EU and national law requirements of ex ante control that again point to the responsibility of regulators.

3. European Union

While the Amsterdam Protocol¹² clearly states the EU's acknowledgement of the importance of PSB on "democratic, social and cultural needs of each society and to the need to preserve media pluralism", the EU's tools to regulate these aspects of PSM are severely limited. Its strongest set of rules applicable to PSM is competition law, whose state aid rules have been very relevant for PSB. Competition law, however, aims to guard against unfair competition and market imbalances and has therefore very limited value for the challenge of "positively designing" a specific legal framework and of providing the necessary conditions for PSM. As the recent Mediadem report stressed it is also reactive because of its ex post nature and therefore hardly suited to cope with the fast pace of change of new media markets.¹³

In contrast, the AVMS Directive¹⁴ prescribes obligations and limits related to media content (such as quota and provisions aiming at protecting minors) but is applicable to audiovisual media services *irrespective of* whether or not they are offered with a view to serving public service interests.

¹⁰ Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet of 7 November 2007.

¹¹ Recommendation CM/Rec(2012)1 on public service media governance.

¹² Protocol on the system of public broadcasting in the member States of the Treaty of Amsterdam amending the Treaty on the European Union, the Treaties Establishing the European Communities and Related Acts (OJ C 340 of 10 November 1997).

¹³ See Policy recommendation for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries, September 2012, point 4.

¹⁴ 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).

Despite these shortcomings for our context, both legal areas foresee in a connected environment a potential role for regulators to assist/monitor/control PSM – as the case may be under the transposing into national law. Furthermore, the EU has already “upgraded” both areas to meet the new realities of how nowadays digitised audiovisual content can be communicated and become the centre of interactive services.

3.1. State aid rules

The 2009 Broadcasting Communication¹⁵ seeks to provide guidance concerning the extent to which Services of General Economic Interest (SGEI) provided by PSM are covered by the public service mandate and therefore do not constitute undue state aid. It integrates existing case law on state aid and expressly addresses issues regarding the scope of public service activities that have arisen because of the development of new digital technologies and Internet-based services [point 7]. It points to the limited power of the Commission to interfere with member states’ definitions of the public service mandate of broadcasters. Only manifest errors in defining this mandate and a lack of clarity of the remit that threatens to impede meaningful supervision could justify Commission action.

Whereas the 2009 Broadcasting Communication largely adopts the principles of the preceding 2001 Broadcasting Communication,¹⁶ it additionally stresses the requirement that a precisely defined public service mandate must be balanced with the need for editorial independence for PSB. The public service remit as such may be broadly defined, go beyond classical broadcasting and include all types of new audiovisual services on all kinds of platforms provided that it be based upon qualitative requirements.¹⁷ The definition must be covered by an official act of “entrustment”, which shall at the same time specify the conditions for providing compensation and handling potential over-compensation.

Broadcasters must be subject to a national mechanism that guarantees effective and transparent supervision of compliance with the remit and especially an assessment (ex officio or complaints-based) that broadcasters respect the qualitative and transparency requirements. Effective supervision implies that the appointed body operates independently from the PSB. It additionally has to have the powers and necessary means to regularly carry out the supervision and to impose appropriate remedies if necessary for the respect of the public service obligations [points 53-54]. Regular (preferably yearly) effective control by an external independent body is also required regarding the use of public funding. The control shall safeguard against cross-subsidisation and overcompensation. It shall also serve to ensure the required level and use of “public service reserves” [points 78-79].

If a broadcaster wishes to introduce “significant new audiovisual services”, it must pass the so called “Amsterdam test”, which takes care of the legitimate interests of commercial media.¹⁸ Prior to the launching and based on a public consultation, the envisaged services must be evaluated as to whether “they serve the democratic, social and cultural needs of the society, while duly taking into account its [sic] potential effects on trading conditions and competition” [point 84]. A service satisfies this test if it adds value for society by catering to the aforesaid needs and provided this added value outweighs the service’s potential (negative) impact on the market. Again, the assessment has to be made by a national body that is effectively independent of the management of the PSB.

