

EXPORTING THE PUBLIC VALUE TEST

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**The Regulation of Public Broadcasters'
New Media Services Across Europe**

Edited by Karen Donders and Hallvard Moe

NORDICOM

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New Media Services Across Europe

Karen Donders and Hallvard Moe (eds)

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Editors' preface

On 25 May 2010, the Centre for Studies on Media Information and Telecommunication (IBBT-SMIT) and the Institute for European Studies (IES) at the Vrije Universiteit Brussel organized a workshop on the status of *ex ante* tests of new public broadcasting services in Europe. The workshop set out from a twofold observation. First, that the European Commission urges Member States of the European Union to implement an *ex ante* test, and second, that the latter are following the British example of a public value test in that respect. Scholars and practitioners exchanged observations and opinions about the topic for an entire day, expressing a keen interest in further research and debate.

The apparent interest for *ex ante* evaluations of public broadcasters' new media services within academia, among regulators, in policy circles, with interest groups as well as media companies provoked this edited collection. The book is a culmination of over twelve months of collaborative work to produce a volume that presents insights into the status of public value tests in Europe. Importantly, the result should not be a run-of-the-mill anthology of academics discussing amongst themselves. Instead, this book offers short, pointed contributions by the range of interests involved in and concerned with the future of public service media in Europe: the public service broadcasters themselves, their competitors, their regulators, and scholars from across Europe. As always, the publishing process in academia lags behind the speed of policy development. Nevertheless, the contributions in the edited collection are highly valuable and remain relevant, even if certain details of *ex ante* tests have changed in the meantime.

We, the editors, wish to express appreciation to Ulla Carlsson and her able team at Nordicom for supporting our endeavour in making this book. A word of appreciation also for Heather Owen, the copy-editor of this collection. We would also like to thank the Centre for Studies on Media Information and Telecommunication, the Institute for European Studies (both Vrije Universiteit Brussel), and the Department of Information Science and Media Studies (University of

Bergen) for their financial support. Special appreciation is richly deserved by the contributors to this edited collection. All of them stuck to tight deadlines, followed up on required revisions and wrote plainly – which is not always easy, given the sensitivity of the topic.

We sincerely hope (and actually already foresee) you will value the contributions of each author as much as we do, and look forward to other, grounded discussions on the public value test and the state of public service media in the future.

Brussels and Brisbane, November 2011

Karen Donders & Hallvard Moe

Chapter 1

Ex Ante Tests in Europe

From Diverging Perspectives to Infinite Conclusions

Hallvard Moe & Karen Donders

There are many historical, economic, political, social and cultural differences between the member states of the European Union. Although reference is most often made to the divide between the ‘old’ and ‘new’ member states, it is fair to say that there are plenty dissimilarities among old member states as well. The diversity in Europe is one of its most attractive features but, admittedly, also a weak point, as joint policies are difficult to develop in a union of 27 countries, each striving after their own objectives and triggered by distinct domestic forces.

One of the few common European ‘things’ is public service broadcasting. The idea that the broadcast media should be the object of a special set of regulatory measures to secure the delivery of certain programmes or values is something that is shared by European states from Spain to Norway – and from Ireland to Latvia. The Amsterdam Protocol (1997) recognizes the importance of public service broadcasting for European democracies and is annexed to the Treaty on the Functioning of the European Union. Exactly what the regulations for public service broadcasting should look like, how they should be enforced, and on what basis, have, however, varied immensely. Social, cultural and political specificities account for such differences. The outlook for the nearly 100-year-old BBC, set up to serve 60 million Brits, diverge compared to, say, the institution in Slovenia, only gaining independence in 1991 and supposed to broadcast to 2 million people. Nevertheless, the idea and practice of public service broadcasting face some challenges and opportunities that apply across contexts.

These challenges can be linked to overarching trends. The media across Europe have, over the last few decades, been marked by economic globalization, political liberalization and technological digitalization. In the face of such broad developments, the public institutions in question have sought to expand their operations beyond traditional radio and television broadcasts. Public service broadcasters have ventured into the online world in all its varieties, launched niche and thematic channels, developed novel commercial services, entered

into partnerships with external actors, and explored all forms of new ways to reach users – whether it is through smart phone apps or video screens in public places. Such endeavours have triggered and intensified fundamental discussions across Europe about what we need public service media institutions for. These are complex discussions, building on history, encompassing new technology, and involving a range of strong stakeholders. The aim of such discussions should be to define public service media,¹ but also to find out how it should be controlled.

Recently, the so-called public value test has emerged as the focal point for these discussions. The public value test is a detailed set of regulations constructed to assess the value for the users and society, as well as the market impact, of a new service proposed by a public service broadcaster. Since it is supposed to forecast or predict an expected result, the test is also referred to as an *ex ante* assessment. Such tests are being introduced in a long line of European states. But the introduction of public value tests has also served as an opportunity for a thorough rethinking of public service broadcasting – laying the basis for what public service media will look like in the years to come.

This book is about the public value test. Enlisting academics as well as stakeholders from across Europe, the aim is not only to describe the implementation in different countries, and spell out differences among them. We also aspire to scrutinize prospects and pitfalls, and come up with recommendations for the future governance of public service media. On a more generic level, all contributions feed into discussions on the future of public service broadcasting in Europe, and trigger critical reflections on the public value test as a tool (or not) for fostering a sustainable transition from public service broadcasting to public service media.

Why the public value test merits our attention

The public value test has been discussed in academic literature already.² So far, however, most discussions are rather fragmented (focusing on one or two countries only), limited in scope (focusing on some legalistic aspects) and sometimes also somewhat biased (representing only one view – for or against – *ex ante* tests). With this contribution, we aim to overcome these shortcomings. For that purpose we have included a number of essays covering different national systems as well as different opinions about the (in)utility of the public value tests designed throughout Europe. Together, they allow the reader a comparative look at distinct cases of new media governance tools.

On the more practical level, a number of essays in this contribution will provide insights into the problems that can occur on an everyday basis when conducting public value tests. Indeed, the subject of this edited collection is a

moving target. Nevertheless, there are certainly several lessons to be learned. First of all, even though it is sometimes asserted that public value tests are a well-established practice in Europe, the essays, which present a mosaic of European experiences so far, illustrate otherwise. In the United Kingdom and Germany, public value test regimes are most advanced in terms of tests conducted, the professionalization accompanying them and existing analyses. In Denmark, Norway and the Netherlands, some practice is also emerging. In other EU member states, however, there is still a struggle to develop a procedure. Secondly, and related to the status of public value tests in various European countries, the essays are evidence of the huge gap between European decision practice and the implementation of so-called appropriate measures in national media legislation. Far too often, decisions of the European Commission are considered reflections of the reality of member states' media regulation. Empirical evidence in this book convincingly proves otherwise. Thirdly, there is yet another divergence between national legislation and actual practice. Paper does not blush and, for public value tests, the saying is no different.

On a more academic level, this contribution also shines a light on fundamental questions about the transition from public service broadcasting to public service media. Even those academics criticizing the public value test will have to admit that the instrument at least forces us to think about the continued necessity of public service beyond broadcasting. For too long, we have taken this for granted.

The aim of this contribution is thus to put public value tests in perspective. Questions the different authors seek to answer include:

- How are public value tests being implemented in different European countries?
- What are the differences in the processes and procedures between European countries, and how can we understand them?
- What are the prospects and pitfalls one can observe in the implementation of public value tests?
- How can we improve (if at all possible) the public value test in order to grasp more fully questions about the transition from public service broadcasting to public service media?

Such, along with more detailed questions, are addressed in this collection of essays. These cover basic descriptions of the public value tests in Germany, Denmark, Norway, Sweden, the Netherlands, Flanders and Southern Europe. The contributions all include an analysis of a particular aspect of the public value test concerned, and end with some wider reflections, conclusions and recommendations. A select group of scholars and representatives of public broadcasters, regulators, policy, private broadcasters and publishers have writ-

ten the essays. The aim thereof is to provide as many angles as possible to the topic of public value tests, and to highlight the different perceptions that exist with regard to one practice.

The structure of, and contributions in, the book

The book is structured into two parts. Chapters 2-5 provide perspectives, or entry points, for the specific discussions of cases in chapters 6-17. In Chapter 2, Tim Raats and Caroline Pauwels take stock of attempts to compare public service broadcasting. Arguing for a mix of methods and perspectives in policy research, including what they label ‘collected case studies’, Raats and Pauwels welcome exploration when embarking on public service broadcasting policy as a research object.

In Chapter 3, Karen Donders explains when and how public value tests appeared on the European policy agenda. She argues that the European Commission’s desire to push for *ex ante* tests in each and every European member state was due to an overload of complaints on the competition authority’s desk. When the Commission argued for an *ex ante* test in its encounters with the German *Länder*, there was no actual evidence of how the public value test in the United Kingdom worked. In other words, the Commission’s quest for a public value test was not inspired by any evidence-based policies.

This is followed up by Ross Biggam’s contribution in Chapter 4. Biggam, who is the Director-General of the Association of Commercial Television in Europe, advocates for the public value test, seeing it as a ‘natural’ aspect of public service broadcasting law. In his opinion, *not* having a public value test would be an anomaly. He warns that a deficient implementation of the tests in EU member states will provoke new complaints from the private sector.

While these chapters provide the EU background for the public value test, Chapter 5 tackles the other side of its emergence: the birth of the idea of public value in broadcasting policy in the UK. Richard Collins traces this history, and brings out the ideas inherent in the concept of ‘public value’ and the public value test as introduced by the BBC. Collins mainly worries about the evolution towards an audit society in which there are rituals of verification or legitimization, but where a real evaluation and reflection on public service broadcasting is lacking. As such, Collins’ chapter completes the background, and brings us to the national cases elsewhere in Europe.

Germany – the state in which, arguably, debates over the public value test have been most fierce – is treated in three contributions. In the first of these contributions, Irini Katsirea meticulously describes the different aspects of the German three-step test, evaluating it critically on several points. She puts forward problems of interpretation with several key concepts that need to be

addressed for sake of legal certainty, and to prevent tensions between public broadcasters and private media companies intensifying further.

Public broadcasting representative Renate Dörr (ZDF) is far more positive about the first *ex ante* tests, calling them ‘a dynamic tool of governance’. In her contribution, she offers insights into the three-step test conducted for ZDF’s new media services, concluding that its outcomes are meeting private sector interests to a large extent. She ends on a critical note, saying that constraining Internet activities of public broadcasters is not always in the interest of consumers whose access to public service content is also limited. In Chapter 8, Stoyan Radoslavov and Barbara Thomass (the latter a member of ZDF’s Television Council) offer yet another perspective on the first experiences with *ex ante* tests in Germany. Radoslav and Thomass highlight in particular the overwhelming weight of private voices in debates on new media services. They stress the importance of a broader societal debate on public broadcasters’ new media services.

From this centre of Europe, the next chapters bring us to the periphery. Norway, although not a full member of the EU, is bound by the state aid rules through the country’s European Economic Area agreement. In Chapter 9, Marie Therese Lilleborge, representing the Norwegian Media Authority, describes the process leading up to the introduction of a public value test in 2010. Lilleborge further explains the procedure of the Norwegian solution, laying out the peculiarities, as well as future challenges. In the following chapter, the Norwegian case is seen from the perspective of the public service broadcaster subject to the tests: Hilde Thoresen and Erik Bolstad, both working at the Norwegian Broadcasting Corporation (NRK), focus on the problematic aspects of the test. They argue that often-taken-for-granted features of public service broadcasting – such as the will and ability to innovate, or the partnership with external actors – might be at risk under the new regime.

Next, in Chapter 11, Erik Nordahl Svendsen gives us insight into the Danish case. Drawing our attention to the wider context of trends in European and Danish media politics, Nordahl Svendsen shows that the public value test is but one instance in the battle between private actors and public service broadcasting. He argues that it is not obvious whether the playing field is becoming more or less levelled.

In Chapter 12, Nina Wormbs tackles the third Scandinavian case – Sweden. Wormbs – an academic, head secretary for the latest Swedish public service inquiry, and member of the Swedish Broadcasting Commission – comes across as a cautious optimist. She argues that, provided it is used with care, the implementation of a public value test in Sweden might bring some order to the controversies surrounding public service broadcasting. In the best of worlds, the test could contribute legitimacy to new services. Such an outcome is, however, not a given, and Wormbs points to the ways in which it might be achieved.

In Chapter 13, Jo Bardoel and Marit Vochteloo highlight the main features of the public value test in the Netherlands. The Netherlands is one of the few small countries where there is already quite extensive experience with the *ex ante* test. Bardoel and Vochteloo point out that, although there are some positive elements to the prior assessment of new media services, one needs to be careful about the ‘depoliticization’ of public service broadcasting policies. In general, they fear administrative and legal procedures will take over from essentially political decisions on government intervention in the media market.

A somewhat different perspective is offered by Herman Wolswinkel (policy advisor with the Dutch Commercial News Media Association), who maintains that *ex ante* tests are necessary instruments to preserve pluralism in the market. In the absence of such instruments, public broadcasters are free to expand activities beyond their legitimate remit while jeopardizing private entrepreneurship that results in both high quality offers and pluralism. The Dutch publishers criticize, first and foremost, the lack of a thorough market impact assessment.

The experiences with the test in Flanders seem to differ quite significantly from the Dutch practice. In her contribution, chapter 15, Hilde Van den Bulck describes how the procedure works in both legal and practical terms. From her assessment, it is clear that there is no real *ex ante* test in Flanders. Political consensus has so far decided in favour of a procedure that exists only in purely legal terms, but that has not yet been implemented. Van den Bulck points out that this is likely to change as political consensus has shifted away from the VRT and moved towards the demand for more control, auditing and accountability. This move is somewhat critically evaluated by Van den Bulck, who perceives it as a threat to the public broadcaster.

The Director Business and Legal Affairs of Flanders’ biggest commercial broadcaster (VMMa), Ben Appel, sets out from a similar observation in chapter 16, pointing to the lack of a genuine *ex ante* test in practice. He criticizes the lack of an instrument to evaluate the public broadcaster’s new media services, arguing for a tool that indeed checks whether or not the public broadcaster can deliver new services, explore alternative funding models and even launch new channels.

In the final chapter, Benedetta Brevini offers a perspective on the status of *ex ante* evaluations of public broadcasters’ new media services in the Southern European states. She analyses how the different political, historical and cultural contexts in the region determine the implementation of the processes. In her analysis, she shows that trends of Europeanization can take different shapes in different EU member states. More specifically, related to the debates on the *ex ante* test and the practices developed, Brevini warns against the adoption of bureaucratic tests that might further deter Southern European public broadcasters from innovating and expanding beyond radio and television into the digital realm.

Obviously, the contributions concisely introduced above do not offer one single perspective on the *ex ante* test. Some are situated in the field of legal studies, political science or communication sciences. Others are more policy-oriented, or even philosophical in nature. In addition, the contributions in this book do not present one conclusion. Instead there are many observations, even more conclusions, and infinite ways to prepare public service broadcasting for the future.

Notes

1. E.g. Ferrell Lowe, G. & Bardoel, J. (eds) *From Public Service Broadcasting to Public Service Media*. Göteborg, Nordicom.
2. E.g. Donders, K. & Pauwels, C. (2010) 'The Introduction of an ex ante Evaluation for New Media Services: 'Europe' asks it or Public Broadcasters Need it?' *International Journal of Media and Cultural Politics* 4(1); Moe, H. (2010) 'Governing Public Service Broadcasting: "Public Value Tests" in Different National Contexts'. *Communication, Culture & Critique* 3(2): 207–223.

Chapter 2

In Search of the Holy Grail?

Comparative Analysis in Public Broadcasting Research

Tim Raats & Caroline Pauwels

In re-positioning themselves as public service media, public broadcasters have increasingly emphasized the added public value of their offers. Core tasks such as culture and education, and high moral standards such as objectiveness, trust and quality have increasingly been put back on the public service broadcasting policy agenda.¹ Indeed, public service media is still a project under pressure, with private companies most notably alleging that public broadcasters are unduly distorting competition, by offering services for which the market is catering. The legitimization of a holistic public service media system and the public broadcasters' role, therefore, requires evidence. Private media companies lobby for this, the European Commission wants it, policy-makers talk about it and, often ignored, the tax-paying audience has a right to it. *Ex ante* evaluations of new media services, subject of this edited collection, fit the discourse for more 'evidence-based' policies. The European Commission, aiming for a national balancing test between competition concerns and public interest objectives, has pushed the instrument.² In that context, the advent of a quest for evidence as a 'holy grail' for evidence-based policy is hardly surprising. Research on public service broadcasting thus becomes more important.

Moe and Syvertsen make a distinction between four types of research on public service broadcasting: in-depth case analysis, studies entailing a focus on European media policy issues, studies assessing broader regulatory issues affecting public service broadcasting, and comparative studies.³ Comparative research, which merits specific attention for the purpose of this edited collection, has been considered one of the most challenging in media research.

Looking more closely at comparative research on public service broadcasting, three main observations can be made. Firstly, there is no standardized method of analysing public service broadcasting on a comparative basis. The methods applied to analyse the various dimensions of public broadcasting differ accordingly. Secondly, media scholars engaging in comparative research encounter a series of obstacles for ensuring the validity of their research findings, rendering

comparative analysis as a methodological Pandora's box. Thirdly, despite the difficulties of comparative approaches, this kind of research is highly welcomed and, through various relevant contributions in recent years, seemingly regaining popularity. Nevertheless, the comparative analysis of media systems remains relatively under-developed to date and single unit case studies remain the most employed.⁴

Given the difficulties of comparative research on the one hand and its apparent necessity for both academic research and policy-making on the other, the question arises: what forms could and should comparative research on public service broad-casting take? The aim of this chapter is to make a case for comparative research on public service broadcasting. It, firstly, identifies which features of complexity have to be taken into account when analysing public service broadcasting. Secondly, different approaches for comparative research on public service broadcasting are identified. Finally, the case for an open 'collective case study' approach is made to address the public value test on a comparative basis. A comparative research approach on public value test – in itself both catalyst for and result of a turn to evidence-based media policy – by contextualizing national contexts within an overarching comparative perspective, might further comparative research and provide essential evidence for a sustainable public service media project.

Comparative research – a case for complexity?

Difficulties and drawbacks in comparative analysis of public service broadcasting can often be traced back to the complexity of its nature. Indeed, public service broadcasting is both a complex concept and empirical reality. Therefore, it should be approached as a complex notion and studied in all its complexity.⁵ Addressing research subjects as complex phenomena could well be considered inherent to the epistemology of social sciences. Public broadcasters, and all media institutions, processes and products, by extension, possess a cultural, political, social and economic component. They are embedded in a complex environment and are both structuring reality, as well as being subject to the structure of reality.⁶

In his critique on deterministic and mono-causal tendencies in social sciences, Edgard Morin suggests a paradigm of 'complexity', replacing a customary paradigm of 'simplicity'. According to Morin, the latter overlooks complexity of human and social reality, which is comprised of complementary, interrelated and opposing antagonisms.⁷ As such, the whole is always more, or less, but never equal, to the sum of its parts. An entity in reality should thus be perceived as a '*Unitas Complex*'. Rather than a theory or a doctrine, Morin presents his theory of complexity as a method for sustaining critical consciousness, and as

a plea for continuous vigilance for reductionist, abstract, mono-causal or one-dimensional research and policy approaches.

