

Public Service Broadcasting Needs State-Guaranteed Funding

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The economic and legal structure of audiovisual media has been hotly debated for decades. It is clearly a game of high stakes. The political influence often rightly ascribed to media sparks aspirations in government, parties and lobby groups, who see media as a political good. A booming market and the expectation of profits and correspondingly high returns cause investors to view the products tradable on this market as economic goods. In public rhetoric, media are mostly said to be a cultural good, indispensable to democracy and societal development.

Audiovisual media depend for their success on financial and technological resources and infrastructure – production facilities, telecommunication networks, receivers and so on. They also need a suitable organisational structure, a workforce with good programming, technical and commercial skills, and access to rights. Consumer behaviour patterns are also important. It goes without saying that stakeholders in this sector sometimes have strongly conflicting interests and do not always disclose them.

The key role played by audiovisual media boosts media growth and promotes an unbroken stream of innovation. But it also harbours risks. So it is no coincidence that all countries have created an intricate legal framework for audiovisual media. Among other things, this aims to ensure properly functioning media in the interests of

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democracy under the rule of law, for example by securing plurality and diversity in communication and equal opportunities in media use. Another aim is to neutralise the risks – predicted in theory by media economists and known in practice from experience – of concentration and power accumulation and hence power abuse. The sector must also be protected from excessive rigidity.

The power problem deserves special attention. The risk of state abuse of power is met with the principle of media independence, which in many broadcasting frameworks is constitutionally guaranteed. In many if not all countries, laws on audiovisual media make organisational provision for independence from the state, for filters shielding personnel from government or party interference and for protection from indirect or indeed direct influence on programming. To counter the risks inherent in the specific economic characteristics of media goods, media law contains checks and balances that hold back those with too much power and ensure access for those with too little. Some sectoral precautions of this kind are now being dismantled and their regulatory effect supplanted by trust in market mechanisms and the controlling influence of general competition law rules.

The driving force in implementing this approach in Europe is the EU, primarily in the form of the European Commission which, despite only limited media policy powers, pursues technology and industrial policy measures promoting the Single Market in full knowledge that they are bound to affect both the content conveyed by media and consumers' ability to form their own opinion. The cultural dimension of this problem is stressed in declarations of intent and preambles, and sometimes even serves as a reason for leaving regulation to member states, as with the Amsterdam Protocol on Public Service Broadcasting. But the cultural dimension is not the main focus of European regulation – not solely because the distribution of powers in European law is mostly centred on economic market freedoms, but also because of the EU's regulatory philosophy concerning the audiovisual media sector. This regulatory philosophy gives only limited recognition to the special characteristics of its policy subject while neglecting the threat to open pluralist opinion and the chances of

later shortened to 10 minutes. I will restrict myself to the 10 minutes in my oral presentation. This is the original paper written for a 30-minute timeslot.

programming that reflects citizens' interests being made available even when market forces go against it.

The German Federal Constitutional Court has long sought to consider the special sociocultural function of audiovisual mass media as a starting point for its constitutional deliberations. In this connection, it recently¹ pointed to a new potential hazard of current media market developments: Alongside conventionally focused media groups, the media sector is seeing an influx of other types of business enterprise, including companies in which international financial investors hold major stakes. The Court stresses that programme production and broadcasting often form just one link in a multimedia value and marketing chain, and that there are varied ways to make media influence and commercial gain mutually reinforcing and thus to reap synergies and economies of scale, among other things through cross-media marketing. The Court has also highlighted the scope for influencing consumer choice in the use of navigators and electronic programme guides. It has additionally reaffirmed earlier pronouncements – on broadcasting – pointing to the increased bias of advertising-funded media towards mass appeal and standardised programming and to the risk of their presenting a distorted view of reality.

A sub-topic of today's conference is 'Funding for public service media in the face of the advent of paying services', that is, whether audiovisual media can be funded other than through licence fees and advertising, as with pay TV. The retention of the public service idea gives grounds for optimism. The idea itself needs clearer definition, however. Some years ago, I attempted to identify elements of public service broadcasting from the rules in different countries. To name some of those elements:

- Pluralism, diversity, fairness, and impartiality
- Equal opportunities in political broadcasting
- Due accuracy of news
- Maintenance of cultural and linguistic identity
- Multiplicity of programme formats
- Coverage of important events

¹ Decision of 11 September 2007.