Interactive services provide the opportunity to introduce pay-for-service elements, and therefore the 2009 Broadcasting Communication addresses under what conditions they may still come within

¹⁵ Communication from the Commission on the application of State aid rules to public service broadcasting of 27 October 2009, OJ C 257/01.

¹⁶ OJ C 320, 15 November 2001, p.1.

¹⁷ See points 47 and 81 of the 2009 Broadcasting Communication.

¹⁸ The importance of taking these interests into consideration has been demonstrated in Germany, where in 2003 the Private Broadcasting and Telecommunications Union (VPRT) filed a complaint against the public service broadcasters for using anti-competitive practices (financed by public means) and thus triggered Commission investigations in the compatibility of the public service remit and funding of PSB. The procedure was discontinued after Germany assured that it would clarify the public service remit and establish a suitable and effective system of supervision. The 12. Rundfunkänderungsstaatsvertrag (12th Inter-State Broadcasting Agreement – RÄStV), which entered into force on 1 June 2009, implemented this system. In particular, *telemedia* services (online-offers) will have to satisfy a three-step-test in order to be launched. For more details see §11f RÄStV (http://www.dvtm.net/fileadmin/pdf/gesetze/13_RStV.pdf) and also Alexander Scheuer, Agreement on 12th Inter-State Broadcasting Agreement Prepared, in IRIS 2008-10:9/13, available at: <http://merlin.obs.coe.int/iris/2008/10/article13.en.html>

the public service remit. As explained in point 83 of the Broadcasting Communication, not every remuneration element of a service provided by a PSM takes the service outside the public mandate. This holds true at least for as long as the pay element does "not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities." What this requirement means in practice is left to case by case decisions.

The formal conditions of the 2009 Broadcasting Communication were first applied on 28 October 2009, when the Commission finally signalled approval for the financing regime of Austria's public service broadcaster *Österreichischer Rundfunk* (ORF). Before that, Austria had made the concession that it would introduce additional criteria to clarify the public service remit with regard to new media activities and establish a new media authority to have the remit supervised according to a further specified procedure that includes all stakeholders.¹⁹

In June 2010, Austria kept this promise by amending its relevant law as follows:

"In order to guarantee ORF's (core) public service remit, Article 4a ORF-G provides for an internal quality assurance system involving the ORF Director-General, *Stiftungsrat* and *Publikumsrat*. Under Article 4a paragraph 2 ORF-G, an external council of experts will evaluate the overall performance of the quality assurance system and decide whether the quality criteria are being met in key areas. KommAustria will ensure compliance with the provisions of the quality assurance system (Article 4a paragraph 8 ORF-G). ORF's public service remit must be clarified with regard to online services (Articles 4e and 4f ORF-G) and special interest channels (Articles 4b, 4c and 4d ORF-G). To this end, ORF must draw up "service concepts", which should provide more concrete definitions (Article 5a ORF-G). KommAustria is also required to evaluate new ORF services in advance (Articles 6 ff. ORF-G), particularly by determining whether they meet the social, democratic and cultural needs of the Austrian population and help ORF to fulfil its core public service remit effectively."²⁰

3.2. *Audiovisual Media Services Directive*

Within the limits of meanwhile familiar uncertainties and national differences linked to the definition of scope, the AVMS Directive shapes the legal framework for all audiovisual media services in a connected environment, including that of PSM. The Directive sets certain goals with regard to quality programming that NRAs ought to monitor and possibly enforce according to their transposing into national rules.