When addressing public service broadcasting as a '*Unitas Complex*', and when thereby taking the heuristics of complexity into account, three largely-interrelated thresholds might hamper comparative analysis: difficulties in *conceptualization*, the need for *contextualization*, and, following from the latter, difficulties in the *categorization* of public broadcasting regimes.

Conceptualization

Media scholars are confronted with difficulties relating to conceptualizing public service broadcasting in various ways. Firstly, incremental as well as large-scale transitions remind us of the dynamic nature of the concept and the multiple interpretations it has gained over the years.⁸

Concepts, however abstract, do not arise out of thin air, but are produced in an interplay with the reality to which they refer and which they attempt to conceive. When reality changes, it becomes necessary either to invent new concepts or to adjust the old ones so that they can continue to be useful, rather than becoming empty shells that have lost their meaning.⁹

The concept of public broadcasting has been assessed and challenged throughout the years. New meanings, roles and functions have been added, resulting in vague formulations and, according to Edin, also sometimes contradictory objectives.¹⁰ Some scholars argue that, despite the fact that new meanings have been added and new roles are constantly attributed to the concept, its underlying values are still the same and remain valid today. Others consider the concept as already an empty shell. Bolin sees in the frequent use of the concept today a proof that it has lost its meaning.¹¹ Moreover, not only the concept of public service (broadcasting) is up for multiple interpretations, similar difficulties arise when defining, operationalizing and empirically measuring some of the key values and moral standards of public broadcasting: quality, diversity, universality, public value, etc.¹²

Secondly, we often tend to misinterpret public service broadcasting as a universal 'default' standard. Much too often, it is perceived as something semantically and empirically homogenous, whereas the concept itself is 'fuzzy'. It not only stands for many possible interpretations, but also just as many national or regional implementations. The idealized conception of 'public service' is ultimately a Western notion, established, incarnated and defended in the Northern and Western European countries (Scandinavian countries, the UK, Netherlands, Belgium), rather than in the countries of the South (Portugal, Greece, etc.), let alone the non-European countries.¹³ It is problematic that this presumably universal model still is – and in most cases unwillingly – presented as the only

existing one. The same misinterpretation of the ‘public service’ concept feeds the idea of comparability, and often leads to drawing mono-causal conclusions based on the limited scope of the comparative research design. Consequently, the scope of research cases included is also mostly restricted to a series of ‘usual suspects’. Unsurprisingly, the BBC as the ‘mother of all broadcasters’ spearheads as a case for comparison. Western European, Scandinavian and Anglo-Saxon countries seem to be mainly included, while fewer Southern European broadcasters are represented, and Eastern European broadcasters, where the democratic notion of public service has a shorter tradition, are still often overlooked. Part of the explanation is that the long media-research tradition coincided with the establishment of public broadcasters and the liberalization of media markets, and the proximity of research sources and collectable data.

Thirdly, the concept of public service broadcasting has a normative dimension, and is employed for what Søndergaard described as ‘moulding reality in a certain way’.¹⁴ Hence, interpretation and conceptualization of public service broadcasting and its key values and standards is often highly ideological,¹⁵ paving the way for ‘battles of interpretation’.¹⁶ Concepts such as ‘public service’ have, since their establishment, been incarnated to serve strategic or political purposes and have been adapted and translated to legitimize activities or to oppose these very activities. The public service media concept, as coined by media professionals, scholars and regulators as a successor of the public service broadcasting, could be also considered a rhetorical instrument, aiming to legitimize multi-platform and full-portfolio strategies.

Contextualisation

When approaching public service broadcasting as a ‘*Unitas Complex*’, a second obstacle is context. Developments on the level of the broadcasting institutions, the activities and challenges they are dealing with, basically everything that forms the impetus for interesting comparison, is the outcome of a complex interplay of actors and circumstances and is always embedded in specific environments. Historical, political, economic, geographic, demographic, cultural-political and social contexts affect the specific situation and structure of media constellations, and public broadcasting systems in particular. What follows is that, on the one hand, it becomes very difficult to compare particular contexts; on the other hand, when engaging in comparing cases, one needs to include thorough contextualization in the analysis.

When looking more closely at a number of the usual suspects that are often the object of comparison, cases which might at first sight appear similar in outlook and structure – Scandinavian cases, the Dutch and British cases for example – tend to differ on some core constitutive elements. Even on the level of the basic organizational structure, variations are significant. The Dutch NPO,

for example, is constituted of a collection of broadcasting organizations, based on membership. In France, a division exists between radio and television in different public broadcasters. In the UK, public service considerations are given to commercial players as well. When looking at financing, various forms of financing appear in what we coin as ‘mixed financing’ models (e.g. Is product placement allowed? Licence fee or tax contribution? Re-distribution of advertising revenue to multiple players?). Furthermore, specific regional and regulatory circumstances for these same cases, also differ clearly (e.g. Belgian’s community regions of Flanders and Wallonia that are responsible for media policy).

Categorization

One of the most significant contributions to comparative media research stems from the work of Hallin and Mancini, which could be considered as a successor of Siebert, Peterson and Schramm’s groundbreaking *Four Theories of the Press* (1956), now considered outdated, but once highly influential for political and comparative analysis of media systems.¹⁷ Hallin and Mancini distinguished three models for media in Western Europe and North America: a ‘liberal’ model (by and large the UK and its former colonies), a ‘polarised pluralist model’ (mostly Mediterranean countries), and the ‘democratic corporatist model’ (Scandinavian countries, as well as Austria, Germany, Switzerland, Belgium and the Netherlands).¹⁸ The analysis itself was based on a ‘most similar systems design’ (MSSD) and focused on North America and Western European countries. Overcoming a Western-centric perspective was one of the initial drivers of Hallin and Mancini in developing the classification. However, while they were wary of a Western-centric approach, their classification was also limited in scope. Eastern and Central European countries were not included in the classification. While being praised for their important contribution in the field of media analysis, Hallin and Mancini’s classification has also been criticized.¹⁹

Classifications have also been conceived when examining how public broadcasters have coped with large-scale trends and challenges affecting their organization. Trappel for example, distinguishes three types in how public broadcasters reacted to the introduction of online media; Achille and Miège describe four ideal types of how public broadcasters have responded to the liberalization of media markets (partial confrontation, oppositional confrontation, identification, consolidation) and Jakubowicz presents a series of strategies of public broadcasters in response to the EU debate.²⁰ Another interesting recent large-scale study, conducted by Lowe and Nissen, sets out to compare public broadcasting in small countries.²¹ The question is, however, on what basis can research cases be defined as smaller countries: inhabitants; GDP; number of actors in the market? The situation becomes even more difficult when comparing large and small broadcasters. What features are constitutive: budget; audience

shares; the number of contracted people; the amount of money going to the broadcaster per taxpayer; etc.?

Indeed, following from the contextual factors described above, the categorization of broadcasting systems in ‘types’, based on structure or developments, is highly precarious. Making general claims on a group of cases and addressing them in their totality thus becomes practically impossible. In that sense, Humphreys’ critique on Hallin and Mancini’s classification could well apply to all categorizations. According to Humphreys, firstly, more elements need to be taken into account when categorizing media systems. When categorizing specific broadcasting regimes and making generalizations on the basis of that categorization, it is imperative to take specific historically-constituted specificities, as well as macro-economic and demographic indicators (GDP, inhabitants, etc.) into consideration. This has, for example, been markedly demonstrated when comparing small and large countries on the basis of their audiovisual industries.

It is necessary to be extremely cautious with generalizations on ‘West-European’ or ‘small West European’ and ‘large West European’ countries ... There is no such thing as a West European situation or West European problems, and therefore no general solutions to perceived problems.²²

Illustratively, in comparing audiovisual markets in Europe, ‘linguistic permeability’ has been coined as a contextual factor hampering comparability. In other words, small countries sharing their official language with other (often neighbouring) countries cannot be treated on the same footing as countries that do not share an official language, rendering it impossible to draw conclusions on differences between small and large, Northern and Southern, centre and periphery, or rich and poor, EU Member States. In an attempt to tackle these contextual factors, Trappel, Meier and Bruck categorized states on this *Kleinstaatlichkeit* or smallness. Various constitutive indicators for national markets were included to assess whether a nation could truly be called ‘small’. Similar contextual indicators need to be included when comparing public broadcasting regimes.²³

A second criticism Humphreys formulates on Hallin and Mancini’s model, equally relevant for all categorizations alike, is that, instead of developing ideal types, research should focus on a comprehensive set of variables and examine patterns of congruence between the different media systems, aiming to grasp the complex interplay of variables. Humphreys thereby points to the *sui generis* character of the analysed countries: the fitting of some countries into a specific type in the classification is problematic, given their specific contexts and heterogeneity. Hallin and Mancini themselves acknowledged this. France and UK for example, could according to them well be considered ‘mixed’ models.²⁴ The fact that classifications are often presented as ‘ideal types’ indicates the

difficulties of categorizing countries. In practice, only one country, or often none at all, corresponds with the ideal type.

A case for comparison?

Does this mean that comparisons can never overcome conceptual or contextual factors? And, then, why do we still need to invest in comparative analysis of public broadcasting?

First of all, differences in contexts need to be put in perspective by also pointing to the various similarities in the development of public service media. Many broadcasters share a common historical trajectory: politicization and establishment of a public broadcasting monopoly based on the spectrum scarcity argument; trends to liberalization and introduction of competition; autonomous and independent public institutions; the introduction of independent regulatory bodies; introduction of mixed financing; etc. In that sense, various trends and shifts affecting one particular broadcaster today also affect more public broadcasters today, and others tomorrow. It is precisely these similarities that make comparison interesting, or, bluntly stated, if all broadcasters were too different, no comparison would be possible. If broadcasters did not differ at all, there would be no need for comparison.

These similarities justify and increase the relevance of a comparative perspective to public broadcasting analysis. Apart from that, one can hardly overlook the relevant contributions from recent years that aim to provide comparative data, or at least comparative perspectives, and aim to overcome some of the hurdles described above. In that respect, the 'Euromedia handbooks' (1992, 1997, 2004), a collection of descriptions of national broadcasting regimes organized by the 'Euromedia Research Group', or the international handbooks of the Hans-Bredow Institute (providing data of media systems since 1957), could be seen as frontrunners.²⁵

Professionalization of the research tradition, the 'meetings of minds' and the development of research networks also instigated a broad comparative perspective of public broadcasting situations in various countries. Common challenges, trends and threats are discussed and compared. These networks have evolved into an important locus for public broadcasting evidence, and are often organized in close collaboration with broadcasting institutions themselves. Example of the latter is RIPE (Re-Visionary Interpretations of the Public Enterprise), which organizes bi-annual conferences on public broadcasting research. Other examples can be found in working groups of international media and communication studies associations, such as ECREA and IAMCR. The meeting of minds also generates output, conference proceedings, collected in edited editions. The RIPE publication, an edited collection of (mostly) case

studies or theoretical research from various countries, counts as a standard for contemporary public broadcasting research, offering a multidisciplinary and broad comparative angle of specific challenges that broadcasters are confronted with today. These meetings can thus contribute to developing semantic communities and common methodologies.

The same international conferences also aim at broadening the scope of public broadcasting research, opening up the pathway for various contributions of research on Asian, African, Latin-American and Central or Eastern European cases by stimulating and welcoming research and presentations from around the globe. Although the focus remains largely on the common denominator (Scandinavian cases, Northern and Western European countries), these widely-applauded efforts gradually lead to stepping away – albeit incrementally – from an Anglo-Saxon, or a Western-centric, approach in public service broadcasting research. A recent, promising contribution in that context stems from the Mapping Global Media Policy project which was conceived within the Global Media Policy Working Group (IAMCR). It sets out to monitor, categorize and analyse global trends in media policy.²⁶ Other recent contributions in research also aimed at broadening the scope of comparison by including Eastern and Central European systems in analysis,²⁷ or by emphasizing practices from African and Asian broadcasters.²⁸

The trend in media regulation towards increased accountability of public broadcasting performance, together with the need for broadcasters to emphasize their relevance and legitimize their activities based on empirical evidence, brought about a renewed research interest in comparative perspectives. Importantly, this research provides data that facilitates comparison of broadcasters' performance. Since the advent of the 'Television Without Frontiers' Directive and the establishment of the 'Audiovisual Observatory', member states are obliged to collect and provide necessary data in order to increase transparency and make comparison of national situations possible. Since the call for responsiveness from such regulatory bodies as Ofcom, more quantifiable data has been produced and been the object of comparison.

Public broadcasters themselves, in recent years, have also been eager in countering vague moral standards and concepts as 'value', 'quality', 'diversity' by translating these notions into concrete measurable instruments. Performance criteria, quality indicators (examples are the Quality Maps in Flanders and the Netherlands) and tests, such as the public value test, have been developed with the overall aim of providing an evidence-based, standardized approach to operationalize and grasp difficult values and activities.

Lastly, important contributions stem from looking at methods developed in other social sciences. Downey and Stanyer, for example, import the 'fuzzy set/Qualitative Comparative' Analysis (fsQCA) to compare developments in media. fsQCA is argued to overcome existing hurdles in comparative media

research.²⁹ It enables approaching variables in their complexity, and analysing the interplay between different actors and factors, allowing the drawing of conclusions on causality:

Rather than place all of our causal eggs in one basket (in Hallin and Mancini's case, the political system) ... fsQCA allows for the analysis of causal complexity through counterfactual reasoning. It allows researchers to examine different causal recipes and the consistency and coverage of their outcomes.³⁰

Case-by-case comparison as a way out?

Contrary to what might appear from the repeated use of the term 'comparative approach', no well-defined uniform or standardized method for comparative public broadcasting (policy) analysis exists. In fact, the methodological and thematic variety in comparative public broadcasting research is as diverse as the cases they set out to compare.

Roughly two forms of comparative research set-ups in public broadcasting research can be discerned. The first exists in comparative analysis of broadcasting constellations, aiming to compare key constitutive elements, and often building on quantifiable elements (parameters, or indicators). Often, these comparative studies take the form of a benchmarking analysis of large n-number of cases. They are systematic, easy to compare and relatively transparent. Disadvantages of this type often reside in problematic – i.e. oversimplified – operationalization of concepts into measurable, quantifiable data, and a lack of contextualization of cases. Another threshold is that data is often collected from contributing national sources, and is therefore not based on a standardized method. A recent interesting example, although not specifically aimed at public broadcasting, is the Media for Democracy Monitor (MDM).^{31, 32}

A second large type, which takes into account complexity and specific circumstances and often aims to focus on transitions in public broadcasting management, output or distribution, is the 'comparative case study' approach, focusing on transitions and constellations of actors and factors or focusing on a thematic subset of issues. Often, two or a select number of cases are included in the research set-up and are thoroughly assessed. Obviously, these cases hardly provide statistical generalization.³³ This is seldom the aim however. A lot of PhD research projects on public broadcasting (policy), include a geographic-comparative case design.³⁴

However, a third type in comparative approaches that might overcome some of the hurdles is what can best be described as the 'collected case study' approach. It has found its way through the dialectics of research, networking and international conferences, and collective publishing from public broadcasting research around the globe. This approach builds on the large tradition of case

study analysis in public broadcasting (policy) research and enables researchers to both conceptualize and contextualize the issues and research subjects and approach them in their complexity. As a collection of case studies, the research does not comprise standardized comparative methods, however it does entail a multi-methodical, interdisciplinary, open and holistic perspective to address policy issues, while employing a broader comparative perspective. In that sense, the comparative approach in this edited collection – assessing the ways public service media translate ‘value’ in legitimizing instruments such as the public value test by setting out from findings from different countries – could be seen as an example of what we call ‘collected case study’ approach.

Conclusions

This essay sets out from the apparent need for more evidence-based and comparative approaches to public service broadcasting practice in various countries. The public value test marks an interesting and increasingly important attempt to consolidate value through evidence. It also demonstrates the difficulties of operationalizing ‘value’ and concepts alike. As there is no such thing as *the* public service broadcaster, there was no standard approach to addressing public service broadcasting on a comparative basis and there is none for public service media either. The approach we coined as ‘collected case study’ provides the overall perspective to address public service media in this edited collection. The approach might outsmart obstacles of context and concept, and provide advantages in comparing challenges in the public service media project. It remains limited in terms of systematic comparison, however. A common ‘unified’ approach in comparing cases is no solution either. Only the divergence of methods and perspectives employed, and the interplay and dialectics between these, propels research on public service broadcasting. As such, the search for the Holy Grail in evidence-based policy and comparative methodology is much more significant than the Holy Grail itself.

Notes

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Chapter 3

The Public Value Test

A Reasoned Response or Panic Reaction?

Karen Donders

Since 2007, EU member states such as the United Kingdom, Germany, Denmark, the Netherlands, Norway and Austria have been compelled to implement an *ex ante* evaluation of public broadcasters' new media services (*in casu* Internet and mobile application services). Such an evaluation essentially evaluates the value for society and possible market impact of a new service. It precedes a necessitated government approval of distinct new services. Some member states are more advanced in their implementation of an *ex ante* evaluation. In the United Kingdom, which was the first to advance a so-called 'public value test', the BBC Trust and Ofcom have already conducted four tests. The German *Länder* – competent in the area of broadcasting – have executed over 30 tests (i.e. the 'three-step test') since 2007 for the ARD, ZDF and the numerous regional public broadcasting organizations. Other countries (including Denmark, Norway, Ireland, Austria, Belgium and the Netherlands) are also developing procedures to deal with their public broadcasters' activities and some of them are moving into the implementation phase thereof.

The spread of the British public value test to other EU member states has not been a 'natural' process, whereby some countries have valued highly the British initiative to deal with public broadcaster's shifting role in a new and increasingly complex media environment. Rather, it has been enforced by the European Commission. On the basis of the European subsidy rules, the European Commission has asked a number of countries to introduce an *ex ante* test similar to the British public value test. The Commission did so with the aim of ensuring fair competition and curbing private sector complaints to its competition authorities. These have indeed been rising sharply since 2003 and most complaints no longer exclusively stem from private broadcasters but also from publishers and Internet companies.

It is rather surprising and even disturbing for some scholars¹ and also public broadcasters to observe that an instrument that inherently curbs public broadcasters' independence to some extent and attaches a particular importance to

the market aspect of public intervention can be, and actually has been, enforced upon member states by the European Commission. Indeed, the introduction of an *ex ante* evaluation introduces a rather new (not to say revolutionary) approach to deal with public broadcasting policy. First of all, an *ex ante* test starts from the idea that public broadcasters should, above all, not harm private competition. Public broadcasting has in essence always been a policy project setting out from a wide social responsibility project in which market objectives are secondary to the public interest. Secondly, *ex ante* mandatory evaluations rely on stakeholder involvement.² Hence, the spread of this instrument formally ends an evolution, following which public broadcasting policy is no longer developed after purely bilateral negotiations between public broadcasters and respective governments (complemented with informal lobbying from private companies), but is, rather, the consequence of a formalized multi-stakeholder environment in which different relevant stakeholders (including the private media sector, citizens, socio-economic groups, cultural institutions) have their say on the breadth of public broadcasting policy. Thirdly, the enforcement of an *ex ante* test upon different member states seems to result in a (even if perhaps superficial) European-led harmonization of public broadcasting policy. The latter is traditionally entrenched within national historical, cultural, economic and political traditions, however.