- Maintenance of high-quality programming
- Protection of juveniles and fostering of educational programming for children
- Maintenance of standards in matters of violence, sex, taste, and decency
- Personal integrity
- Responsible advertising
- Consumer protection²

Goals like these are not met simply by giving users, as is increasingly the case, a wide choice of audiovisual content and distribution channels. The quality, i.e. the type of content on offer is also critical. Another key factor comprises the conditions for access, not only in terms of financial barriers, but also freedom from manipulation in the use of access and how well content and the means of using it are tailored to users' individual media skills. New technological and economic possibilities can reduce existing problems, but they can also amplify them. Today's inter-media networks, cross-promotion opportunities and the many ways of combining content more or less subtly with advertising all raise the risk of citizens being manipulated. Separation of content and advertising was traditionally a matter of principle and indeed professional ethics. In large segments of the private-sector media, this principle has been consigned to the museum.

Programming made for the cultural elite is not the sole proof, and elite notions of programme quality are not the sole measure, of public service quality. The key test is whether programming is bound to the goals of diversity and equal opportunities in communication. What matters is that the media serve the communication interests of all population segments and that sufficient qualitative diversity is ensured for democracy to function and also for people to be provided with guidance relating to all areas of life. This includes:

- Securing diversity of content and opinion, i.e. including opinions and values important to society as broadly and as fully as possible while excluding dominating, one-sided concentrations of opinion-forming power.
- Securing individual, group and institution diversity, i.e. ensuring all important segments of society have their say.

- Securing thematic diversity, i.e. breadth of programming, covering events, information and topics affecting the various areas of life.
- Securing geographical diversity, i.e. covering views and information from the various geographical levels relevant to communication – local, regional, supra-regional and international.
- Securing genre and programming type diversity, i.e. covering the various formats and programming types (such as information, entertainment, education and advice).
- Securing reception diversity, i.e. keeping open different communication channels so that different communication needs can be taken into account regarding the means of reception.

The panel title asks if the availability and accessibility of pay TV might not be a way of keeping up public service focus in broadcasting. I doubt this, even though some possibilities do exist. Various kinds of pay TV are already available, notably channels for specific types of programming and specific audience segments, in some cases on a pay-per-view basis. I surmise that the public service ideals I mentioned earlier would be well served with at least some of these offerings and users would benefit in terms of their communicational development and social guidance. It could help to give such services structural support – for example with rules ensuring public service programming easy or even preferential access to distribution networks and platforms. But this idea comes up against the European Commission proposal for amending the regulatory framework for electronic communications networks and services, which goes in the opposite direction. Under the Commission proposal, spectrum policy and spectrum management will largely cease to be available for the attainment of cultural and media policy objectives.

The key issue for the proper functioning of the media overall, however, is whether pay TV will reach the target audience as a whole or – and various signs point this way – will reach only a select few users with the ability and thus the will to pay, and then in most cases only for certain content such as sporting events, films and some

² *Wolfgang Hoffmann-Riem, Regulating Media, 1996, p. 297 ff.*

children's programmes. This sort of selection risks widening a cultural gap that is already visible when it comes to exploiting the new possibilities offered by the world of multimedia. For understandable commercial reasons, providers will want and need to address either a segment of the audience willing to pay a premium for specific content or, if individuals do not want to pay such a premium, a segment large enough to generate sufficiently high revenue.

Selectivity of this kind is not a major problem in media and cultural policy terms if there are adequate alternatives, such as the public service broadcasters in Germany, which receive state-guaranteed funding for this very reason. In my view, however, the model of state-guaranteed funding for specific public service broadcasters ought not to be superseded by another that is currently under debate. I am referring here to the granting of rewards for specific programmes tied to the public service idea, no matter which broadcaster provides them. The proposed rewards consist of monetary payments or favours of some other kind. This sort of model not only requires standards and criteria that do justice to the conceptual diversity of public service broadcasting and that a suitably qualified body could apply fairly easily to a wide range of content in a way that outsiders can follow. The task is in fact far harder than that faced by juries who award prizes for quality programmes according to set criteria. After years of effort – for example by German broadcasters – directed at formulating and implementing standards and procedures for quality control, we cannot say that such standards and procedures are impossible to find, but we know that their application allows considerable leeway and therefore ends in controversy. It is virtually impossible to do without standardisation and simplification of benchmarks and procedures. But even then, with individual decisions relating to individual programming, the risk remains of broadcasters aligning their strategic focus to the preferences of those who decide on the quality of a given programme and the corresponding rewards. The result is effectively censorship before the fact – and this still applies even if the quality of a programme is not assessed until after it is broadcasted. Any outside intervention approximating to censorship contradicts the fundamental principles of free communication, even if it comes from a body independent of the state.