Art. 13 AVMS Directive contains the key requirement for quality content in non-linear services, irrespective of whether they are offered by PSM or commercial providers. According to this provision the production of and access to European works should be promoted where practicable and by appropriate means. The Directive mentions financial contributions (for the purchase of rights or to promote production) as well as quota and prominence rules as potential options for implementing policies. Recital 69 of the AVMS Directive gives further guidance as to how the provision might be transposed into national law, for example by an attractive presentation of European works in EPGs or a minimum share of European works in on-demand catalogues. Regular re-examination of the requirement is recommended and opens the door wide for the involvement of regulators. Recital 74 underlines that the objective of supporting audiovisual production in Europe may also be pursued through the definition of the remit or specific requirements for PSM.

As a recent workshop on promotion of European works revealed,²¹ the transposition of Art. 13 has visibly advanced only in a few countries and the national solutions differ significantly. In some of them (e.g. French-speaking community of Belgium, the Netherlands), regulatory authorities are at the forefront of the developments while in others (e.g. Slovakia) the Commission was the driving force behind the change (not the result!) to take place. Many countries tend to simply adapt the

¹⁹ http://europa.eu/rapid/press-release_IP-09-1603_en.htm

²⁰ Christian M. Bron, Comprehensive Media Rights Reforms Adopted, in IRIS 2010-8/11, available at: <http://merlin.obs.coe.int/iris/2010/8/article11.en.html>

²¹ The expert workshop on "Promoting European Works in On-demand Audiovisual Services", co-organised by the Observatory and IViR with the support of the EMR, took place mid-March 2013. The results will be published in the IRIS Special-series and become available at the end of 2013.

solution they already apply for linear services to non-linear offers and enforcement seems to be not (yet) on the agenda.

A major difference in the tasks of NRAs with regard to the promotion of audiovisual works results from a fundamental difference in the related national policies. If a country works on the premise that promotion of European works will benefit everybody from the producers to the service providers to the public, it might try to join all forces in a voluntary scheme. In this scenario, the NRA has a crucial role to play in convincing and motivating all stakeholders to participate in that common effort.²² The prevailing measure will be prominence rather than quota because it leaves more room for innovative ideas and tailor-made solutions. At the other end of the spectrum, a country whose industry does not really buy into the usefulness or feasibility of promotion might tend to impose "hard" requirements whose fulfilment it can measure.²³ Here the NRA takes on a role close to that of a monitoring and enforcement agent.

In the context of media diversity, Art. 5 AVMS Directive also deserves being mentioned because of its requirements for the provision of easy, direct and permanent access to information on the media service provider (lit. a to c). Whereas the availability of this information contributes to more transparency, it alone seems hardly enough for consumers to make better informed choices with regard to the quality of content.²⁴ At the same time, Art. 5 lit. d AVMS Directive also recalls the potential role of NRAs insofar as "where applicable, the competent regulatory or supervisory bodies" shall be indicated.

4. Specific issues under national law

4.1. Recent developments

In many countries, we can witness reviews of the PSB remit or even the system of PSB as such. The developments relate often (but not only) to public service broadcasters engagement in new media services. Programme quality considerations are almost always addressed. In most cases these developments go hand in hand with some form of adapting the structure of governing, monitoring, and/or supervising PSB.

For example, the Italian AGCOM has issued guidelines for PSB obligations covering the period 2013-2015. Among the measures identified by AGCOM several may potentially impact on the quality of content in new services: *Radiotelevisione Italiana* (RAI) shall (i) ensure a higher quality of programmes and experiment with new formats; (ii) engage in developing audiovisual production that foster a positive image of Italian culture and identity; (iii) promote new audiovisual works and (iv) offer to the public material from its historical archives.²⁵

The government of the French-speaking community of Belgium has entered a new five-year service contract with PSB *Radio Télévision Belge Francophone* (RTBF), in which it now addresses the online presence of RTBF (also with regard to social networks), while maintaining already existing requirements as to the quality of content. The contract expressly asks the RTBF to encourage the offer of new media services, especially with regard to their complementary and interactive potential (see Article 6.1. f)).²⁶