Argument

This chapter does not seek to evaluate the *ex ante* evaluations of the different EU member states. Several contributions to this volume are devoted to that. Rather, it aims to assess how the idea of an *ex ante* evaluation gained ground within the European Commission and whether the export of the British public value test was grounded in a solid and logical attempt to better regulate public broadcasters' expansion onto the Internet. The argument is that the European demand for an *ex ante* test of new media services was anything but a rational answer to challenging evolutions in the media sector. On the contrary, it was a panic reaction to deal with aggressive private sector lobbying against a new media remit of public broadcasters and member states' reluctance to adequately redefine the public broadcasters' role in the digital age.

Structure

The chapter consists of five parts. First, it discusses the conflicting visions on public broadcasters' evolving into multimedia institutions. Second, it depicts the consequential events of the European Commission asking for and enforce-

ing, and member states implementing *ex ante* tests for the evaluation of public broadcasters' new media services. Third, it is evaluated whether or not the timeline uncovered in Part 2 justifies the European Commission's objective reasons to ask for an *ex ante* evaluation. Fourth, as the chapter argues that this is not the case, it explains what then motivated the European Commission to affect public broadcasting policy in an intrusive way. Finally, some conclusions and recommendations are outlined.

Public broadcasting as a gap-filling exercise or an evolution towards public service media

The debate on state subsidies for public broadcasting at the European level is to be situated within national and also academic debates on the future course of public service broadcasting in Europe. Public broadcasters are evolving into some sort of public media service provider (i.e. not only offering public radio and television services, but increasingly expanding activities to new media markets). Often policy makers have failed to recognize this ongoing transition by adapting regulatory and control instruments for public broadcasting. This lack of up-to-date and, above all, adequate regulation (meeting the challenges of a highly-complex digital media environment) is caused by practical circumstances (such as the priorities set on governments' agenda, budget constraints), but is also due to the absence of a clear vision for the future of public service broadcasting. Is public service broadcasting to evolve in public service media, public service content or public service communication?

Several scholars in the field of communication science, political sciences and economics have provided insights on the future course for public broadcasting organizations. Contributions can be divided into two broad categories of views: a social responsibility perspective and a market failure vision. Of course, this categorization implies some level of simplification (which is useful in order to set the contours of the debates on the public value test) as actual debates take place between people with positions that are often more nuanced or difficult to categorize.

The social responsibility perspective sets out from the assumption that public broadcasting organizations are necessary in order to fulfil certain public interest objectives. Most importantly, public broadcasters have to foster democracy by fostering informed citizenship and public debate. In addition, the necessity for and the main goals of public broadcasting do not fundamentally alter in the digital age. On the contrary, the ambition remains the same, but is spread over all relevant platforms and public value delivered through an increasing variety of services (ranging from traditional programmes to on-demand, pod-cast, social networking services, etc.). This perspective explicitly rejects the idea that the

new media environment makes public intervention in the market obsolete and sticks to Garnham's assertion that the justification of public broadcasting 'lies in its superiority to the market as a means of providing all citizens, whatever wealth or geographical location, equal access to a wide range of high quality entertainment, information and education ...'.³

Market failure views on the future of public broadcasting disagree with such a vision and generally praise the superiority of the market over government intervention. Scholars that fit within this perspective generally assume that market failure decreases as a consequence of digitization and convergence. Private initiative in itself will cater for the vast variety of the audience's preferences. Hence, there is a declining need for government intervention in the broadcasting market. As a consequence, public broadcasters should not expand activities to the Internet. Such an expansion is considered not only unnecessary but also most unwelcome, as it would distort the development of a healthy, well-functioning market. In addition, broadcast activities should also be confined to a number of 'difficult' genres like news, historical documentary and culture.⁴ A most extreme future scenario for public broadcasters would be their abolition all together and, potentially, the replacement of public broadcasting organizations by a so-called Public Service Publisher system in which public service content is commissioned on the basis of a competitive tender procedure.⁵

European subsidy rules and the golden-egg public value test

In 2004, the BBC launched the idea of a test for its new media services in the strategic policy document *Building Public Value*. In a pro-active attempt to curb private sector attacks on the BBC's role in the digital media ecology, the BBC suggested significantly testing services vis-à-vis their public value (i.e. the way in which a proposed new service contributes to the public purposes of the BBC as defined in the Royal Charter) and their possible negative and positive market impact. This idea was taken over by the legislator and, up until the end of 2006, the BBC Trust and Ofcom – jointly responsible for executing the test – worked on a procedure of evaluating the admissibility of new services. In 2007, the first test of the BBC's on-demand services (including the iPlayer) was conducted and, after adaptations to overcome private sector concerns, it resulted in approval of the proposed new service.

Although interviewed experts and stakeholders⁶ cannot exactly indicate when the public value test was picked up by the European Commission, they all agree that the European Commission first mentioned the possibility of undertaking a test for public broadcasters' new media services at the beginning of 2005. Within the framework of the European Commission's investigation of the funding of the German public broadcasters, a letter of May 2005 from the

German *Länder* indeed mentions that the latter are not inclined to implement a test. Indeed, the *Länder* argue that the requirement of such a test does not respect the division of competences between the European Commission and the member states in the area of public broadcasting. The latter are solely competent in defining the public broadcasters' role, deciding on funding and enforcing regulation. Conforming with the Amsterdam Protocol (annexed to the Treaty on the Functioning of the European Union), the European Commission's competences remain limited to checking for manifest distortions of competition by public broadcasters. What is more, the German *Länder* contend that a test of public broadcasters' new media services would go against the principle of independence.

Nevertheless, due to a divergence of opinions between the German *Länder* (of which some are more supportive of private sector arguments), the *Länder* and the European Commission agreed to implement a three-step test that mimics the basic features of the British public value test. The European Commission thus insisted on implementing a test that was not yet fully developed and had not, at the beginning of 2005 (when it first asked for it within the framework of the German state aid case), even been put into practice. As the whole idea of having an *ex ante* evaluation for new media services rests on the conviction that public broadcasting policy should be based on evidence, the European Commission itself can be criticized in that it had no evidence whatsoever that an *ex ante* evaluation of new media services serves the goal of more fair competition.

In any case, after its decision on the German *Länder's* funding of public broadcasting (24 April 2007),⁷ the European Commission insisted on the introduction of an *ex ante* evaluation in Flanders (the Northern part of Belgium), Ireland, Austria and the Netherlands. All these countries – albeit some after serious conflicts with the European Commission – eventually had to agree to a test.

The European Commission even further consolidated the *ex ante* evaluation for new media services by introducing it in a soft law document specifying with which guidelines the funding of public broadcasting has to comply. This document, commonly referred to as the Broadcasting Communication, was published on 2 July 2009. In spite of furious criticism from some member states, public broadcasters and a number of scholars, the Broadcasting Communication proposes that an *ex ante* evaluation of new media services is recommendable and will – at least in the Commission's opinion – lead to less European 'meddling' with public broadcasting.

In short, the idea of an *ex ante* evaluation for member states other than the United Kingdom emerged within the framework of the European Commission's state aid policy at the beginning of 2005. It spread to most Western European member states of the EU by the end of 2009 and in fact consolidated a soft law document that served as a guideline for 'good behaviour' for all EU member states.

Rationality at the rhetorical level

The prying question is why the European Commission focused so much on the *ex ante* evaluation? Several reasons were provided by the Commission itself. First of all, it insisted on reducing private sector complaints with its competition authorities. The latter were overwhelmed with private broadcasters', publishers' and Internet companies' allegations of illegal state aid. In the Commission's opinion, an instrument balancing public value and market impact concerns at the national level would make a lot of these complaints redundant. Hence, the Commission assumed that an *ex ante* evaluation would offer a national level of grievance and shield its own services from never-ending waves of complaints. Nevertheless, a number of experts have argued that the test actually offers a concrete basis for private media companies to question public broadcasters' activities in new media markets. In that sense, complaints might even increase where private companies feel the outcome of *ex ante* tests is not serving their interests. Indeed, interviews with some private sector representatives indicate that (certainly in bigger member states) there is willingness and even determination to take matters back to 'Brussels' if deemed necessary.

Secondly, the European Commission also said that the new Audiovisual Media Services Directive (which updates the 1989 Television Without Frontiers Directive and aims to realize an internal market for audiovisual media services) asks for an update of the state aid guidelines for public broadcasting. Again this argument seems flawed as there is no legal reason why the new Directive makes an update of a soft law instrument indispensable. There is no procedural link between the two instruments.

Thirdly, and related to the former argument, it was also maintained that technological evolutions required an update of the 'old' (2001) guidelines for public broadcasting subsidies. However, these guidelines already accepted a remit encompassing new media services. In fact, when adhering to the principle of technology neutrality (much propagated by the European Commission in other policy domains), public broadcasting should by no means be evaluated on the basis of its platforms of activity.

Finally, public broadcasting representatives especially rejected the idea of a European-enforced *ex ante* evaluation on the basis of the Amsterdam Protocol. The latter explicitly recognizes the autonomy of member states to organize a system of public broadcasting that contributes to the social, cultural and democratic wellbeing of society (in so far as such a system does not overly distort competition in the internal market). In spite of the dominant assertion that the Amsterdam Protocol shields member states from too much European Commission intervention and is a recognition of a social responsibility model of public service broadcasting, the European Commission asserted that the Amsterdam Protocol was in fact in need of an 'Amsterdam test'⁸ – i.e., a test balancing the

social, cultural and democratic contributions of particular services on the one hand and their market impact on the other.

Irrational behaviour prevails

Was the European Commission's demand for an *ex ante* test indeed a rational and intended reflection of the Amsterdam Protocol? Several events seem to suggest otherwise.

First of all, the European Commission asked Germany, Flanders and Ireland to introduce an *ex ante* test before it ever spoke of the 'Amsterdam test' which seemed to be a concept invented only for the sake of getting the 2009 Broadcasting Communication approved. The 'Amsterdam test' as a concept provoked rather cynical reactions with member states and public broadcaster representatives.

Secondly, the European Commission asked for a test as an expression of its desire to have a more evidence-based policy for public service broadcasting. However, when asking for a test in the German, Flemish, Irish and Dutch cases, there was no 'evidence' suggesting such a test was an optimal way of, firstly, ensuring compliance of public broadcasting regimes with the EU's internal market rules and, secondly, regulating all of the public broadcasters' new media activities. The BBC iPlayer test was only concluded in April 2007. At that point the German case was closed and negotiations on the Irish, Flemish and Dutch cases had already dealt with the possibility of introducing an *ex ante* test in these countries' public broadcasting systems. Hence, this leads us to conclude that, without any empirical evidence, the European Commission asked member states for a more evidence-based approach.

Thirdly, in many State aid investigations, it was apparent that the European Commission was not entirely knowledgeable about the ins and outs of an *ex ante* test and the ways in which different member states were in fact 'making' their own tests. Although the European Commission stresses that tests only have to live up to a set of shared criteria, it seems that a number of tests *de facto* – they perhaps do in theory – do not even live up to some basic principles. For example, in Flanders the government indeed defined the criteria following which a service is new and, hence, requires an *ex ante* test. However, the Flemish government decided to define new by making a list of services that are not new. This list is so extensive – admitted by most involved stakeholders in Flanders – that the possibility of having a test in practice is almost nil (see chapters 15 and 16 on Flanders). In the Netherlands, the entire procedure of having a test is, for the large part, controlled by the Minister of Media. The European Commission, however, always emphasizes the necessity of an independent body conducting evidence-based evaluations. It remains

to be seen how the Dutch system transposes this into practice when a policy maker is essentially firmly in control of this system. It is also not clear what the desirability is of a scenario in which politicians assess services on a case-by-case basis. Another and final example to illustrate that an *ex ante* test can have many faces is Germany. The German *Länder* have agreed to a rather extensive procedure and plenty of tests. However, concepts of services – even if lengthy – remain rather vague, procedures untransparent, and the number of tests tires all involved stakeholders and risks lowering the quality of the procedure. This is to be deplored – also given the fact that a number of services are being tested (for example, streaming of news bulletins) which are allegedly difficult to place outside the public service remit. In spite of all these deficiencies, the European Commission continues its plea for *ex ante* tests.

Finally, and based on the above observations, it seems that the European Commission, above all, wanted to silence private sector complaints with its demand for an *ex ante* evaluation. It remains to be seen, however, whether deficient tests will not provoke more complaints.

Conclusion

Does this mean that the *ex ante* test is indeed dead, as proclaimed by one of Flanders' private broadcasting representatives (see chapter 16 in this volume)? Is an *ex ante* test a useless instrument to guide public broadcasters' expansion into new media environments?

Far from it. The *ex ante* instrument has an intrinsic value, provided its procedure is duly developed and without an implicit desire to sidetrack the European Commission. We are not developing *ex ante* tests because Europe wants it, but public broadcasters and the media market at large need it. Consequently, public broadcasters should seize the *ex ante* test as a tool that can advance its project, not as a 'hostile' instrument. They should actively reflect on how to elaborate on the public value assessment of new services, placing these more firmly within their overall public service media strategies. In addition, public broadcasters should think more in-depth about the ways in which they stimulate the market, that is also what they do and, perhaps (because we do not know), the positive effects on the market outweigh the negatives. Above all, *ex ante* tests should be seen by public broadcasters as tools for collaboration. Concerns of stakeholders (public and private) should be taken into consideration and carefully considered in developing further public service media strategies.

Notes

1. Bardoel, J., & Ferrell Lowe, G. (2007) 'From public service broadcasting to public service media. The core challenge', in G. Ferrell Lowe & J. Bardoel (eds.) *From public service broadcasting to public service media* Göteborg: Nordicom (pp. 9–28).
2. Donders, K., & Pauwels, C. (2010) 'The introduction of an *ex ante* evaluation for new media services: "Europe" asks it or public broadcasters need it? *International Journal of Media and Cultural Politics*, 4(2), pp. 133-148.
3. Garnham, N. (1990) *Capitalism and communication: global culture and the economics of information*. London: Sage Publications, p. 120.
4. Armstrong, M., & Weeds, H. (2007) 'Public service broadcasting in the digital world', in P. Seabright & J. von Hagen (eds), *The economic regulation of broadcasting markets: evolving technology and challenges for policy* Cambridge: Cambridge University Press, (pp. 81–149).
5. Peacock, A. (2004) 'Public service broadcasting without the BBC?' in A. Peacock (ed) *Public service broadcasting without the BBC?* London: Institute for Economic Affairs, (pp. 33–53).
6. Between December 2006 and April 2011, the author conducted over 70 expert interviews with representatives of public broadcasters, private broadcasters, publishers, the European Commission, regulators, scholars and government representatives.
7. European Commission. (2007, 24 April) *State Aid Case E 3 / 2005 – Aid to the German public broadcasters*. Available at, http://ec.europa.eu/competition/state_aid/register/ii/by_case_nr_e2005_0000.html#3.
8. Kroes, N. (2008) 'The way ahead for the Broadcasting Communication'. Speech at the Conference on '*Public service media in the digital age*', 17 July, Strasbourg.

Chapter 4

Ex Ante Regulations, the EU and its Member States *Back to Brussels?*

Ross Biggam

After two years of formal and informal consultation with stakeholders, and negotiation with member states, the European Commission published its revised Broadcasting Communication in October 2009.¹ This was an update on the 2001 Broadcasting Communication. Although the 2009 Communication codifies existing Commission case law on a range of issues relating to state aid in the broadcasting sector, the main innovation in the Communication is the introduction in paragraph 88 of 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 *ex ante* requirement involves two assessments: (a) whether the proposed new services deliver adequate 'public value' in terms of meeting the democratic, social and cultural needs of society and (b) what impact the proposed new service would have on the market.

This chapter examines why an update of the 2001 Communication was necessary, recalls some of the debates leading up to the adoption of the 2009 text and asks whether the solutions, which contain a significant element of compromise between various parties, adopted in the October 2009 text will be effective enough to fulfil the Commission's intention that new services proposed by public broadcasters would in the future be scrutinized more in national capitals than in Brussels.

Revising the 2001 Communication to reflect a changed media environment

The need to introduce this new text might have been thought uncontroversial. The 2001 Communication had been instrumental in breaking an impasse in which the European Commission had been placed in a very uncomfortable position, with conflicting demands from other EU institutions: on the one hand, the European Court condemning the Commission for failure to act in some long-running cases filed by private broadcasters,² on the other hand, the member states reasserting their prerogatives over all questions of public service remit, most notably in the adoption of the Amsterdam Protocol in 1997 which confirmed that:

the provisions of the Treaty shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting ... for the fulfilment of the public service remit as conferred, defined and organised by each Member State, 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

Only through the carefully-worded 2001 Communication had it been politically possible for the Commission to meet the conflicting demands of the Court and the member states, and begin to establish a corpus of precedent in the area of state aid to broadcasting, precedents which were notably cautious in their deference to member states on any issues touching on the public service remit.

Yet within a few years of its adoption, the 2001 Communication was outdated in one critical aspect. The Communication applied the classical tools of entrustment, supervision, transparency and proportionality to assess whether state aid was compatible with the Treaty – but only for broadcasting services. The Communication was largely silent on how to apply competition law principles to new media ventures, which fell outside the classical definition of ‘broadcasting’ and, in some member states at least, were therefore not necessarily regarded as being within the remit of the public broadcaster. The debate about the appropriate scale of state intervention in the online media market was ‘live’ at national level as early as 2004, when the government-commissioned Graf Report in the UK concluded that many BBC online activities were inadequately distinctive from what was offered on the market:

Sites covering areas such as fantasy football and local entertainment listings were not sufficiently distinctive from commercial alternatives, or were inadequately associated with public service purpose to be justified by the remit.³

Emerging EU case law on public broadcasters and new media

Shortly thereafter, the issue of public broadcasters' online activities was placed on the European Commission's agenda with the launch in February 2005 of a full DG Competition enquiry into the new media activities of ARD and ZDF, following earlier complaints from the German market. Cases filed from Austria and Flanders around the same period also focused on the expansion of public broadcasters into new areas of activity (a sports channel, in the Flemish case). Indeed, the European Commission had identified a potential issue here many years before in a 1997 Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation:

... if state funds intended to support a public broadcaster in fulfilling its public service mission were used to leverage and cross-subsidise these new activities or the use of new technological platforms, such as the internet, then such practices would be subject to the Treaty rules on competition and on the freedom to provide services.