There is another, even weightier objection. Programme production and broadcasting form just one of many links in a long value chain. Influence on quality is wielded by those involved in production and broadcasting. Media impact, however, depends not just on the quality of a given programme, but on how and when it is broadcast, on influence over consumer behaviour for example via navigation systems, on spectrum placement, the surrounding programming, and also on marketing. It is therefore not possible to tell from a single programme whether broadcasting meets the public service ideal. The way the programme interacts with other media impact factors must also be taken into account. This is why licence revenues go to specific broadcasters and not to selected programmes.

Because so many factors are important in public service provision, it is necessary to take an integrated view with special emphasis on the structures under which programme ideas are born, realised and turned into broadcast programmes. The most important of these structures alongside many others are organisational structure (including precautions to ensure independence and efficiency), the nature of funding sources, workforce professionalism and ethical commitment, programming schemes, and internal and external forms of quality control. The complexity of factors determining public service broadcasting is the main reason why public service obligations are imposed on broadcasters – and not on selected programming – and why most countries secure public service within their broadcasting framework by providing for a special form of funding. In Germany this is a licence fee; in many other countries it takes the form of government grants.

Based partly on such considerations, the German Federal Constitutional Court³ emphasised less than a year ago that given the lack of diversity in private broadcasting, public service broadcasting is indispensable under German constitutional law and the legislature must see to it that the technical, organisational, personnel and financial resources are in place for public service broadcasting to discharge its mandate. The Court added, “Because programming must remain open to new content, formats, genres and distribution channels and the mandate is therefore dynamically linked to the operation of broadcasting, public service broadcasting must not be tied to the status quo in programming, funding or

³ Decision of the First Senate, 11 September 2007.

technology.” This means among other things that public service broadcasting must be allowed to use the Internet. The mass media content currently made available online lastingly breaches a number of public service ideals, for example with the common online practice of technically and substantively very close integration and overlap between advertising and other content. As key segments of the population, especially teenagers, often obtain mass media information exclusively online, public service deficits can affect their cultural guidance and potentially that of a whole generation.

As to the funding of public service broadcasting, the German Federal Constitutional Court has underscored that such funding must be open to future developments and be needs-driven. The Court speaks of a guarantee for funding that enables public service broadcasting to discharge its mandate. It also stresses that licence fee funding is meant to provide the maximum possible detachment from free market forces and to ensure that programming is aligned to media goals, notably the goal of diversity in its many dimensions, without regard to viewing figures and advertising revenue. The Court would presumably extend its warning against a prime focus on viewing figures to include pay TV if asked to decide if the latter was a suitable way of fulfilling the public service idea.

It is my conviction that producers of programmes and compilers of programming schedules will only achieve professional focus centred on the public service idea in its many facets if they can operate in professional autonomy and if there are suitable organisational and financial structures that allow them to meet public service requirements on an ongoing basis. This of course includes focusing on viewer needs. However, focusing on viewing figures – i.e. data important to the advertising industry on viewing patterns of audience segments receptive to advertising – is not enough to ensure alignment with the communication needs of all citizens, as is not financing through pay TV. There is therefore a need for statutory and hence ultimately state-provided guarantees for a funding structure based on an approach other than advertising and pay TV revenue.

This must of course be supplemented with a quality assurance system including sufficient transparency about the criteria behind programming decisions and their application in broadcasting organisations. Such assurance must relate not just to the

final stage – the decision to broadcast each programme – but must at least indirectly cover all links in the value chain. Especially considering the ongoing convergence of technologies and programming, it would be wrong to neglect the interplay of the many factors involved. Yet the European Commission's proposed regulatory model for the audiovisual sector fosters just this kind of neglect. It is thus all the more vital to leave member states scope to meet the cultural responsibilities of broadcasting with media regulation of their own. The emergence of private pay TV is not an adequate substitute for statutorily guaranteed funding of public service broadcasting.