In Switzerland the Federal Council has communicated its decision to allow the PSB *Société suisse de radiodiffusion et télévision* (SSR) more flexibility in its on-line offer, while safeguarding the interests of competing private services by prohibiting the SSR from advertising on its Internet site.²⁷ In the same communication the Federal Council launches the idea of setting up an extra-parliamentary commission on the media that would monitor the evolution and importance of

²² This is the case in Belgium. For a presentation of their system, see <http://prezi.com/z0x71vd00m1n/promotion-of-eur-works-in-vod-for-obs/>

²³ This is the case in Slovakia, see Juraj Polak, Promotion of EU Works in On-demand Audiovisual Media Services, IRIS 2013-2: 36, available at: <http://merlin.obs.coe.int/iris/2013/2/article36.en.html>

²⁴ See also Helberger, op. cit. page 83.

²⁵ Francesca Pellicanò, AGCOM Adopts Guidelines for PSB Obligations for Years 2013-2015, in IRIS 2013-2/30, available at: <http://merlin.obs.coe.int/iris/2013/2/article30.en.html>

²⁶ The RTBF service contract is available at <http://csa.be/documents/1703>

²⁷ Patrice Aubry, No Advertising on Internet for Public-Service Radio and Television, but More Freedom Regarding Content of On-line Offer, in IRIS 2012-9/13, available at: <http://merlin.obs.coe.int/iris/2012/9/article13.en.html>

Switzerland's media market place and public sector. This commission would further assess public needs and advise the Federal Council.

The Portuguese government followed a commitment to rethink the concept of PSB in light of technological changes. It established a Working Group of media professionals that drafted a report on the definition of a concept for PSB. Among others the report recommends improving news programmes and abolishing the state media regulator *Entidade Reguladora para a Comunicação Social*.²⁸

In the UK, the BBC is at the centre of a debate about the future of prominence regulation, a regulation originally designed to benefit PSB in a multi-channel linear broadcasting environment. It is largely based on privileged access to DTT capacity and appropriate EPG prominence.²⁹ The existing rules are, however, difficult to reconcile with today's patterns of content delivery and consumption that include, for example, catch-up and on-demand services, and that involve new actors and new content gateways.³⁰ Therefore the DCMS is reflecting on how to adapt it with a view to maintaining the high quality output of PSB. Ofcom, author of the current EPG code,³¹ feeds the actual discussion alongside the BBC and other stakeholders.

In response to practical problems in the co-functioning of the bodies of the Croatian PSB *Hrvatska radiotelevizija* (HRT), namely the Programme Council, the Management Board and the Supervisory Board, a recent amendment to the Croatian Radio-Television Act restructured the management of HRT as to the election procedures (now in the hands of the government) and generally the distribution of competences.³²

Changes in the functioning of public service broadcasters may also occur as a result of the way they are funded. In Slovakia, for instance, the PSB Radio and Television of Slovakia (RTS) is funded since January 2013 by an annual contribution from the State budget, which may be used solely to cover the net costs of the public service mission. While this change might help to secure and regularise the budget it also means a more direct link to the government. Both aspects have been used as arguments that RTS may better fulfil its public service mission. Yet the political opposition views the new funding scheme as potentially inviting government interference with RTS editorial independence.³³

4.2. Public value tests

In order to ensure respect of the Amsterdam requirements set by the Commission with regard to the public service remit, countries have introduced corresponding procedures.

Prominent examples, already introduced at EPRA meetings, are Germany, Norway and the UK with their ex ante public value tests and market assessments for new services offered by PSB. Spain too has – at least in theory – introduced a public value test. The test has not yet been applied because, on the one hand, the RTVE Corporation has not launched significant new services and, on the other hand, the authority responsible for conducting the test (CEMA) is not yet operational. Other countries, for example Hungary and Italy, have introduced systems where new services are examined on the basis of technical, economic and media policy considerations before they may be green lighted. Public service objectives seem to enter into these considerations/evaluations without this being expressly labelled as public value test. Switzerland runs a co-regulation system where