With the 2001 Broadcasting Communication no longer able to guide broadcasters (public or private) and member states as to the appropriate limits for state intervention in new media, there was a risk of a significant legal vacuum developing. The argument was advanced by some public broadcasters that there was in practice no legal vacuum if the public service mission were to be understood 'dynamically', i.e. that the broadcasting remit should be extended to include online. This argument has some logic – after all, nobody was arguing that public broadcasters should not move into digital – but comparing public broadcasters' expansion online with 'the move from black and white to colour' understated not only the scale of the move online but also the changed nature of competition from the monopoly era of black and white television to a dynamic, multi-platform media industry. In particular, the changing nature of public broadcasters' activities meant that they were no longer competing only with commercial broadcasters but also increasingly with newspaper groups. Changes in the print media market, not least the migration of classified advertising to online sites, meant that there was an urgent need for newspapers to be present in the online field. But newspaper groups were attempting to colonize exactly the same territory – the provision of reliable, accurate news content online – as broadcasters, including, critically for these purposes, publicly funded broadcasters. Additionally, public broadcasters, whether by legal mandate or by tradition, were always going to favour free-of-charge access to their content – in opposition to the preferred model for the print sector. Again, the strategic challenge for the newspaper industry had been recognized early:

How can print or broadcast media owners hope to recoup investment in new media by persuading consumers to pay for content which is being given away free of charge by competitors who are wealthier, less accountable, and less regulated?⁴

Underlying much of the hostility shown by some newspaper groups towards public broadcasters' plans was a clash of regulatory and market cultures. Unlike commercial broadcasters, newspapers never had to compete directly with publicly funded media (indeed, the very notion of a state-funded newspaper is alien to western democratic thinking). This conflict became sharper as newspaper groups' online strategies came to include a prominent role for audiovisual news reports and other video content – here, the fact that the print media has no history of the form and detail of content regulation imposed on the audiovisual sector led to a high-profile opposition by many print media groups to the European Commission's proposal to also include a tier of regulation for non-linear audiovisual content services in the Audiovisual Media Services directive. And it is noticeable that print media groups were at least as active as private broadcasters in filing the wave of cases decided in 2007–2008 which introduced the notion of an *ex ante* test to European media law.

As already hinted at, the first of these cases was the 'state aid compromise' of 2007 between DG Competition and Germany. Here, the Commission may be thought to have broken new ground by insisting on the introduction of a national procedure – *ex ante* evaluation – for the examination of the connection with the cultural, social or democratic needs of a society (sometimes described as the 'Amsterdam criteria', after the wording in the Protocol).

Implicitly, the model for some of DG Competition's thinking appears to have been the BBC public value test which was introduced in the UK without recourse to EU intervention,⁵ but rather as a product of the changes introduced, at very short notice, as a consequence of the Hutton Report.⁶ These included the arrival of a new BBC Director General who, on assuming office, immediately launched a manifesto called 'Building Public Value' aimed at restoring the values and purposes of the BBC. At the same time, the fallout from Hutton included the creation of a new regulatory structure (the replacement of the BBC Governors with the BBC Trust) which sought to differentiate itself from the Governors by acting more as a 'regulator' of the BBC and less as a 'cheerleader'. Given the concerns raised by UK media interests about the extent and scale of the BBC's new media ambitions, not least in the context of the Graf review, this issue was an early priority for the Trust, leading to the establishment of the public value test in 2006. Despite its name, the public value test actually encompasses both parts of the *ex ante* test: the public value and the market impact of the proposed service are each examined, albeit in separate procedures, and then weighed against each other.

After the German compromise, the requirement for a form of *ex ante* scrutiny prior to allowing publicly-funded operators to launch new media ventures became the usual practice of DG Competition in closing competition cases (Austria, Ireland, Flanders). In each of these decisions, the Commission retained the delicate balance struck in the 2001 Communication – and, indeed, in the Amsterdam Protocol itself – and introduced competition law tools such as market impact assessments while simultaneously taking care to reassure member states and public broadcasters that the content and scope of a public service remit remained, assuming no manifest error, a matter of national competence.

Reactions to the proposed new Communication

Commission thinking throughout this period had been that the 2001 Broadcasting Communication was indeed in need of a review, but that it would be preferable to wait until sufficient experience had been gained from the cases before issuing a draft text for comment.

The Commission proceeded cautiously. The opening of the public consultation in January 2008 was accompanied by a fact-finding questionnaire addressed to stakeholders (although clearly DG Competition was already in possession of much of the relevant data for at least those markets which had recently filed cases). Politically, the Commission initiative may have been at risk of being overshadowed by the announcement in the same week, of President Sarkozy's plans to radically restructure the funding and remit of France Télévisions, not least by abolishing advertising⁷ on the French public channels and replacing the lost revenue partly through a series of new taxes on some private broadcasters and telecommunications operators. However, with over 120 responses to the consultation, including 23 member states, the importance of the possible new Communication was clear.

Stakeholders divided along predictable lines in their responses to the draft Communication. Public broadcasters, as noted above, argued that the 2001 Communication was adequate and also that 'it seems doubtful whether there is a legal basis for incorporating requirements regarding *ex ante* evaluation into the Broadcasting Communication'.⁸

In particular, public broadcasters questioned whether introducing a market impact assessment would not run the risk of defining public broadcasters' new media activities with reference to 'market failure'.

Commercial broadcasters in contrast argued that not only should 'the revised Communication ... indeed clarify member states' obligations to carry out *ex ante* evaluation of proposed expansion by pubcasters into new areas of business' but also that 'if the revised Communication also includes meaningful rules on

procedural, institutional and substantive aspects, then this would be a significant step forward in introducing an element of transparency into the system'.⁹

Member states' responses to the formal consultation were mixed – Commissioner Kroes summarized their responses as:

Many Member States oppose a reform because they think the 2001 Communication has worked well, yet a significant number believe that the right reform would enhance legal certainty for the benefit of all stakeholders.¹⁰

The most important move by those member states opposed to reform happened at a Conference on 'Public Service Broadcasting in the Digital Age', convened by the French Presidency of the EU in July 2008. With all member states' officials invited to the Conference, a paper drafted by the Dutch Ministry of Culture entitled 'Main Principles for a Revision of the Broadcasting Communication (BC)' was circulated among national officials. The paper quickly gained support from a number of member states, both at the Strasbourg Conference and afterwards, possibly showing that opposition to the text had increased since the consultation referred to by Commissioner Kroes.

This paper 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. In line with the EBU response, the paper argued that 'in line with the principle of technological and platform neutrality, the Broadcasting Communication should acknowledge that in the digital media landscape the public service remit can include all electronic content'. On *ex ante* regulation, 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.

The Dutch paper concluded that as the key principles for a revised Communication 'are already in place in the 2001 Communication, there is in our opinion only need for small changes in order to adapt it to the technical developments of the digital age'. 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 Dutch paper was never formally discussed by the Council of Ministers, as by the time of the Culture Council in November 2008 the Commission had issued a further consultation, this time with a draft Communication, and had invited the member states to a multilateral state aid meeting with DG Competition at which the draft Communication would more appropriately be discussed.

The European Parliament was the only EU institutional actor which was silent during the process. Although traditionally a strong supporter of public

broadcasting, the European Parliament was unable to express any view on this dossier as the imminent European elections (June 2009) meant a heavy backlog of legislative dossiers which took priority over files such as the draft Broadcasting Communication, on which the Parliament did not enjoy co-legislative powers. The many Members of the European Parliament who wished to express an opinion were able to organize hearings along committee or political group lines (the committee responsible for state aid, Economic and Monetary Affairs, was preoccupied with the global economic crisis but the Culture Committee and the two main political groups, the EPP and the Socialists, organized hearings in January, March and April 2009 respectively) but these could not give rise to any binding statement of the Parliament's view.

Adoption of the 2009 Communication

If the Dutch paper was never formally adopted, its influence can be seen in the differences between the first draft text put forward by the Commission in November 2008 and the second draft proposed in April 2009. As the Commission confirmed when publishing its second draft, the text would now 'leave member states more flexibility for fitting their specific broadcasting system into the common framework, whilst continuing to ensure a level playing field'. Commissioner Kroes had made clear, notably in a speech to the Dutch Parliament in March 2009, that the views of member states would have to be taken into account. The main substantive concession made to the member states was the weakening of the firm position taken by DG Competition in the first draft on the possibility of publicly-funded broadcasters accessing pay-TV revenues (DG Competition had suggested in the first draft that 'special vigilance' would be required for such ventures).

On *ex ante* regulation, the Commission managed to retain 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.

Although the Commission did invite stakeholders to submit – for the third time – their views on the new draft, the concessions made by the Commission were evidently enough to satisfy the member states, as the final version adopted on 2 July 2009 (and published in the Official Journal in October) did not contain any further substantive changes from the April draft.

National implementation and experiences

The 2009 Communication is also interesting from a structural viewpoint in that it explicitly shifts the burden of regulation in this area to the member states. As paragraph 96 of the Communication states:

The Commission considers that it is in the first place up to the national authorities to ensure that public service broadcasters respect market principles. To this end, Member States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.

As Commissioner Kroes made clear at the Dutch Parliament, ‘interventions by Brussels can be avoided, once member states start assessing not only the public value but also the actual market impact of a new state financed media activity’.

However, the legal instrument of a Communication, in contrast to an EU directive, does not give rise to an obligation on the part of member states to inform the Commission of their implementing measures. And, two years on from the adoption of the Communication, implementation appears to be patchy. While there is at present no up-to-date, authoritative analysis of what is by definition a rapidly changing landscape, from various studies carried out to date it appears that some form of *ex ante* scrutiny has been put in place by eight EU member states (Austria, Denmark, Finland, Germany, Ireland, Netherlands, Sweden and the UK), one EEA state (Norway) and one devolved regional government (Flanders). This is a disappointing total, particularly as the period since the adoption of the Communication saw many national parliaments dealing with media legislation, as the obligations under the EU Audiovisual Media Services Directive had to be transposed at national level.

In a minority of countries which have not implemented anything, it may be the case that pressures on public finances mean that no new media ventures necessitating an *ex ante* test have been proposed by publicly funded operators.

It is too early to comment on the quality of *ex ante* scrutiny carried out at national level. In some of the ten markets listed above, while the statutory powers may have been granted to the regulator, no actual tests have yet been conducted. Other markets such as Ireland have only had one test and, as a result, the examples which could be collated so far would be almost exclusively from the UK and Germany, two large markets with very well-financed public broadcasters.

However, the limited scope of implementation of *ex ante* regulation could pose problems in the years ahead for all interested parties. *Ex ante* tests appear only to have been introduced in those North-West European markets where the public broadcasters are traditionally dominant (audience share for publicly-funded TV is at least 30 per cent in each of the ten markets quoted above, high by European standards and a reflection of the strong financial position of these operators). For commercial operators, *ex ante* scrutiny particularly in markets

where the public broadcaster is financially and politically secure gives rise to the risk that *ex ante* scrutiny will become mere legitimization of the public broadcasters' expansion plans, particularly 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 clear risk that further cases will be filed at DG Competition by broadcast or print competitors in 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.

The scenario of further cases being filed in Brussels is not welcomed by anyone: it is expensive for complainants, politically undesirable for member states and time-consuming for all parties, including DG Competition. But in the absence of meaningful implementation of the Communication across the EU in the next two year or so, it seems unavoidable. In which case one would have to conclude that the promise of the Communication – for a simpler, cheaper and quicker resolution of these issues at national level – has not been delivered.

Notes

1. European Commission (2009) *Communication from the Commission on the application of State aid rules to public service broadcasting* [OJ C 257/1 27.10.2009]. Brussels: European Commission. Available at, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:257:0001:0014:EN:PDF>.
2. European Court of Justice (1998) *Gestelevision Telecinco v Commission* [Case T 95/96, judgment of 15 September 1998].
3. Timms, D. (2004, July 5) *BBC 'should close websites'*. Available at, <http://www.guardian.co.uk/technology/2004/jul/05/media.newmedia>.
4. World Association of Newspapers (WAN) (2003) Annual Conference.
5. The BBC's expansion into 24-hour news had been approved by DG Competition in the late 1990s, and publishers of educational software had raised concerns with DG Competition about the BBC's activities in that market, but there was no 'horizontal' complaint about the BBC's activities from the UK commercial sector.
6. A judicial enquiry into the events leading up to the death of David Kelly, a former UN weapons inspector in Iraq. Mr Kelly had been in contact with BBC journalists who reported that the government had knowingly exaggerated a report into weapons of mass destruction and Iraq. Hutton cleared the government of wrongdoing, while the BBC's processes were strongly criticized, leading to the resignation of the BBC's chairman and Director General.
7. While the broad outlines of the Sarkozy plan have been implemented, at the time of writing off-peak advertising on France Télévisions has yet to be phased out.
8. EBU (2008) *Response to the Commission's questionnaire on the revision of the Broadcasting Communication*. See also ARD presentation at Presidency Conference in Strasbourg, July 2008.
9. ACT (2008) *Response to the Commission's questionnaire on the revision of the Broadcasting Communication*.
10. Kroes, N. (2008) 'State aid for broadcasting', *Medienforum Cologne*, 9 June, Cologne.

Chapter 5

Public Value, the BBC and Humpty Dumpty Words

Does Public Value Management Mean What it Says?

Richard Collins

'When I use a word', Humpty Dumpty said in rather a scornful tone, 'it means what I choose it to mean – neither more nor less'.¹

Why invoke *Alice Through the Looking Glass*' Humpty Dumpty when considering broadcasting and public value? Because in the UK media context the term public value signifies both a formal regulatory and management instrument, the public value test (applied only to the BBC), and also a norm or principle intended to underpin the whole range of the BBC's output and activities. In consequence there is a distinctly Humpty Dumptyish quality to the term 'public value' when used in a UK broadcasting context – at times it means one thing and at other times it means something entirely different.

Below, I will outline the development of the BBC's public value doctrines, doctrines which have proven influential in the wider context of European public service broadcasting – and the contradictions in the unfolding of this public value scenario. I argue that though the public value test (PVT), which was born out of the BBC's embrace of a then novel and fashionable public sector narrative about a decade ago, has delivered real benefits, the BBC's particular mode of implementation of public value management doctrines involved losing an important potential to revivify the BBC, and general public service broadcasting, policy and practice.

BBC commitment to a normative public value doctrine first surfaced around 2004². The first, BBC Trust administered, public value test took place in 2007 (in respect of the BBC's proposals for on-demand services). The introduction of a public value test in the BBC responded to a variety of forces:

- First, and positively, a general 'New Labour' Government interest in fostering innovation in public sector management.
- Second, and negatively, a growing belief that the growth and profile of the BBC should be subject to more stringent external scrutiny than the,

then current, Department for Culture, Media and Sport (DCMS) ‘approvals’ procedure.

- Third, also negatively, the European Union signals, e.g. in the Altmark Trans case of 2003 and the European Commission’s judgement in the 2003 Research Machines’ state aid case against the BBC’s digital curriculum initiatives that established public sector policies and procedures, whether in the UK or other member states, did not always satisfy EU norms and required to be changed.

Looking forward, the BBC’s public value test clearly influenced the adoption in Germany of the *Drei-Stufen-Test* and equivalents elsewhere in the EU. But, looking backwards, the public value test owes, some at least, of its origins to a quite different set of forces – notably Mark Moore’s (1995)³ advocacy of a new form public sector management – public value management.

Mark Moore and the translation of public value theory into British administrative practice

The US scholar and Harvard management theorist Mark Moore first formulated the idea of public value management. Moore proposed that public sector managers could revivify ossified institutions and practices by working with users. Public value management would re-orientate public bodies to ‘ends’ rather than to ‘means’ and thus go beyond ‘hitting the target but missing the point’ through bottom-up engagement with users (co-production) and supplier competition. Moore’s theory was transposed into UK practice as part of Tony Blair’s first New Labour administration (1997–2005).⁴

Moore’s public value management was a reaction to the then fashionable new public management (NPM)⁵ theory: re-figuring public bodies in the image of the private sector, NPM sought to address endemic public sector problems – notably producer ‘capture’ (making public sector bodies serve those who worked in and controlled them rather than users) and the lack of responsiveness and accountability to users of top-down ‘command and control’ public sector governance. NPM was meant to remedy inefficiency and a lack of responsiveness to users but, for its critics, wrenched public bodies into an inappropriate ‘privatized’ (even if not actually privately owned) stance with accountability to users based on an empty purchaser/provider relationship between unequals.

Public value, with its ethos of co-production – that is, partnership between users and providers potentially combines downward accountability to users, but to users as citizens rather than as subjects or consumers. It aspires to reassert the public in organizations which had, under NPM, become excessively privatized. Moore’s doctrine potentially made public value a messianic

slogan for reinvigorating the public sector through a form of self-organizing, collaborative governance, or what Moore calls ‘co-production’⁶ in which users and providers collaborate and co-operate to make public institutions work. Public value governance, rather than being a form of command and control, hierarchical, governance (‘old’ public management) or market, purchase and exchange (NPM) governance, public value offered ‘network’ governance based on collaboration and co-production between service providers and users.

Public value⁷ therefore reflects both a negative – a general disenchantment with both markets and hierarchy – and a positive – public demand for involvement in and democratic control of public services – whilst also maintaining the contestability central to NPM. A ‘hard’ characterization of public value theory might describe it as NPM plus co-production. A ‘soft’ version would refer to what Davies⁸ called the elements which ‘cannot so easily be valued, or even sensibly be valued at all’ and which are likely to be under-valued and under-provided in NPM-type public service delivery. The BBC’s *Building Public Value* thus exemplifies both the BBC’s (shrewd) tactical accommodation to a New Labour fashion and a (possible) re-invention of a ‘top down’ and excessively commercialized BBC as a public value-oriented broadcaster engaged with its users and re-oriented to public service goals.

Public Value, *Altmark Trans* and State aids

It is clear that the doctrine advocated by Moore and his British epigones is far removed from that in the European Commission’s 2009 *Communication from the Commission on the application of State aid rules to public service broadcasting*⁹ which, in Clause 45, requires that:

The definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not.

These requirements stem from the judgement in the 2003 *Altmark Trans* state aid case which has resonated beyond public transport (its original locus) and establishes that where enterprises (including public service broadcasters) receive public funding their:

- public service obligations must be clearly defined;
- the level of funding must be clear in advance and objectively and transparently determined;
- funding should not exceed what is necessary to discharge public service obligations; and,

- where provision is not the result of a public procurement tender, costs must be shown to be reasonable in comparison to a comparable commercial operation.¹⁰

In turn, these requirements underpin the introduction, and pervasive generalization across the EU, of public value tests/*Drei-Stufen-Tests* and thus have institutionalized a conception of public value in broadcasting far removed from Moore's public service management theory. In this shift something important has been lost.

Building Public Value

Elements of a Moorean conception of public value informed the BBC's *Building Public Value*. Though a senior BBC insider cynically described *Building Public Value*, privately, to the author as the BBC's 'manifesto' for securing the renewal of its Royal Charter and a favourable licence fee settlement and amplified his remark by stating, after a significant pause, 'And of course, as with political parties' manifestos, we know that not everything in the manifesto will be delivered',¹¹ *Building Public Value* won the BBC a good deal of support including from those who, before and since, have been regarded by the BBC as hostile critics. For example, David Elstein argued that:

Building Public Value 'is one of the most radical documents the BBC has ever issued ... It contains much self-criticism and many promises of reform ... A steady flow of statements and activity has confirmed that the BBC is contemplating dramatic change.

Although Elstein qualified his praise by stating that the BBC 'stops some way short of real transformation',¹² his testimony to the boldness and scale of the BBC's proposals was eloquent.