²⁸ Mariana Lameiras & Helena Susa, Portuguese Government Orders a Report on the Definition of the Concept of Public Service Broadcasting, in IRIS 2012-1/37, available at: <http://merlin.obs.coe.int/iris/2012/1/article37.en.html>

²⁹ See Ofcom, Driving investment and growth in the UK's TV content industries, Response to Department for Culture, Media and Sport discussion paper, especially points 4.1-4.10, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/ofcomresponses/Response_to_DCMS.pdf

³⁰ See Report by the BBC, The Economic Value of the BBC: 2011/12, January 2013 and Robin Foster and Tom Broughton, PSB prominence in a converged media world, December 2012.

³¹ The Code was drafted following an obligations under section 310 of the Communications Act and is available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf>

³² Nives Zvonaric, Parliament Adopts Amendment to the Croatian Radio-Television Act, in IRIS 2012-9/27, available at: <http://merlin.obs.coe.int/iris/2012/9/article27.en.html>

³³ Juraj Polak, Amendments to the Radio and Television Act, in IRIS 2012-1/42, available at: <http://merlin.obs.coe.int/iris/2012/1/article42.en.html>

the public service broadcasters define their quality criteria and policies and OFCOM imposes (external) auditing.³⁴

Gradually, case law emerges, in which these systems are applied to concrete services. Among the first examples for the application of a public value test was the BBC Trust's approval of several new on-demand services. These comprised a seven-day catch-up TV service over cable, including "series stacking" by which an entire series could be stored and viewed within seven days of the final episode, a similar service over the Internet, and a service for simulcast TV broadcasting over the Internet.³⁵ As a result of its Market Impact Assessment, Ofcom had expressed concerns as to the series stacking being close to becoming a substitute for commercial services and likewise as to the impact the length of catch-up services over the Internet might have on the market. The BBC Trust addressed these concerns by proposing to adopt a narrower definition of series available for stacking and to shorten the storage windows for catch up over the Internet. Some years later, the BBC Trust approved Project Canvas³⁶ in light of the results of the public value (as well as a market impact) assessment. The Trust highlighted among others that the Project would increase the range of content and services on digital terrestrial television.

A recent decision of the *Landgericht Köln* (Cologne District Court) addressed the question of whether the version of 15 June 2011 of the "Tagesschau app" (a daily news service of the German PSB, the ARD) was still covered by the public service remit or fell under the prohibition of Article 11d(2)(3) *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting – RStV). According to the Court, the specific app, if viewed from the perspective of a user, had the capacity to substitute the press because of the very detailed content that resembled that of most newspapers and magazines. Therefore the version of 15 June 2011 fulfilled the elements of "press-like services not related to a programme" and was banned. At the same time the Court confirmed that the Tagesschau app as such had passed the three-step test under Article 11f RStV and generally came within the PSB legal remit.³⁷

The first application of the Norwegian public service remit ex ante test concerned the inclusion of a new travel and route planner. The Norwegian King in Council found that this service could be included in the public service remit of the Norwegian PSB (NRK). The Competition Authority's assessment, however, had pointed the other way when it found that the new service would have a substantial negative impact on existing commercial actors that develop similar services and would weaken the reasons to develop such services. Likewise the Media Authority was of the opinion that the new service was clearly not justified within the democratic, social and cultural needs of society defined by NRK's public service remit. The King in Council nevertheless cleared the new service even though subjecting it to conditions of equal access to public data and to commercial aspects. It found that the traffic and route planner can be justified within NRK's Statutes and that its added public value outweighed potential effects on competitors.³⁸

An Austrian constitutional case, currently pending before the *Verfassungsgerichtshof*, might possibly relate new aspects to the question of where countries might draw the line as to permissible new services (with or without public value test). The case concerns an appeal of the ORF, the Austrian PSB, against the NRA's interpretation of the ORF Act, according to which the ORF shall be banned from co-operating with social networking sites because such activities are thought not to be covered by the ORF's public service remit (except in connection with the ORF's own daily online news extracts).³⁹

4.3. Additional competition law aspects⁴⁰

³⁴ See EPRA working paper, presented in 2010 in Belgrade and available at http://epra3-production.s3.amazonaws.com/attachments/files/803/original/WG3_PSB_assessment_OFCOM_CH.pdf?1323685469

³⁵ Tony Prosser, First Market Assessment of New BBC On-Demand Proposals, in IRIS 2007-3/23, available at: <http://merlin.obs.coe.int/iris/2007/3/article23.en.html>

³⁶ Tony Prosser, BBC Trust Approves Project for On-Demand and Internet Services to be Made Available on TV Sets, in IRIS 2010-2/22, available at: <http://merlin.obs.coe.int/iris/2010/2/article22.en.html>

³⁷ For more details, see Tobias Raab, Cologne District Court Bans Version of Tagesschau App, in IRIS 2012-10:1/8, available at: <http://merlin.obs.coe.int/iris/2012/10/article8.en.html>

³⁸ For further details, see Marie Therese Lilleborge, The First Ex Ante Test Completed, in IRIS 2013-1/13, available at: <http://merlin.obs.coe.int/iris/2013/1/article31.en.html>

³⁹ Martin Lengyel, Administrative Court Confirms "Facebook Ban" for the ORF, in IRIS 2013-1/6, available at: <http://merlin.obs.coe.int/iris/2013/1/article6.en.html>

⁴⁰ For more information on competition law aspect in the context of PSM, see also Susanne Nikoltchev (ed.), IRIS Special "Converged Markets – Converged Power? Regulation and Case Law", (European Audiovisual Observatory, 2012).

Currently, an online platform project involving several companies of the German PSB ARD and ZDF as well as other production and licensing companies is being assessed by the *Bundeskartellamt*, the German Antitrust authority. The companies jointly set up a video-on-demand platform, called "Germany's Gold", to make digitised content from the past 60 years of German and international film and television history available to viewers via satellite, cable, terrestrial broadcasting, the Internet and other technologies. Individual on-demand payments, subscriptions and advertising would finance the service. The President of the *Bundeskartellamt* expressed the concern that "the joint online platform would mean that the prices and choice of videos, in particular, would be coordinated between the two broadcasters." In his view: "The problems arising under competition law are obvious. In addition, the media libraries and the production of content are financed by user fees and therefore already distort competition to a considerable degree on the video-on-demand market. Further-reaching restrictions of competition by the commercial subsidiaries of the broadcasters cannot be accepted. The general question whether it is justified to demand payment for the use of content which has already been financed by user fees is not an issue under competition law."⁴¹ The *Bundeskartellamt* is now discussing with the companies options of whether and how commitments by the PSB could mitigate the impact of the project on competitors.

The *Bundeskartellamt* had also examined the merger aspects of the case but found no danger of a dominant position. In this context, it is interesting to note that if a PSB were to hold a dominant position, this would not only be an obstacle to a proposed merger but could possibly also lead the competition law authority, in exceptional circumstance, to impose an obligation to open its archives to competitors.⁴² This points in the same direction as the commitment that Germany made in the context of the Commission's review of the German financing scheme for PSB. Germany, at the time, promised that sports rights not used by the PSB would be offered in a transparent procedure to third parties for sub-licensing.⁴³

4.4. Archives

PSB archives dispose of a wealth of European works⁴⁴ and therefore an asset for quality programming. Within the limits of copyright law, public service broadcasters are in a position to use these archives for their own on-demand services. To the extent that they hold/own intellectual property rights, a further question would be whether public service broadcasters should also open their archives to competitors – especially because material will have regularly been produced with the support of public money – and if so, under which conditions. Yet in reality, copyright will often be a main obstacle to any kind of use.