Concurrently, Michael Grade, then Chairman of the BBC's Governors stated:

the BBC exists to create public value. In other words, it aims to serve its audiences not just as consumers, but as members of a wider society, with programmes and services which, while seeking to inform, educate and entertain audiences, also serve wider public purposes. Public value is a measure of the BBC's contribution to the quality of life in the UK.¹³

It is easy to mock such pious aspirations – when calculating its contribution (always found to be positive) to an increased quantum of public value, the BBC has never publicly considered the possible diminution of public value for which it may be responsible through programmes like *Top Gear*, devoted to bigging up loutish petrolheads: rather, it is an increase in public value that is always identified. Nonetheless, the aspirations Grade stated, and which

were to be found in *Building Public Value*, represented what seemed to be a welcome reorientation and return by the BBC to its distinctive public service roots. However, as implemented in the public value test, public value doctrines have not fostered and inspired a re-animation of the BBC and its staff with a novel, outward-facing co-productive engagement with its publics. Rather, public value management in the BBC has been institutionalized as what Mike Power called a ‘ritual of verification’¹⁴: that is a more stringent bureaucratic holding to account of those who do and create by an external authority.

The BBC, new services and regulation

BBC regulation, or non-regulation, of its Internet activities provoked the implementation of the public value test. There were two key enquiries, which provoked a recognition that the established process for approving new BBC services was unsatisfactory and inadequate. In 2003, the European Commission, in a case initiated by a UK company, Research Machines, joined by 17 other companies, judged that the BBC received state aids that had not been properly notified and approved.

In 2004, an independent committee, set up by the UK Government and headed by Philip Graf (later Deputy Chairman of Ofcom and Chair of Ofcom’s Content Board), reported on the BBC’s role in the Internet content sector. Graf found notable weaknesses in the BBC’s regulatory and approvals process and argued that ‘The Charter review should seek to find a better regime for regulating services such as BBC Online.’¹⁵ The weight of these studies combined with a generalized disquiet over the potentially damaging effect of a lack of adequate external scrutiny of BBC initiatives, further combined with the potentially significant impact of the BBC in new markets led, in 2004, to the BBC Governors committing the BBC to devising and implementing public value tests. The public value test replaced the ‘approval’ power previously held by the Department of Culture, Media and Sport (DCMS)¹⁶, the Government department responsible for the BBC and thus has contributed to a modest, but welcome, strengthening of the BBC’s independence of Government.

Thus far there have been four formal, full scale public value tests conducted by the BBC Trust – the successor to the Governors – (Online services, HDTV, Gaelic Digital Service, local video services¹⁷), three of which resulted in approvals. The local video proposal was rejected. As is well known, there are two elements to the public value test: a market impact assessment, undertaken by Ofcom, and a public value assessment, undertaken by the BBC Trust. As well as the public value test, the BBC’s new performance management system includes service licences issued by the Trust which define objectives for all BBC services and will be undertaken at least once every five years. Chris Woolard, then a member of the Trust secretariat¹⁸, described (interview 4 May 2006)

the service licences as ‘mini public value tests’ (though the BBC undertakes the market impact assessment and not Ofcom). Latterly, the Trust seems to have extended the possible impact of the public value test by stating that one should be undertaken for “any potentially significant change to the BBC’s UK Public Services”.¹⁹

Public value – looking backward, looking forward

How far has the BBC’s implementation of public value doctrines met both the challenges posed by insufficient accountability of the BBC – notably in respect of its impact on markets which it enters and/or in which it is present – and the criteria of evidence-based judgement and transparency identified in the BBC Trust’s account of public value in the BBC authored by Coyle and Woolard? Mary Warnock, when a broadcasting regulator at one of Ofcom’s predecessors, referred to accountability as having two dimensions: giving an account and being held to account.²⁰ The public value test, and Trust policies generally, have certainly improved transparency and accountability in the sense of giving an account. There is authoritative testimony²¹ to the way in which the Trust’s procedures have increased the extent to which the BBC Executive is held to account by the Trust (though not all regard the Trust as sufficiently separate from the BBC’s management to discharge effectively this office of holding to account).

However, a Trust commitment to transparency has not consistently been implemented: the Trust (in contrast to Ofcom’s standard practices) did not publish responses to its consultation on the BBC management’s Strategy Review.²² And the procedural complexity associated with the current Strategy Review²³ process is hardly one which facilitates understanding or participation. For the 2010 Strategy Review to have been published by the Trust, the Trust has had to request the BBC Director-General to formulate proposals; him to submit them to the Trust; the Trust (after indicating both that it wants to do further work on the Executive’s proposals and that ‘the core vision and principles set down by the Director General provide the right response’) to open them to public consultation, and only then, when consultation (as already stated, not wholly transparent because only the Trust will know what responses have been received) is complete, can the Trust define and issue its definitive ‘asks’ to the BBC Executive. But it will not be over then.

For anything significant to actually happen, the Executive will then have to apply, formally, and separately for each service in question, to the Trust for permission to make changes; the Trust will undertake a formal public value test (involving a market impact assessment undertaken with Ofcom, a public consultation, a consultation with the BBC’s Audience Councils and, if a new

service is under consideration, securing approval from DCMS), publish its provisional determination, (normally) publicly consult on it and, only then, issue a decision on which the Executive may act. The time-consuming and wasteful convolutions of this process need no emphasizing – but they principally stem from the unusual nature of the BBC's governance structures, where the Trust is both the BBC's regulator (for the most part) and, formally and constitutionally, the BBC, rather than being intrinsic to the public value test process itself.

The Trust is undoubtedly more open in its practices, and seems less dependent on BBC management, than was the BBC Board of Governors which preceded it. This open-ness and independence has been evident in the conduct of the public value tests, but the fundamental problem of governance and accountability has not been resolved, only restated. The public value test ultimately depends on the judgements of those who make it.²⁴ But it follows that process is not all (though it is much); who makes the decisions (and who decides who the deciders are) is also important. On the substantive matter of who makes the decisions (as well as how they make them – and transparency and evidence-based decision-making are good bases on which to make such decisions) as well as on the character of the process of decision-making hangs the legitimacy (or illegitimacy) of the decisions.

Conclusion

The transposition of public value doctrine into practice in UK broadcasting is thus a fascinating, and as yet unfinished, set of stories. It is a story of the fleeting fashionability of a New Labour-sponsored 'craze' for a novel management theory – nothing new there; management theories rise and fall like the hemlines of skirts. A story of the re-versioning of a rather unlikely candidate for Europeanization (Moore's version of a re-vitalization of American public management through competition and direct democracy) into a very European hierarchical, and somewhat formalistic, procedure. And a story of the Europe-wide dissemination of a flawed 'ritual of verification'²⁵ which is both highly UK specific (in being implemented by rather an odd body, the Trust); limited in application (four formal public value tests in 3 years) and irrelevant to many important decisions (such as ending services: a public value test is not necessarily required, though one may be implemented, for the closure of services e.g. as proposed in the BBC management's 2010 *Strategy Review* and, further, public value tests are not required for ongoing services – i.e. for the overwhelming preponderance of BBC activities). And it is also a story of a missed opportunity – an opportunity to re-animate the BBC's distinctiveness, its public service vocation and its engagement with its users. Ironically, it also seems to be a classic instance of 'hitting the target but missing the point' whereby

public value doctrines have been implemented not to re-enable and re-vivify an institution but as a very old-style public-management practice of control and policing. Moore's vision of a re-animated public sector newly oriented to users regrettably has, Frankenstein like, metamorphosed into a regulatory tool designed to constrain and control public service broadcasters.

Accordingly, the twin challenges of re-vivifying the BBC (and other European Public service broadcasters) with a renewed commitment to public service and making effective a genuine accountability to the publics the BBC serves remain unmet. The BBC's decade-long embrace of public value doctrine has proven to be an effective rhetorical device for securing the Charter (renewal and a generous licence-fee settlement) but only by emasculating a potentially-effective slogan calling for a re-orientation to a public service broadcasting different from a me-too quasi commercialism. The (modest) positive effects of the public value test – notably greater transparency, improved management effectiveness and discipline – have been secured at the expense of casting off the most impressive and persuasive elements of what briefly promised to be a new doctrine for UK public service broadcasting – set out in the BBC's 2004 *Building Public Value*.

Notes

1. Carroll, L. (1962) *Alice's Adventures in Wonderland and Through the Looking Glass*. London: Puffin.
2. See BBC (2004) *Building Public Value. Renewing the BBC for a Digital World*, London: BBC. Available at <http://downloads.bbc.co.uk/aboutthebbc/policies/pdf/bpv.pdf>.
3. Moore, M. (1995) *Creating Public Value. Strategic Management in Government*, Cambridge MA: Harvard.
4. See Hewison, R., & Holden, J. (2004) *Challenge and Change: HLF and Cultural Value. A report to the Heritage Lottery Fund*, London: Demos. Available at <http://www.hlf.org.uk/NR/rdonlyres/4A9BB4D0-CA7D-4372-92FE-38C85ED1EB20/667/DEMOS1.pdf>; Kelly, G., & Muers, S. (2002) *Creating Public Value. An Analytical Framework for Public Service Reform*, London: Strategy Unit, Cabinet Office. Available at http://www.e-democracy.gov.uk/documents/retrieve.asp?pk_document=22&pagepath=http://www.e-democracy.gov.uk:80/knowledgepool/.
5. NPM, a doctrine dedicated to bringing techniques of private sector management to the public sector, figured strongly in the 1999 UK White Paper *Modernising Government* (Cabinet Office 1999). Osborne, D. and Gaebler, T. (1992) *Reinventing government: how the entrepreneurial spirit is transforming the public sector*; Reading, MA; Wokingham: Addison Wesley is usually identified as the canonical source text of NPM doctrines.
6. Moore, M. (1995) *Creating Public Value. Strategic Management in Government*, Cambridge MA. Harvard. P. 117–118.
7. The term 'public value' has a loose and inclusive character, as has the related term 'public good' which is sometimes used synonymously with public value. 'Public good' can mean either (or both) a generalized something which is good for the public or a very particular kind of economic good – one which is non-rival and non-excludable. Classic examples of economic public goods include parks, defence and policing, street lighting and broadcasting. When economic activity is co-ordinated through markets, public goods in the economic sense tend to be undersupplied because individuals have strong incentives to 'free ride' on others'

- provision. Accordingly, provision of public goods is customarily seen as the role of the public sector because public authorities can compel all to contribute to their provision and prevent any from free riding. However, public value provision and production (co-production) of public goods is normatively characterized by user involvement and decision-making rather than passive reception.
8. A former BBC Chairman. See page 130 in Davies, G. (2005) 'The BBC and Public Value', in J. Heath & D. Levy (eds) *Can the market deliver? Funding public service television in the digital age?* Eastleigh: John Libbey Publishing, (pp. 129–150).
 9. European Commission. (2009). *Communication from the Commission on the application of State aid rules to public service broadcasting* [OJ C 257/1 27.10.2009]. Brussels: European Commission. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:257:0001:0014:EN:PDF>.
 10. See European Court of Justice. (2003) *Judgment of the Court of 24 July 2003. Altmark Trans GmbH and Regierungspräsidium Magdeburg vs. Nabverkehrsgesellschaft Altmark GmbH* [case C-280/00]. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:226:0001:0002:en:PDF>.
 11. A different source, latterly a senior BBC manager, stated to the author: 'yes, it was a fix as the BBC approached the Charter renewal process'.
 12. Elstein may be thought to have had a *parti pris* as he then was Chairman of the Commercial Radio Companies Association. See Elstein, D. (2004) *Building Public Value: a new definition of public service broadcasting? 19th IEA Current Controversies Paper*, London: Institute for Economic Affairs. Available at <http://accessible.iea.org.uk/files/upld-news217pdf?.pdf>, p. 2.
 13. BBC (2004) *Building public value. Renewing the BBC for a digital world*, London: BBC. Available at <http://downloads.bbc.co.uk/aboutthebbc/policies/pdf/bpv.pdf> p. 7-8.
 14. Power, M. (1997) *The Audit Society. Rituals of Verification*, Oxford: Oxford University Press.
 15. Graf, P. (2004). *Report of the Independent Review of BBC Online*, London: DCMS. Available at <http://www.culture.gov.uk/images/publications/BBCOnlineReview.pdf>. p. 6.
 16. However, Coyle and Woolard state that DCMS retains a veto over any wholly new BBC service. See Coyle, D. & Woolard C. (2010) *Public Value in Practice. Restoring the Ethos of Public Services*, London: BBC Trust. Available at; http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/pvt/public_value_practice.pdf. p. 77.
 17. See http://www.bbc.co.uk/bbctrust/framework/public_value_test/decisions.html and http://www.bbc.co.uk/bbctrust/news/press_releases/2008/local_video_prov.html
 18. Woolard subsequently moved to Ofcom.
 19. Coyle, D. and Woolard, C. (nd) *Public Value in Practice. Restoring the Ethos of Public Services*, London: BBC Trust. Available at http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/pvt/public_value_practice.pdf p. 65.
 20. Warnock, M. (1974) Accountability, Responsibility – or Both? *Independent Broadcasting 2*, p. 2–3.
 21. Personal communication to the author by David Levy, now Director of the Reuters' Institute, University of Oxford, when a senior BBC official (18.5.2006), who described the 'quite dramatic' change in senior BBC management practice which has attended the BBC's adoption of the four drivers which now inform the quarterly management 'reporting packs' submitted to the BBC Executive Board and to the Governors.
 22. BBC (2010) *BBC Strategy Review*, London: BBC Trust. Available at http://www.bbc.co.uk/bbctrust/assets/files/pdf/review_report_research/strategic_review/strategic_review.pdf
 23. See https://consultations.external.bbc.co.uk/departments/bbc/bbc-strategy-review/consultation/consult_view
 24. There is nothing intrinsically wrong with this – judgement, and trust, have to repose somewhere.
 25. Power, M (1997) *The Audit Society. Rituals of Verification*, Oxford: Oxford University Press.

Chapter 6

The Three-step Test

Three Steps Forwards or Backwards for Public Service Broadcasting in Germany?

Irini Katsirea

The three-step test was incorporated in the 12th Inter-State Broadcasting Treaty, transposing a compromise reached between the European Commission and the German *Länder* in 2006.¹ The Commission's main concern was the absence of an adequate definition of the public service remit in relation to online activities. The 12th Inter-State Broadcasting Treaty clarified the definition of the remit. It enabled public service broadcasters for the first time to offer telemedia that do not relate to a specific programme as long as they are editorially motivated and arranged.² Also, it established certain categories of online services which shall not be part of the public service remit such as non-programme related print-like offerings, bought-in feature films and series, nationwide local reporting and, as before, advertising and sponsoring. Furthermore, it highlighted the functions to be performed by public service broadcasters' telemedia services: enabling the whole population to gain access to the information society, providing aid to orientation and promoting media literacy of all generations and also of minorities. These provisions are now to be found in the latest Inter-State Broadcasting Treaty.³

Certain telemedia services are commissioned on the basis of the Treaty without the need to undergo the three-step test. These are programmes and programme-related telemedia that are offered for retrieval for a period of seven days (or of 24 hours in the case of major events such as matches of the first and second German football divisions). These time limits have been criticized for being excessively short as they prevent the public from accessing content that they have already financed by means of the licence fee. All other offerings (including all existing online content that was available on 30 April 2009) need to be based on a clear telemedia concept and to undergo the three-step test. The entire ARD and ZDF online arsenal had to undergo the three-step test by the end of August 2010. This enormous bureaucratic task has now been completed.

Under the three-step test the broadcasting council of the responsible authority (ARD or ZDF) needs to check: first, whether a new or significantly amended

digital service satisfies the democratic, social and cultural needs of society; second, whether it contributes to media competition from a qualitative point of view and; third, the associated financial cost.

In the following, we will discuss the scope and mechanism of the test as exemplified in two assessments that were voluntarily launched by the end of 2008 before the 12th amendment to the Inter-State Broadcasting Treaty came into force on 1 June 2009. The first of these voluntary tests concerned *www.kikaninchen.de*, an Internet portal for pre-school children, and *KI.KAplus*, a video-on-demand service. The second test concerned *NDR Mediathek*, a live streaming and podcasting service. We will also consider, by way of comparison, a test that was carried out after the entry into force of the 12th Inter-State Broadcasting Treaty.⁴ By analysing these decisions, this chapter seeks to assess whether the three-step test is a useful tool to concretize the online public service remit, and to render public service broadcasters more accountable, or whether it is rather a futile exercise that unduly compromises their editorial independence.

The first step: in search of the online public service remit

The first step of the test replicates the wording of the Amsterdam Protocol. It is very general and does not provide specific criteria against which to measure a certain telemedia offer. It requires broadcasting corporations to spell out the communication needs to which their services are responding.⁵ However, it is hardly conceivable that there are services in whose defence absolutely no democratic, social or cultural need can be brought forward. Broadcasting councils can plausibly argue that there is either a broad interest in a certain mainstream offering, in which case public broadcasting would act as ‘trusted guide’, or that there is a niche interest that private media with their profit-making orientation cannot cater for.⁶

Kikaninchen, *KI.KAplus*, *NDR Mediathek* and the *3sat* telemedia fall within the first of these categories. The argument of the councils goes as follows: in view of the rising popularity of the Internet, it is useful to have offerings for (pre-school) children that help improve their computer skills as well as offerings that let viewers of all ages catch up with their favourite television or radio programmes online. Obviously, this line of reasoning can be used to justify almost any online service. This is, however, hardly surprising if one considers that there is no separate public service remit for the online domain. Public service broadcasters are not only allowed to act online in the event of a failure of the market.⁷ Their online presence can be comprehensive as long as certain outer limits are respected. The same structural deficits displayed by commercial broadcasters that necessitate the presence of their public service counterparts

in a linear environment are also present in the online domain. The problems of online media concentration coupled with the extreme vulnerability of commercial online providers to financial interests can only be mitigated by public service online media with a strong public service ethos.

The second step: balancing market impact and public value

The second step is the core of the three-step test. The Treaty indicates criteria to be taken into account so as to decide whether a certain offering is justified: the quantity and quality of already existing, freely available offers, the market impact of the planned offering and its likely opinion-forming function. Almost every aspect of the second step is controversial including the question as to what is a 'freely available offer'. Private broadcasters and some academics argue that subscription-based services should not be excluded. It would be artificial to include advertising- and publicly-funded content, but leave pay-services out of the equation even though these are especially threatened by the expansion of freely available online content. It is therefore suggested that 'freely available offers' should be interpreted as offers that are available to everyone, not just to a closed circle, professional or otherwise.⁸

This far-fetched interpretation seems inconsistent with the clear wording of §11f (4) RStV.⁹ The availability free-to-air is inherent in public broadcasting services' mission and closely linked with their aspiration to universality. Pay-services need to be taken into account when assessing the market impact of a planned offering, but the same does not apply to the analysis of editorial competition. This was also the director's advice in *Kikaninchen*.¹⁰ Nonetheless, the council obligingly decided to also take pay-services into consideration in view of the current legal uncertainty. In *3sat* the ZDF council exclaimed in a more forthright manner that the terms 'freely available' and 'free-to-air' were synonymous. It argued that its view was supported by the Commission decision that formally closed the state aid procedure against Germany. The Commission approved of Germany's commitment to further clarify the concept of editorial competition, taking into account 'the scope and quality of already existing (free-of-charge) offers'. Furthermore, the ZDF council relied on the German language version of Art. 14 of the Audiovisual Media Services Directive. This provision translates 'free television', which undoubtedly excludes pay-TV, as '*frei zugänglich*' i.e. 'freely available'. Despite the fact that it was not legally obliged to do so, the ZDF council in *3sat* also agreed to take pay-services into account so as to provide a more comprehensive picture of editorial competition.