A short look at Directive 2003/98/EC, which provides a general framework for the conditions of re-use (in terms of licences, charging policies, transparency and competition rules) of any content whatever its medium (including in electronic form or as an audiovisual recording) of "public service bodies", shows that EU law does not state such an obligation. This follows from the fact that Art. 1 para. 2 lit. d of the Directive excludes PSB from the scope of the Directive. The revised Directive (whose adoption is expected for June) will not change this situation.

Any obligation concerning archives can therefore only be found in national law. It is also the national law that would need to oblige PSM to engage in the digitisation of audiovisual content, the indispensable prerequisite for using archived content in new media services. As a consequence, NRA might get involved in the policy on PSB archives only to the extent they have competence in copyright clearance, management or licensing or if they are involved in schemes for the digitisation of PSB archives. The latter is, for example, the case for the Broadcasting Authority of Ireland (BAI) that developed and now conducts a funding scheme to support the archiving of broadcast material.⁴⁵ The Italian AGCOM has also included in its PSB guidelines [see above] that RAI should make available to the public material contained in its archives. The Norwegian PSM shall undertake

⁴¹ Bundeskartellamt, Press Release of 11 March 2013, ARD/ZDF Online Platform "Germany's Gold" raises competition concerns, available at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_03_11.php

⁴² See Kim de Beer, Summary of the Discussion, in Susanne Nikoltchev (ed.), IRIS Special "Digitisation and Online Exploitation of Broadcasters' Archives", (European Audiovisual Observatory, 2010), page 72.

⁴³ See European Commission, letter to the German Foreign Minister of 24 April 2007 concerning state aid, E 3/2005, K(2007) 1761 endg., para. 355., available at: http://ec.europa.eu/eu_law/state_aids/comp-2005/e003-05.pdf

⁴⁴ The EBU estimated that 28 million hours of broadcasting content were available. See, Pranvera Këllezi, A Competition Law and Policy Perspective, in IRIS Special "Digitisation and Online Exploitation of Broadcasters' Archives", page 43.

⁴⁵ See Damien McCallig, Ireland Approval of Funding Scheme for Broadcast Archiving, in IRIS 2012-4/29, available at <http://merlin.obs.coe.int/iris/2012/4/article29.en.html>

efforts to digitise its archives, to make as many of its TV programmes available on the Internet for simultaneous distribution and as an archive service for download and/or individual playback.⁴⁶

5. Wrapping-up: the trunk roads to Rome

The Council of Europe has firmly established the idea that PSM should use the newest technology available at any given time to fulfil their public service obligations. That PSM develop public media services based on the opportunities of a connected environment falls squarely within this logic. According to the CoE, it is the responsibility of member states to guide PSB in their transition to PSM and to enable them to continue catering to essential societal and policy needs for quality content. The EU seconds the CoE policy though with a more economic mindset.

Through participation in European standard setting and as creators of the national legal frameworks, countries regularly confirm the paramount importance of PSM for quality content. They do so in general and also specifically regarding new technical possibilities. The concrete results achieved, however, differ significantly across Europe. For example, whereas a travel and route planner is covered by the public service remit in Norway, cooperation with social networks is not in Austria. While Belgium believes in voluntary prominence of European content, Slovakia resorts to imposing monthly quotas. The country-by-country and case-by-case approach means that the “completed” picture of PSM in a connected environment, at which we might look one day, will be largely painted by an array of administrative and court decisions. Different legal areas ranging from specific media legislation to competition law will supply the colouring. And various official bodies will have left their imprints. It will be up to the European institutions to judge whether the European frame proves sturdy enough for the whole.

NRAs occupy a high rank in the process of establishing the PSM remit. As the case may be, they might have to multi-task as regulators, monitors, supervisors, reformers and sometimes cheer leaders. And they will have to grow alongside the technology that will continue to dictate the speed and the direction of all developments.

Susanne Nikoltchev
Strasbourg 29 April 2013

⁴⁶ Marita Bergtun, Norway, in IRIS Special “Converged Markets – Converged Powers? Regulation and Case Law”, page 140.