The methods used to assess the quality of the proposed online offers in the first voluntary tests also attracted vehement criticism. There is no clear answer to the question, for instance, whether freedom of public service broadcasting

from advertising is a hallmark of quality. Private broadcasters argue that this is not the case in view of the statutory prohibition of advertising in public service online offerings. This argument, if taken to its logical conclusion, suggests that the other public service obligations laid down in the law – such as impartiality and balanced pluralism – would also need to be disregarded, leading to a clearly untenable state of affairs. Besides, it is worth mentioning that the ‘single-funding’ system for public broadcasters’ online presence was chosen by the German legislator; by no means was it imposed by EU law. Such a funding scheme is not a constitutive element of a service of general economic interest. The Commission has no objection to the choice of a ‘dual-funding’ scheme rather than a ‘single-funding’ one.

Still, the broadcasting council in Kikaninchen again acceded obligingly to private broadcasters’ bizarre logic. It accepted that the lack of advertising was immaterial as a matter of principle. It could only exceptionally be taken into account in the case of pre-school children that are not able to distinguish between advertising and programme elements. In 3sat the lack of advertising was not accepted as a hallmark of quality *per se* either. It was only intimated that it could indirectly boost the quality of online offerings.

This concession is not, however, to the entire satisfaction of the private broadcasters who complain that the added value of these new services has not been sufficiently established, and that the crowding-out effect on existing private offerings has not been taken seriously. In the case of NDR Mediathek, the obligatory market impact assessment excluded the print media from the relevant market. It argued convincingly that NDR Mediathek’s relevant market is the time-shifted viewing of radio and television programmes, not the digital reproduction of the printed word. The market impact assessment found that the planned offering might only have an impact on private VOD services, especially by local and regional broadcasters, but that this impact would be offset by NDR Mediathek’s quality attributes. What, precisely, are these quality attributes? This question was largely evaded. It was somewhat cynically suggested that Mediathek would exercise a complementary function in view of the financial constraints affecting private regional broadcasting.

In Kikaninchen, print media and even children’s TV were also excluded from the relevant market. The market impact assessment prognosticated on the basis of a market simulation that private offerings would not be jeopardized and that Kikaninchen would contribute in a positive way to editorial competition. Again, the market impact assessment did not explain how. According to the broadcasting council’s decision, Kikaninchen’s added value consists in offering a wide spectrum of content, in boosting the linguistic development of pre-school, especially immigrant, children and in providing parents with specialized, media pedagogical guidance. However, as the council conceded, the telemedia concept did not really explain how these aims would be achieved.

All in all, the decision in NDR Mediathek did not even attempt to justify the public value of the offering in question but relied largely on the unspoken assumption of its inherent superiority.¹¹ The decision in Kikaninchen did not offer any hard and fast criteria for proving beyond doubt the service's quality either. This may be attributed to the notorious elusiveness of the concept of 'quality', but also to the inexperience and uncertainty attached to these first tests that were carried out without the framework of the Broadcasting Treaty to rely on. Having said that, the Treaty does not provide any real benchmarks that would help separate the wheat from the chaff. Nor could it have done so, given that the postulate of freedom from state control prohibits the state supervision of programme content.

The more recent assessments that were carried out against the backdrop of the Broadcasting Treaty do not offer much ground for optimism either. They bear witness to the excesses to which media regulation is prone to in the age of convergence. The obligation to put the entire *acquis* to the test – as opposed to only the most significant new endeavours as in the case of the BBC – has led to inflated, costly, self-glorifying procedures. The yearly budget for Kikaninchen amounts to some €320,000, while the three-step test for this service costs around €300,000. Despite the oft-repeated mantra that the Broadcasting Treaty does not require an added value, all broadcasters are at pains to prove that their services are more extensive and diverse, more sophisticated, more reliable than those of their competitors.¹² This undermines the objectivity of the assessments and lays them open to the accusation of bias.

The ground for such criticisms is fertile in view of the fact that responsibility for the conduct of the three-step test rests on the broadcasting councils. Have these internal bodies the necessary distance from the management of the broadcasting corporations so as to use their enormous discretion in a dispassionate, independent manner? The decisions in Kikaninchen and NDR Mediathek are cause for concern. However, the scepticism cannot perhaps be generalized since attitudes differ from one council to the next. The WDR council rejected proposals for two web-channels in August 2009, catching the director off-guard.

This chapter has only offered a snapshot of some of the contentious aspects of the three-step test. There is, however, a plethora of unresolved issues that cannot possibly be addressed within the confines of this discussion. Can the seven-day retrieval period only be extended in exceptional circumstances? What weight has to be accorded to the obligatory market impact assessment? Is the council entitled to approve of a planned service – possibly in part – when the economic existence of numerous commercial offerings is in jeopardy? Is the broadcasting council's decision justiciable? The Broadcasting Treaty does not give a clear answer to these fundamental questions. Moreover, it leaves huge room for interpretation of more specific concepts. What is an offering? Should the entire website of a broadcasting corporation be classified as an offering

or also the web pages it consists of? When is an offer editorially motivated and arranged? Which services are excluded by the notion of non-programme related press-like services?

This last question has been particularly contentious. As a result of political pressure from the publishing sector, non-programme related, press-like services have been excluded from the public service mandate. However, it is unclear which services are to be considered as 'press-like'. According to §2 (2) Nr. 20 of the Inter-State Broadcasting Treaty, press-like services are not just the electronic editions of print media but all journalistic, edited offers which correspond to newspapers or magazines in their design and content. Some argue that this provision encompasses all online offerings that constitute a functional equivalent of a newspaper or a magazine.¹³ This broad interpretation of 'press-like' would render a large part of public service broadcasters' online presence unlawful. Public service broadcasters, on the other hand, have classified their text-based offerings as non-press-like, and have subjected them to the three-step test. Only electronic versions of newspapers that display static text and image combinations are 'press-like' in their view. This position has recently been endorsed by a former president of the Federal Constitutional Court, Hans-Jürgen Papier, in a report commissioned by the ARD broadcasting corporations.¹⁴ The report concedes that this interpretation is likely to erode the concept of 'press-like' services. Nonetheless, so the argument goes, only a narrow interpretation of the exemption laid down in the Broadcasting Treaty is compatible with the online remit of public service broadcasting and with the constitutional guarantee of its continued existence and development ('*Bestands- und Entwicklungsgarantie*').

The polarized debate about the exclusion of non-programme related, press-like services exemplifies the lack of consensus about the reach of public service broadcasters' online remit. The *Papier* report argues in favour of a broad online public service mandate in view of the vulnerability of commercial online media to financial interests. Their role in the online domain is that of a trusted guide who helps viewers navigate the information maze by providing them with a concentrated, impartial account of the spectrum of views in society. Opponents retort that the chief rationale for public service broadcasting – the risks for pluralism due to spectrum scarcity in the analogue world – is not valid as far as the Internet is concerned. Online media are inherently diverse, and viewers do not need to be guided. It is also pointed out that the delivery of public service content across new media, characterized by individualization and fragmentation, is incompatible with the traditional public service broadcasting's integrative function. The Inter-State Broadcasting Treaty unsuccessfully attempts to reconcile these conflicting viewpoints, and the interests of the press with those of the public service broadcasting corporations, both competing for high search-engine rankings. This failure is symptomatic of the more general inability

of the three-step test to provide a clear vision for public service broadcasting and to articulate suitable criteria for assessing the value of its online remit.

The third step: value for money in public service broadcasting

The last step of the test requires disclosure of the financial cost associated with a certain digital service with the aim of creating financial transparency. This aspect of the test has also been contentious. It has been argued that §11f (4) Nr. 3 RStV mandates a cost-benefit analysis, which would balance the cost of a new or significantly-amended service against its public value. According to this interpretation, the value of a certain service that is identified on the basis of the first and second test steps only represents its 'gross-value' before netting out of the associated costs. However, the Broadcasting Treaty does not require such a cost-benefit analysis. It is worth comparing §11f (4) Nr. 3 RStV to Art. 28 of the BBC Agreement, which explicitly mentions the value for money of the proposed change. Whereas the UK public value test has been inspired by US theories of public sector management that gained increased currency in the latest BBC Charter review process against the backdrop of the Hutton enquiry, the German three-step test has been introduced as a result of the abovementioned state aid procedure and Commission decision. The calculation of the net-cost of the public service mission within the framework of the state aid procedure serves the aim of avoiding overcompensation, not of ensuring the most cost-effective use of public funds.¹⁵ Consequently, it cannot be the aim of the three-step test to introduce a new model of financial control beyond the control of overcompensation carried out by the Independent Commission for the Assessment of Financial Requirements of German Public Broadcasting (*Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten*, KEF).

Conclusion

The three-step test promises to contribute to a more precise definition of the public service remit, and to increase the transparency and accountability of German public service broadcasting. Notwithstanding its laudable objectives, the test is tainted by the fact that it combines content and financial supervision in a way that is likely to interfere with broadcasters' autonomy. At the same time, the three-step test is based on fickle foundations. It requires a balancing act to be carried out between the impact of significant new audiovisual services on the market and the value of these services for society without being able

to conceal a profound uncertainty as to the criteria for evaluating the public value of the online remit. The Inter-State Broadcasting Treaty does not contain any tangible standards, but contents itself with repeating the conditions of the Amsterdam Protocol.

As long as the concept of ‘public value’ remains elusive and contested, the three-step test will be inherently prone to manipulation. Instead of overcoming the legitimacy crisis of public service broadcasting by spelling out its significance, it might exacerbate the tension between the private and the public media sector further. Public service broadcasters will rightly resent the unprecedented privilege granted to their commercial counterparts to have a say on the direction in which they are to develop. The private media sector will have good reasons to denigrate it as an empty ritual of verification. The self-aggrandizing decisions reached so far by the broadcasting councils expose them to the accusation of bias and are arrows in the quiver of the critics of public service broadcasting. Perhaps as more tests are carried out in future, the councils will gain more experience in justifying their decisions in a more rational and professional, less subjective way. Also, it would be preferable to dispense with costly market research of uncertain value in future, thus freeing up funds for high-quality programming. The conduct of extensive consultations on the likely impact of planned offerings might enhance the legitimacy of the three-step test.¹⁶ However, no matter what procedural improvements or quality assurances are offered, they will probably never entirely satisfy those who hope for a sharp demarcation in terms of programme profile between private and public online offerings and who seek to confine public service broadcasters to a residual role.

Notes

1. Case E 3/2005, 24 April 2007, *Financing of Public Broadcasters in Germany*, C (2007) 1761 final.
2. The concept of ‘telemidia’ (*Telemedien*) emerged from the merging of the previously existing concepts of teleservices (*Teledienste*) and mediaservices (*Mediendienste*) under the Telemediengesetz (TMG) of 26 February 2007 (BGBl. I p. 179) last modified by Art.1 of the law of 31 May 2010 (BGBl. I p. 692). Telemidia are defined in §1(1) 1 TMG as all electronic information and communication services that do not constitute telecommunication or broadcasting.
3. Staatsvertrag für Rundfunk und Telemedien (RStV) of 31 August 1991, last modified by the 15th Rundfunkänderungsstaatsvertrag of 15-21 December 2010.
4. ZDF, Drei-Stufen-Test. Fortschreibung des Telemedienkonzepts von 3sat FR8/10, 25 June 2010.
5. Schulz, W. (2009) ‘The Legal Framework for Public Service Broadcasting after the German State Aid Case: Procrustean Bed or Hammock?’ *Journal of Media Law*, 2: 219–236.
6. Wimmer, N. (2009) ‘Der Drei-Stufen-Test nach dem 12. Rundfunkänderungsstaatsvertrag. Was ist und wer entscheidet über den Public Value öffentlich-rechtlicher Online-Angebote?’ *Zeitschrift für Urheber- und Medienrecht*, 8/9: 601–606.
7. Case T-309/04, T-317/04, T-329/04, T-336/04, *TV2 Danmark* [2008] ECR II-2935.

8. Ibid., 606; V. Bensing, M. Kops & K. Sokoll (2009) *Rahmenbedingungen für die Durchführung des Drei-Stufen-Tests. Gutachten erstellt für den Rundfunkrat des Westdeutschen Rundfunks*, Köln/Berlin: Institut für Rundfunkökonomie an der Universität zu Köln, 104; Dörr, D. (2009) 'Aktuelle Fragen des Drei-Stufen-Tests. Wer kontrolliert den publizistischen Mehrwert nach welchen Maßstäben?' *Zeitschrift für Urheber- und Medienrecht*, 12: 897–903.
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10. Rundfunkrat des Mitteldeutschen Rundfunks, Beschluss über die Genehmigung des neuen Angebots www.kikaninchen.de, 21 September 2009, 29.
11. Rundfunkrat des Norddeutschen Rundfunks, Abschließende Beratung und Beschluß über das Angebot der NDR Mediathek, 27 March 2009, 4: 'Dispensing with NDR Mediathek would mean dispensing with standards and quality in the market and would affect consumer welfare in a negative way'. [author's own translation]
12. See e.g. ZDF, Drei-Stufen-Test. Fortschreibung des Telemedienkonzepts von 3sat FR8/10, 25 June 2010, 50 et seq.; WDR, Beschluss des WDR-Rundfunkrates über die Genehmigung des Telemedien angebot 'wdr.de' vom 19. Mai 2010 in der Fassung des Genehmigungsbeschlusses des WDR-Rundfunkrates vom 18. Juni 2010, 19. May 2010, 53 et seq.; RBB, Beschluss zu dem Telemedien- angebot rbbonline in der überarbeiteten Fassung des Telemedienkonzepts vom 15. Juni 2010, 24. June 2010, 82 et seq.
13. Gerhardt, N. (2010) 'Presseähnliche Angebote nach dem 12. Rundfunkänderungsstaatsvertrag. Zur Zulässigkeit von Onlinetextangeboten öffentlich-rechtlicher Rundfunkanstalten', *AfP*, 1: 16–20.
14. Papier, H.-J. & Schröder, M. (2010) 'Gebiet des Rundfunks', *epd medien*, 60, 16 (referred to as *Papier* report).
15. Rundfunkrat des Rundfunk Berlin-Brandenburg, Beschluss zu dem fernsehgebundenen Inhalt ARD Text in der überarbeiteten Fassung des Telemedienkonzepts vom 15. Juni 2010. Available at www.rbb-online.de/rundfunkrat/dst/entscheidungsbegrueundung0.file.pdf, 21 February 2011, 80; Wiedemann, 'Einfallstor', 5.
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Chapter 7

The ZDF Three-step Test

A Dynamic Tool of Governance

Renate Dörr

Over the last three decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. (Section 1 of the Broadcasting Communication)

Due to technological changes and the economic crisis, media markets are increasingly facing economic pressures. For this reason there has been a shift towards more economic reasoning and market analysis. Cultural and social arguments as well as general public policy objectives are losing their centrality in the broadcasting debate. At the same time, the role of European competition policy is constantly growing. Commercial broadcasters took advantage of this development and began pursuing complaints in Brussels. One outcome is well known: the introduction in Germany of the three-step test. Even though, in the beginning, this test was heavily challenged, ARD and ZDF have taken the legal requirements and the implementation of this test very seriously. In the end it has proven to be a dynamic tool of governance based on clear principles: transparency, openness and control. It gives the legal certainty that public service broadcasters need to plan their activities in the digital age, even if there are drastic restrictions on what ARD and ZDF can do in the Internet.

Legal and political background

The German public service broadcasters, ARD and ZDF, have always been under constant pressure to justify their new and existing activities. The private commercial broadcasters and newspaper publishers are at the forefront of attacks on the Internet services of public service broadcasters.

Commercial broadcasters organized within the VPRT (*Verband Privater Rundfunk und Telemedien*) lodged formal complaints in Brussels against the

Internet activities of ARD and ZDF. Together with newspaper publishers they argued that, due to its funding mechanism, public broadcasters' new services distort free competition and kill new business models developed by commercial media. In addition, they stated that the activity of ARD and ZDF on the Internet was not part of the public service remit.

Having conducted its investigations during 2005, the Commission decided to open an infringement procedure against Germany. The discussion between the German authorities and the Commission led to a compromise in 2007.¹ Germany agreed to introduce a new regime for public service broadcasting, while the Commission agreed to drop the case against Germany. The compromise included a new process, the so-called three-step test. Due to complex legal procedures in Germany, the compromise was only implemented in December 2008 under the terms of the 12th Interstate Broadcasting Agreement. It came into force on 1 June 2009.²

During this whole process the opponents put a lot of pressure on the German politicians responsible. They made it clear that they would exhaust all political and legal means to combat the online activities of ARD and ZDF. The German *Länder*, responsible for broadcasting issues, responded to the arguments of commercial broadcasters and newspaper publishers by considerably limiting the Internet activities of ARD and ZDF: the resulting German 12th Interstate Broadcasting Agreement is even stricter than the compromise reached with the European Commission and much stricter than the Broadcasting Communication of the European Commission.³

From the outset, ARD and ZDF were very supportive in implementing the new test. In December 2007 (nearly one and a half years before the coming into force of the relevant media law) the ZDF Television Council had already adopted principles of the procedures following a proposal by the ZDF Director-General. These early decisions reveal that ZDF and the Television Council took the need to demonstrate the 'public value' of its Internet services very seriously and actively played a very constructive role in this process.⁴

Basic principle: Public service broadcasters must be able to offer new services

Technology neutrality is the underlying principle in the German state aid case as well as of the Broadcasting Communication of the European Commission. This means that public service broadcasters must be able to adapt their services to technological changes. New online services (telemedia) and mobile applications are therefore part of the remit of public service broadcasters. This has never been questioned, either by the Commission, or by the German authorities. The Broadcasting Communication clearly states in section

81: ‘... public service broadcasters should be able to use the opportunities offered by the digitalisation and the diversification of distribution platforms on a technologically neutral basis to the benefit of society’. Moreover, this position has been confirmed by the Commission in answer to a question from a Member of the European Parliament (MEP): The MEP questioned the ARD’s right to offer ‘*Tagesschau Apps*’⁵, arguing that this service would be outside the public service remit. The European Commission clearly reiterated the principle of technological neutrality and declined the MEP’s request to prohibit this service.⁶

Entrustment of new services

The central question of the whole discussion is as follows: What does technological neutrality mean in practice? What kind of services can/should be offered by public service broadcasters in the digital world?

The answers to these questions can be given in two different ways: the first option is the direct mandate of national law-makers, i.e. the legislator lays down in domestic media law the kind of services public service broadcasters may offer without applying a test. The second option is to introduce a public value test: significant new services or significant alteration of existing services would then have to be evaluated in accordance with a specific procedure.

The German legislators have chosen the two models for different types of services. They have given the mandate to provide specific television and radio channels. In addition the mandate includes catch-up services available for viewing over seven days (in case of sports events only 24 hours) after the scheduled transmission in the linear programme. The editorial offerings directly related to the linear programme and available for only seven days are possible, but have to be described in the telemedia concept. All the other services require a three-step test, mainly television programmes on demand beyond seven days, content related to television programmes on demand and content not directly related to television programmes. According to the law, the telemedia concept must specify exact time limits for each kind of service during which the service may be available online.⁷ Only content on current history and culture (archives) may be available without such time limits. It is important to underline that the three-step test must be applied not only to new services but also to existing online services. The 12th amendment of the Interstate Broadcasting agreement requested in Article 7 that the three-step test has to be applied to existing Telemedia services that will continue after 31 May 2009.

What are the three steps?

The German version of the public value test is a very specific one and cannot be directly compared with the British public value test.⁸ Its aims are to enhance transparency and legitimacy, tighten control over new offers and limit the impact on commercial markets. The Commission requested that the test must resolve the following three central questions: the broadcaster has to examine the following aspects for each service to be offered online:

1. Does it form part of the public service mission and thus meet the democratic, social, and cultural needs of a society?
2. Does it contribute to the quality of media competition?
3. What expenditure is planned for providing the service?

The Television Council – the competent PVT manager

One of the German specificities – very often criticized by commercial competitors – is the fact that the governing bodies of the respective public service broadcasters are responsible for applying the test. These are the regionally-based Broadcasting Councils (for the ARD network, which includes radio) or the Television Council (for ZDF, without radio). The ZDF Television Council is composed of members who are chosen to represent the interests of the general public. Their task is to ensure that the programmes fulfil the public service remit and, more precisely, to establish and monitor programme standards.

Constitutional requirements

The specific role of these governing bodies flows directly from German constitutional law: Article 5 of the German Constitution guarantees the right of expression and the freedom of the media. The Federal Constitutional Court has confirmed the importance of the public service broadcaster in ensuring the provision of a universal, basic, diverse, plural and high-quality service as a pre-requisite for the healthy development of private commercial broadcasters. Moreover the Court has emphasized the independence of the public broadcaster to design their programmes free from any state influence.⁹

As a consequence, the public service broadcasters' remit is defined by law in rather abstract terms.¹⁰ The detailed oversight of programming by ARD and ZDF is the responsibility of the Broadcasting/Television Councils. They have to determine whether the programmes are fulfilling the public service remit and ensure that the programmes fulfil the needs of society. Consequently, it is also these councils that are in charge of implementing the test.

The Commission recognized member states' competence in this respect. This is clearly stated in section 54 of the Broadcasting Communication:

In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of public service obligations ... 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 obligations.

Independent and competent governance body

So the European Commission has recognized the governing bodies as the manager of the public value test. However, they have also formulated a condition: the independence of such a body. In Germany, there are a number of factors that guarantee the independence required here: above all, the pluralistic and representative membership and the existence of the so-called 'Chinese wall'.

The composition of the Councils is laid down by media law. The ZDF Television Council contains 77 members representing all the relevant groups in society, e.g. representatives from trade unions and the business community, from the fields of education, science and the arts, from state governments (*Länder*), from the Federal government and parliament and, last but not least, representatives of the newspaper publishers. This is important to mention since the newspaper publishers are one of the actors that have criticized the Internet activities of ZDF. As members of the Television Council they are not only directly involved in applying the three-step test but also belong to ZDF's 'control body'. They are, at the same time, accuser and controller.

Moreover, there is a so-called 'Chinese wall' between the Television Council and ZDF. This has been established to ensure clear separation between supervision and broadcasting operations. This structure gives the Television Council clear financial and institutional independence: It has its own budget to carry out the three-step test and is responsible for any financial implications. In addition, the Television Council has its own staff and a secretariat that works only for the Council.

During the process, the commercial media criticized the fact that the members of the Television Council would lack competence, arguing that the Television Council activities are only 'sidelines' for its members. Responding to this problem, the Television Council decided from the outset to appoint an independent legal consultant to advise on the formal and material aspects of the three-step test. Throughout the process, the members of the Television Council also

underwent several training processes and organized various expert meetings on issues such as procedural requirements, evaluation criteria for public value and quality, and the legal aspects of the test. Importantly, they also set up a ‘Telemedia project group’ to provide the Council with methodological support in carrying out the three-step test.

All this has led to the Television Council now being recognized – even by commercial competitors – as an independent and competent governance body with the ability to learn and adapt to a transforming media landscape.

The ZDF three-step test: how an extremely complex test was created from scratch

There has been more than one three-step test in Germany. Both ARD and ZDF have been obliged to carry out nearly 40 tests. These tests follow more or less the same procedure (see figure 1). In the following section, the ZDF three-step test will be described in detail in order to explain how it works. Transparency is a key characteristic of the ZDF test, so all documents related to the test including stakeholder consultation and market analysis are available online at www.zdf.de.

Project description by ZDF's Director-General.

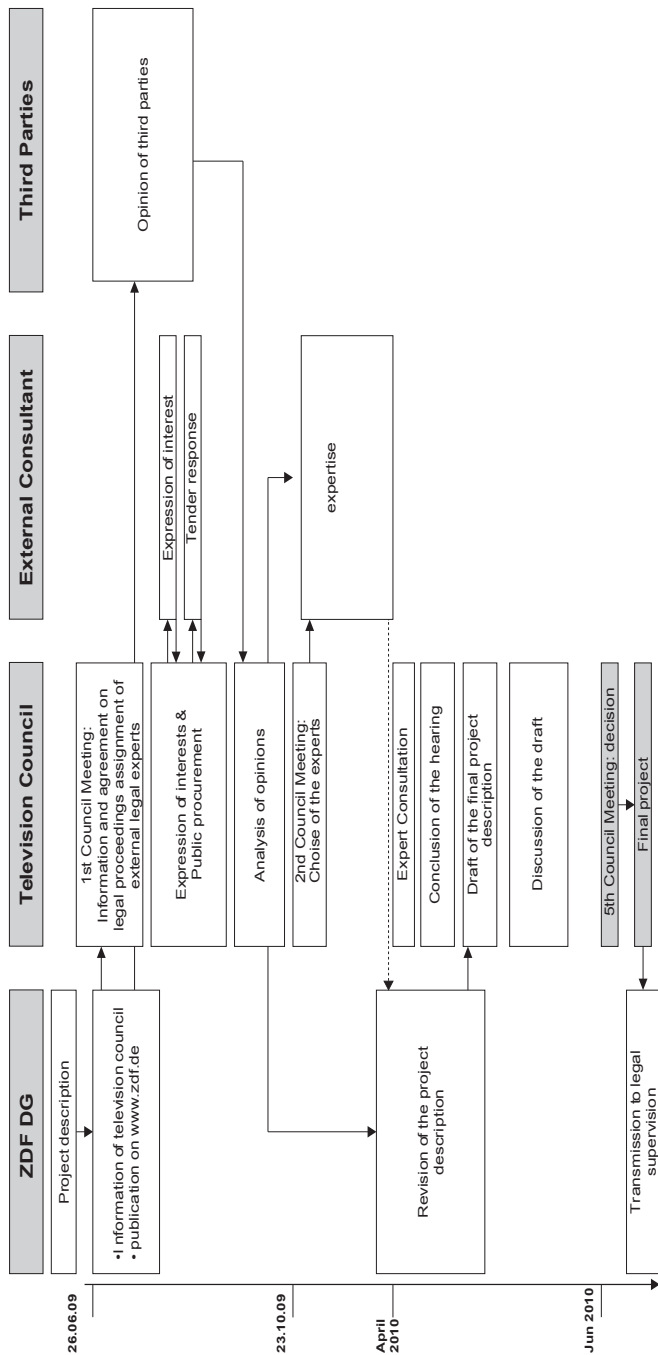
The starting point of the test was a detailed project description of new and changed services (telemedia concept) by the ZDF's Director-General (June 2009). This strategy document set out the content and direction envisaged for different Internet platforms, e.g. www.zdf.de or www.heute.de.

The project description also addressed the criteria for the three-step test (see above), explaining why the planned offers belong to the public service remit and how they constitute a qualitative contribution to journalistic competition. It also gave consideration to the issue of the scope and quality of freely-accessible services that already exist. Finally, the project description detailed the costs of the service in question.

The strategy also contains a concept for setting differential availability periods that determine what content is to be accessible for how long after television transmission (*Verweildauerkonzept*). This was a specific requirement made by German legislators. The document was submitted to the Television Council as well as to the *Länder* governments in May 2009.

Indeed, ZDF also published the project description on its online platform and informed the press accordingly. This gave potentially affected market players an opportunity to respond. Stakeholders had six weeks to send in their comments (June–August 2009). There were more than 54 comments on the initial

Figure 1. The procedure of the three-step-test



project, 31 from associations and 23 from private persons. The responses were taken into account in the deliberations on the Television Council (see below).

Market impact and stakeholder consultation

The Television Council decided to commission an expert assessment of the possible market and, to this end, issued an EU-wide call for tenders, published in the official journal of the EU (June 2009). The Television Council received eight offers and finally chose a consulting consortium (made up of Goldmedia GmbH, Salans LLP and Goldmedia Custom Research GmbH) to carry out the market impact assessment in October 2009. The costs of the market impact assessment ran to nearly €500,000. The consortium was given three months to submit their analysis.

Even though it was not required by German law, the Television Council held an external consultation with all the relevant associations in March 2010. These stakeholders included private broadcasters, the press, the telecommunication industry, producers, consumer and cultural organizations. This consultation exercise was also open to journalists and therefore completely transparent.

Results of the market impact assessment

The private sector competitors attached special importance to the market impact assessment. They consistently argued that the online offers of ZDF would have a tremendous impact on their own services. In the light of this critique, the study's results have proved particularly interesting: the market analysis came to the conclusion that the telemedia services provided by ZDF only had a small to negligible impact on the markets investigated. In fact, removing the ZDF online content from the market would only benefit advertising-funded providers to the value of 0.4 percent of market volume. In the case of 3sat and Phoenix, the impact would be even more marginal. The removal of 3sat online would benefit the other providers to the value of 0.1 percent of the market, and of Phoenix online content just 0.01 percent.

Revision of the project

Even though the market impact assessment came to the conclusion that the telemedia services would only have a marginal impact on the market, the Television Council decided to take account of the comments made during the consultations and hearings and limit as much as possible the ZDF online offerings. To this end, the Television Council requested a number of changes to the initial project. (For details of the requirements, see below). The revised project descriptions were elaborated in spring 2010 by ZDF and submitted to the Television Council.

Approval of the Television Council

At its meeting on 25 June 2010 the ZDF Television Council approved the tel-
 emedia strategies for ZDF as revised in accordance with its stipulations. Fol-
 lowing extensive scrutiny and appraisal, the governing body determined that
 the modified concept meets the requirements of the Interstate Agreement on
 Broadcasting and complies with the public service remit. It clearly meets soci-
 ety's democratic, social and cultural needs and adds a high-quality contribution
 to journalistic competition and opinion-forming.

Final step: Approval by the legal supervisory authority

After the approval by the Television Council, the final step in the procedure was
 submission to the *Länder* in their capacity as the legal supervisory authority.
 This was done and, in August 2010, the *Länder* approved the ZDF telemedia
 concept. The whole process of setting up the three-step test for ZDF took
 more than one year.

Strong limitation on Internet activities

The main aim of the whole exercise is to define as precisely as possible the
 new activities of the public service broadcaster. Commercial broadcasters and
 newspaper publishers would like to restrict these services as much as possible.
 As already outlined at the beginning, one basic principle for the European
 Commission is technological neutrality. Yet some opponents have argued that
 these criteria would give the public service broadcasters *carte blanche* to offer
 whatever services they want.

In reality, however, this is not the case. The German legislators as well as
 the Television Council have implemented this general criterion of technologi-
 cal neutrality in a clearly-defined way and limited ZDF's scope for offering
 new services and upgrading existing services. The following facts demonstrate
 these limitations:

General restriction imposed by the German legislators

A comparison of the EU requirements under the *Beihilfekompromiss* (State aid
 compromise) and those under national law reveals that the national rules actu-
 ally go beyond what the European Commission requested: this can be seen,
 above all, in the time limits set under the German law, especially the 24-hour
 restriction for sports events. According to these rules, sports events may only
 be made available online for just 24 hours after the event takes place. In addi-

tion, the ZDF telemedia concept had to specify exact time limits for each kind of service during which that service may be available online. This considerably restricts the availability of ZDF's online services.

Beside this requirement, the German law completely prohibits 'press-like' services. This obligation clearly reflects the complaints voiced by the press lobby that a public service broadcaster would damage their Internet business models. Another limitation that takes up the concerns of the press sector is the ban on providing comprehensive local news coverage through its Internet services. German law requires that all online services provided by ZDF and ARD remain free of advertising and sponsoring. The advertising market of the commercial broadcaster should not be affected.

Above all, feature films and serials that have been purchased rather than commissioned must not be offered for online viewing. This means that, for instance, foreign series like Britain's popular 'Midsomer Murders' (screened in Germany as 'Inspector Barnaby') may not be put online at all.

And last but not least, the German legislators also included in the law an exhaustive 'negative list' of services that cannot be provided by public services broadcasters because these services do not serve democratic, cultural and social values. This 'negative list' contains seventeen different types of service such as classified ads, games, chat rooms without a clear link to broadcasting programmes, betting platforms, music downloads, etc.

Television Council demanded sophisticated quality criteria

Moreover, the Television Council formulated a clear concept for the quality criteria to be applied. This has resulted in a very complex matrix of requirements in which the Television Council specifies different quality criteria with respect to different programme genres: sport, fiction, education and knowledge, consumer magazines, arts programmes and children's programmes. So for each of these categories there are separate criteria with respect to democratic, social and cultural value. The Television Council required ZDF to clarify these criteria and to revise the project description accordingly (*Telemedienkonzept*). Under this highly complex concept, ZDF has to demonstrate in detail the quality of the offerings.

Television Council requested important changes in the telemedia concept

After consulting with stakeholders and considering the results of the market impact assessment, the Television Council requested a modification of the telemedia strategies. Even though the market impact assessment demonstrated

that there would be only a marginal impact, the Television Council decided to take account of a number of comments made during the consultation process and to limit as much as possible ZDF Internet services. In addition, it requested more specific information with respect to the cultural, social and educational values of ZDF Internet services. Hence, it formulated more than 20 requirements that ZDF had to include in the revised project description. These notably included the provision of greater detail regarding service quality and cost, and more specific information on subdomains, programming guides and digital channels. In addition, the Council advocated changes to the lengths of time different types of programming are kept available online. For example, the new rules set a limit of three months for series. Beside this, the Television Council requested that consumer information would not be made available online, since it would be similar to services offered by magazines. And, finally, all ringtones and games had to be deleted from the ZDF homepage.

Thus, the ZDF telemedia concept was only approved subject to a number of conditions. ZDF was obliged to make substantial changes to its concept and to accept strong limitations on its services and offerings.

‘De-publication’ of 100,000 articles and 4,000 videos

As mentioned above, the German legislators prohibited all ‘press-like’ services provided by ARD and ZDF, since this would negatively influence the business models of newspaper publishers in the Internet.

ZDF took this prohibition very seriously. ZDF ‘de-published’ more than 100,000 articles and 4,000 videos, corresponding to more than 80 per cent of the online content up to 2010. In addition, ZDF’s online services now remain heavily focused on audiovisual material in order to avoid the domain of written material in which the press offers its Internet services.

Conclusions

The German three-step test is not simply an importing of the UK’s public value test. Rather, it is a tool designed specifically for the legal and political environment in Germany. It has proven to be a dynamic tool of governance that is based on clear principles: transparency, openness and control. The bodies responsible for carrying out the test are independent and competent governance bodies with the capacity to learn and to adapt to a transforming media landscape.

By now, even the competitors recognize that ZDF implemented the three-step test in a serious manner and respect the time and effort put into performing

this test. Nevertheless, in reviewing this test it is also clear that it has become something of an ‘administrative monster’. So it does not come as a surprise that a discussion on how to change and simplify the test has already started.¹¹ The Television Council, for example, assessed the three-step test in February 2011. In a detailed evaluation report¹² they put, for example, the so-called *Verweildauerkonzept* (exact time limits for each kind of service) into question. This concept obliges ZDF to time-limit the online availability of its content. As already mentioned, more than 100,000 articles and documents were ‘de-published’ up until 2010. During 2010 another 125,000 documents and more than 27,700 videos went offline because the time limit expired. Members of the Television Council heavily questioned the sense of this rule with respect to its economic, cultural and technological aspects.

The results of the tests are double-edged: On the one hand, the end of the three-step test gives legal certainty for ARD and ZDF to plan their services in the digital world. On the other hand, the stipulations of the Interstate Broadcasting Agreement and the outcome of the three-step test in practice amounts to major restrictions not only for the public service broadcasters but, above all, for the users. Contrary to what is really standard practice on the web, a lot of ZDF content, for example, quickly goes offline and is no longer available for people who want to do research and find out more. The current arrangements thus go a very long way towards meeting the interests of publishers and commercial broadcasters.

Notes

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4. See Meyer, R. (2008) *Der Drei-Stufen-Test und ‘public value’ Modell für Deutschland*. Mainz: Johannes-Gutenberg-Universität Mainz Mainzer Medieninstitut.
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6. Koch-Mehrin, S. (2010) *Written question by Silvana Koch-Mehrin (ALDE) to the Commission and the Answer given by Mr Almunia on behalf of the Commission* [P-1015/2010]. Available at, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-1015&language=EN>.
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8. See Bauer, H. & Bienefeld, A. (2007) ‘Der Public Value Test Ein Vergleich zwischen dem BBC-Modell und dem geplanten Verfahren beim ZDF’, *Funkkorrespondenz*, (49), 7 December.
9. See for example BVerfG, BvR 2270/05 from 11.09.2007.

10. For details, see Wolfgang, S. (2008) *The Public Service Broadcasting Mandate seen as the Process of its Justification*. Berlin: Friedrich-Ebert-Stiftung.
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ZDF's Three-step Test as a Societal Debate about the Future of Public Service Broadcasting

Stoyan Radoslavov & Barbara Thomass

On 25 June 2010 the Broadcasting Council of the second German national channel, ZDF, ruled that the services offered by the ZDF on the Internet are in accordance with the prerequisites of the latest interstate treaty on broadcasting. The German version of the public value test for the ZDF was completed.

With this decision, a process of more than a year was finalized – trying to put an end to the ongoing critiques and polemics against the public service broadcaster's expansion onto the Internet. It can, however, be doubted that this end has indeed come.

Following the complaints of commercial broadcasters within the frame of European competition laws and the conflict with the European Commission about the activities of public service broadcasting in the digital world, the German legislator found a compromise with a broadcasting law that defines the restrictions of German public broadcasters for their enhancement of the remit in the online world. The three-step test is the German version of the public value test, which requires the definition of the cultural, social and political needs of the society and how they are served by new media services.

This chapter will give a report and an analytical assessment of this governing instrument against the background of the German debate about public service broadcasting in relation to its development to public service media. The main hypothesis of this contribution is that the legal provisions, the procedures and the public debate about the three-step test can be interpreted as a societal debate, mirroring the degree of public support for the online future of public service broadcasting as public service media.

The discussion, therefore, will outline the legal provisions for public service broadcasting online activities and explain how political and economical backgrounds – the interests of the stakeholders in media policy and the conditions on the media markets – have influenced the resulting legal provisions. A special insight will be given to the detailed procedures accompanying the ZDF three-step test, as they shed a light on how this governing instrument

is used by different stakeholders for external interests. As the public debate concerning public service broadcasting has been mirrored in the submissions and commentaries referring to the three-step test, the public discourse about the test will be analysed in its main arguments.

ZDF's Three-step test as a procedure

The compromise of the German government and the European Commission about the appraisal of the licence fee meant that the public service broadcasting remit had to be specified – the question of how the process of specification should be organized thus became important. Part of the compromise between the German Government and the European Commission was, then, the so-called three-step test¹ (*Drei-Stufen-Test*) which identifies a procedure for how new services should be submitted to a test of whether or not they are in accordance with a public service orientation. This was spelled out in the new interstate treaty on broadcasting from 1 July 2009. The crucial paragraphs are the following:

Public service broadcasters in Germany are allowed to put all their digital services (called *telemedia*) online for only seven days (an exception is sports, with only 24 hours). All services intended to be available for longer than that must undergo this three-step test. This also refers to the online services already in existence, which had to fulfil the procedure before 31 August 2010.

The then existing online services of the ZDF included both general and thematic sites:

- zdf.de (information about the main programme and the digital channels, live streaming, detailed information)
- heute.de (news)
- sport.zdf.de (sports)
- ZDFmediathek.de (catch-up and on-demand services)
- tivi.de (addressing children up to 13 years of age)
- theaterkanal.de
- unternehmen.zdf.de²

The three-step test comprises the following elements: the public service broadcasters have to elaborate on what the online service is about and explain how it is in accordance with the remit. Therefore what must be demonstrated, and approved by the broadcasting council, should be:

1. the degree to which the service corresponds to the democratic, social and cultural needs of the society;

2. the degree to which the service will contribute to the editorial competition (*publizistischer Wettbewerb*); and,
3. what financial efforts are necessary for the service.

In a further prerequisite, the law demands that, concerning step 2 (competition), the involvement of an external consultant to give an expert opinion on the effects of the service on the market, and that third parties can comment on the concept of the services, i.e. how they feel it affects them.

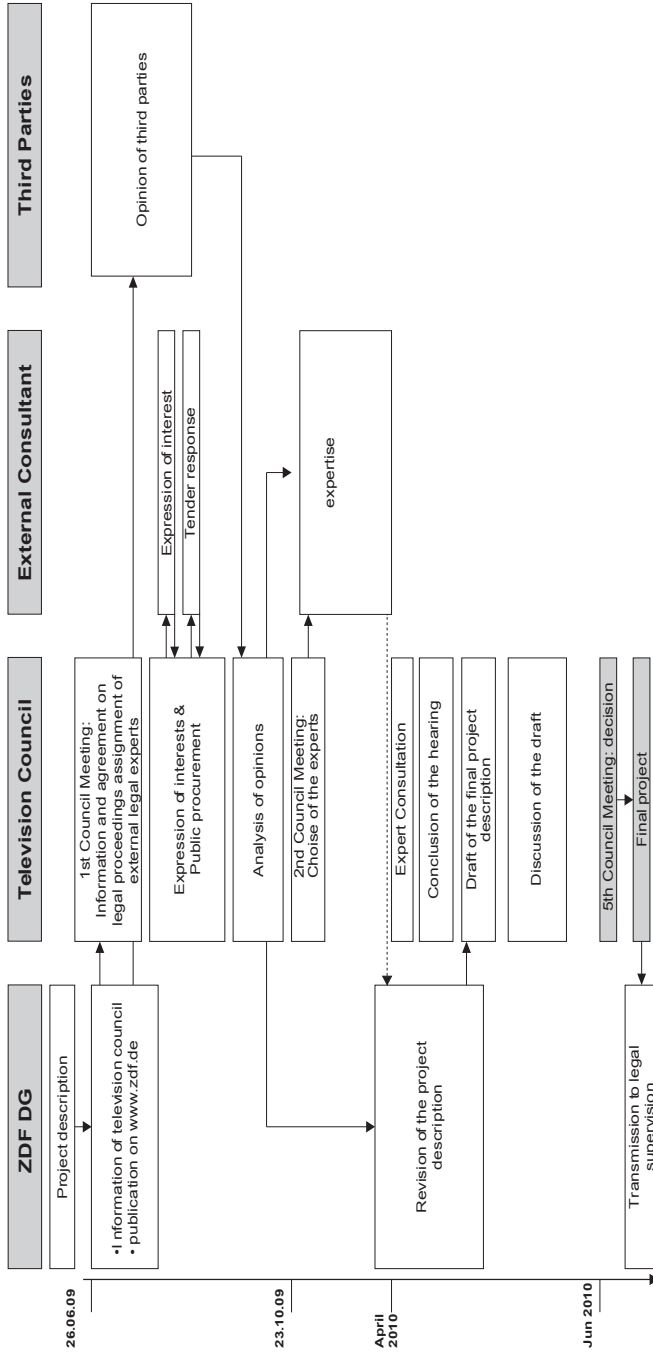
The broadcasting law does not stipulate that market competition is the fundamental criterion: it leaves it to the broadcasting council to balance, in a final evaluation, editorial and market competition issues with the value that the service in question contributes to the needs of society.

It is important to mention and explain why the broadcasting councils of the public service broadcasters – in the case of the ZDF, the Television council as the ZDF broadcasts only television, not radio – are the central actors of the three-step test. This procedure is the evaluation of whether or not the public service broadcaster acts in accordance with the legal remit. According to the rulings of the Constitutional Court, the independence of public service broadcasting requires that there must be no government institutions involved in the control of public service broadcasting. The constitutional interpretation of the communication and broadcasting freedom leaves it to the broadcasting councils, which have a composition representing the general public – more precisely: the so-called socially-relevant groups – to establish control over public service broadcasting, which includes the control and evaluation of the further development in the online world.

The broadcasting council pursued some particular interests through this procedure: to have control of the adoption of new channels or services; to reduce to a minimum the influence of third parties that is demanded by the EU requirements; and to find a balance between the transparency of the procedure and the ability of the corporation to act flexibly and quickly. This is one of the most disputed issues, as publishers and commercial broadcasters are likely to contest the legitimacy and competence of the broadcasting councils to decide on the market impact of new services.

Although ZDF's three-step test seems quite clear cut, the procedure to implement it is rather complicated. After the director general had presented the concepts for the various online services in question, and the television council had officially opened the procedure, third parties could comment within a given deadline on the concepts, and the external consultants for the evaluation of market effects had to be chosen. The third parties' commentaries (53 statements were given) were submitted to the director general; the different sub-committees of the television council dealt with the issue and, in the next session, the television council debated the statement of the third parties, the

Figure 1. The procedure of the three-step-test (ZDF (Transl. S.R./B.T.))



comments of the director general and posed questions to him. In a further session the television council debated the external expertise. The director general modified the concepts for the online services in line with the statements of third parties, expert opinion and the questions of the television council.

In a final round, the committees of the television council prepared a suggestion on the approval of the concepts, which was then debated and voted on in the final session in June.

There were two additional elements in the process of opinion formation of the television council: a workshop on the issue of how to develop criteria for the evaluation of the needs of society, and an extra expert consultation.

In contrast to the UK public value test, where public value is a quantitative concept that aims to state the benefit of new services on monetary grounds, the German three-step test takes a different approach. Here, the contribution to the journalistic and editorial competition (*publizistischer Wettbewerb*), which is explicitly *not* a quantitative but a qualitative dimension, is the decisive element of the test. The market impact is just one element of the procedure but has no prominent significance.

Until the implementation of the three-step test there had been no specification of what *public value* could mean. The notion was used in political debate without a clear-cut definition and very different dimensions are addressed with this fashionable notion. Hasebrink mentioned that *public value* has no integrated programmatic content, but is the result of a consultation procedure which integrates all relevant stakeholders, and is flexible enough to react to changing social conditions with adequate objective targets: 'Public value can be understood as a balanced triad of production of services orientated to social aims, transparent evaluation and consequent involvement of the public sphere.'³

It is the two implications of the notion of *public value*, having a methodological dimension and a content-orientated dimension, which were often mixed up in the public debate. The methodological dimension refers to a special form of media governance whereas the content one addresses different understandings of the common welfare connected to broadcasting.⁴

Depending on the diverging perceptions of common welfare in Europe, *public value* can be understood as a public good, as a cultural good, or as a democratic good.⁵ In Great Britain, for example the concept is most strongly associated with the provision of public goods as a targeted intervention against market failure. In France, Italy and the Scandinavian countries, public value is connected with sustaining cultural heritage and language, whereas in Germany it refers to the maintenance of an active public sphere and democratic structures.⁶

Although the content dimension itself was no longer used in the political debate, these three meanings continued in the sense of the *democratic, social and cultural needs* of society being met.

ZDF's Three-step test as a societal debate

As previously argued, the main aim of the three-step test in Germany was to define the cultural, social and political needs of society and the way these needs should be served by new media services. It comprised, thus, a normative and a methodological aspect.

In analysing the public discourse accompanying the ZDF three-step test, we concentrate on the submission procedure and the media coverage of the ZDF test, as those two sub-discourses constituted the main pillars of the public discussion. Whereas the first substantiates the stakeholders' input into the decision-making process, the second represents their output in shaping public opinion. By listing and evaluating their core arguments, we would then be able to draft some preliminary conclusions on the direction of the public debate on the essence of public value, comprising both content and procedure, and thus differentiate between its normative and methodological aspects.

Submission procedure

One of the major innovations of the three-step test, from a media governance point of view, was the active involvement of third parties in the decision-making process. In the ZDF case this was implemented by introducing a three month submission procedure followed by an expert consultation inviting some of the major stakeholders to an open discussion.

During the submission procedure 53 responses were received, evaluated and considered in the final decision. Whereas most of them were drafted by industry and public organizations, 23 were submitted by private citizens. Some of the core arguments of that part of the procedure are ranked according to their frequency:

Calculating storage windows for content online: How long public service media content should be kept online has become the most controversial question of both the submission procedure and expert consultation. Whereas private competitors argued that unlimited content provision would suffocate the emerging video-on-demand market, consumer associations and private citizens explicitly opposed the application of artificial storage windows for publicly-funded content.

Estimating adverse market impact: Private competitors accused ZDF of unfair competition. Since ZDF's online services are ad-free, the market impact of those services is not estimated within the advertising market but in the more general context of competition for attention. Public attention was, thus, defined as a resource that could be monetarized by market competitors if there was no public service intervention.⁷

Defining content restrictions: Market competitors reiterated the legal restrictions from the so-called negative list of the broadcasting treaty and pleaded for

their rigid interpretation and application to ZDF's online offers. Many online services without an explicit link to concrete television programmes or without editorial supervision were suggested for removal. According to the stipulations of the interstate broadcasting treaty, press-like services, not linked to concrete programmes, are also disallowed. However, defining what a press-like service is has become one of the most contentious issues of the process, with publishers and the television council using divergent interpretations of the matter.

Defining added value: In accordance with the existing legal provisions, the second step of the test was to evaluate the service's quality contribution to editorial competition. Most submissions elaborated criteria for estimating the added value of new services: credibility, professionalism, diversity and open access for people with disabilities are mentioned as examples of such. Whether free access and ad-free content constitute added value was discussed. Some submissions deliberately excluded entertainment from the added-value criteria, others pleaded for the inclusion of a UK-inspired 'value for money' assessment.

Narrower scope of application: As already explained, the three-step test applies to the director general's written proposals (*Telemedienkonzepte*), which structured all ZDF online services into the already-listed six online offers. However, most stakeholders pleaded for narrower and more precise definitions of the online services subjected to the test.

More participation and transparency of the test procedure: Some stakeholders argued for a longer submission period and extended access to relevant procedure documents.

Media coverage

It will be argued that the public debate regarding the three-step test was both influenced and mirrored by the media coverage surrounding it. Because of its complexity, ZDF's three-step test has not been very popular among mainstream media in Germany. However, the fact that all opinion makers (publishers, commercial and public service broadcasters) were also directly involved in the political process as stakeholders calls for some extra attention towards that part of the public debate. Twenty-five press and online articles from Germany's national newspapers and magazines accompanying the final phase of the ZDF's three-step test were analysed in order to comprehend how that issue was adapted and presented to the general public. As a result, six major arguments could be distinguished that dominate the published debate. The ranking below is based upon their intensity within that debate.

1. Providing online press-like services is illegal: The majority of articles outlined this argument indirectly by quoting or interviewing presidents or spokesmen of the publishers' associations. In most cases, the provision of press-like services was dealt with as a publicly-funded online-expansion strategy threatening pub-

lisher's business models and, as argued in some articles, even press freedom in general. Only a few articles discarded the press-like debate as obsolete and pleaded for technologically-neutral diversification criteria between publicly- and privately-funded content online.

2. *'Bureaucracy monster'*: Because of its significant scope and time-span the three-step test was mostly criticized as a very expensive and time-consuming procedure, producing unmanageable volumes of documentation.

3. *What is a de-publication*: A publicly-funded procedure that prescribes the publicly-funded removal of publicly-funded online content so that the people who have funded it cannot access it. This paradox was often substantiated by the number of removed sites and traced back to the political compromises of the broadcasting treaty. Some articles claimed that removing content from the online environment is not appropriate to the nature of the medium.⁸

4. *Planned economy invades the market*: The online environment was mostly portrayed as a free-market domain that is to be protected from state intervention. However, precise figures that substantiate crowding-out effects or market distortion were not mentioned.

5. *Broadcasting Councils are not fit for media governance*: The executive bodies were often criticized in terms of their broad and ineffective composition, members' competence and independence. Comparisons with the BBC Trust often underlined this critique.

6. *Storage windows for online content*: ZDF's storage windows were explained in the context of the genres and formats they are applied to. Generally, they were characterized as more generous than the storage windows introduced by other broadcasting councils.

A close look at the core arguments that have shaped the published debate along ZDF's three-step test leads to the conclusion that the published opinion was biased as it focused primarily on the negative impact of ZDF's online services and the assessment procedures accompanying them. Whereas five of those arguments hold to the problems of public service media's 'online expansion', the de-publication argument is the only one that underlines the public value lost through deletion of its text-based services.

Conclusions

In general it can be concluded that legal provisions dominate both parts of the discourse. The direction of the public debate has to some extent been predefined by the existing broadcasting treaty, adopting the provisions of the

state aid compromise between the European Commission and the German Government to the German media landscape. This adherence is understandable, with legal certainty being essential for the development of both public service broadcasters and market competitors.

However, overemphasizing the existing legal provisions leads to an overexposure of obsolete intermedia differentiation within the public value debate. Differentiating press-like services from broadcasting ones or services related to television programmes from autonomous ones is hard to reconcile with the principle of technological neutrality, promoted by the European Commission, and shifts the focus from a more sustainable future-oriented functional differentiation between private and publicly-funded communication structures.

Another key element of the societal debate around the three-step test is the tendency of argument quantification. Whether it is the number of sites being 'de-published' due to three-step test provisions or the potential turnover from ZDF's eventual online market exit, arguments are gladly transmitted in numbers.

Whereas the submission discourse focuses primarily on procedure specifications (estimating online storage windows, applying negative list restrictions, defining relevant markets) the media coverage embeds the three-step test within more general narratives of public funding, journalism sustainability, dual system, state independence, press and market freedom.

Both sub-discourses deal mainly with methodological aspects of public value by elaborating on how to organize the co-existence of public and private media providers in a multimedia environment. The normative and content aspects of the public value concept as well as defining the social, democratic and cultural needs of a society are not explicitly dealt with. Some submissions, though, propose concrete added-value criteria for new services by referring to the communicative needs of society. Most of them come either from the general public or from public organizations.

Final analysis

To analyse the legal discussion within broader debates about the societal role of public service broadcasting/public service media means to take into account the complex situation of media markets and norms of media policy in Germany. The legal provisions as they are laid down in the broadcasting treaty and the chosen procedure of how to implement them reflect how the conditions on the media markets and the resulting interests of the stakeholders in media policy influenced both. While the three-step text was a compromise reconciling the German constitutional view of non-interference of the state in broadcasting issues with the European Commission's demand for a specified remit, the implementation is a reflection of relation of power in the German

media market. The broadcasting councils were aware that the long-existing claims of commercial media for non-involvement of public service broadcasting in the online sector would be the main obstacle in pursuing their online strategies. So they elaborated the aforementioned complex procedure, which follows the rather legalistic form of media policies as is characteristic of Germany, in order to give little room for any legal claims.

The broadcasting council in its session from 25 June 2010 concentrated on the editorial competition and ranked the editorial benefits of online services higher than their potential negative effects on commercial markets. It decided that the online services are in accordance with the stipulations of the broadcasting treaty and encompass the public service remit.⁹ This ruling was decided with two dissenting votes and one abstention. Given the pluralistic composition of the broadcasting council of the ZDF – and the underlying idea that its members represent the general public – a broad consensus about the online strategy and the underlying plans for future development of the public broadcaster can be stated.

Nevertheless, if we consider the published debate, we can observe a lot of disagreement and controversy. The main critique towards the concepts of online media and their ability to serve the democratic, social and cultural needs of the society for public service online media were given by the representatives of commercial media associations (BDZV, VDZ, VPRT¹⁰). During the nearly year-long ZDF three-step test, this governing instrument was used by some of them for external interests. It was mainly the representatives of the daily newspapers (BDZV, the association of newspaper publishers) who acted on their own agenda. While the broadcasting law orientates the whole procedure to the notion of the needs of the society, and empowered every broadcasting council member to ensure these needs are well served, the members of the television council representing the BDZV pursued their position, being firmly against any further development of public service broadcasting. This was obvious in many statements and their final ‘no’ to the approval of the online services. They were also dominating the public – i.e. published – opinion.

The core content of the critique was the challenge of the existence of democratic, social and cultural needs. Thus, the critique aimed at the fundamental stipulations of the broadcasting law and was then disguised as a critique of single services and methodological questions. A similar fundamental argumentation was given – on the occasion of the expert hearing and as written statements of third parties – by those groups which accepted the presented services. Here, the main arguments were that online services are in line with the remit of public service broadcasting and that the ZDF online services contribute to the diversity of media. Interpretations of the mentioned democratic, social and cultural needs as they were elaborated on by the members of the ZDF broadcasting council during the procedure were not a substantial part of

the public discussions – neither in the submissions by third parties, nor in the media coverage.

The *ex ante* test – after it had been first implemented in Britain as the *public value test* – has now become a topic of debate in many EU member states after the European Commission's 2009 Communication.¹¹ The German example of the three-step test within the ZDF shows that its character of being a compromise is reflected in its implementation. While the procedure has been heavily debated, its content-related dimensions – how to define and specify common welfare with respect to broadcasting – were not considered in the appropriate way. A chance for a broad societal debate, as it was introduced by the broadcasting law, was given away as the published articles did not refer to the dimensions of quality in the online services. This was mainly done within the broadcasting council and, here even, concentrated in a subcommittee.

If similar experiences could be drawn from other countries where an *ex ante* test has been executed, we must ask for the future debate about applicable elements to promote its use for a societal debate. Increasing the involvement of the general public in the submission procedure would have to be one of the main preoccupations.

Notes

1. European Commission (2007, 24 April) *State Aid Case E 3 / 2005 – Aid to the German public broadcasters*. Available at http://ec.europa.eu/competition/state_aid/register/ii/by_case_nr_e2005_0000.html#3.
2. We do not refer to those services which are offered together with the first public service broadcasting channel ARD (3sat.de, phoenix.de and kika.de).
3. Hasebrink, U. (2007) 'Public Value: Leitbegriff oder Nebelkerze in der Diskussion um den öffentlich-rechtlichen Rundfunk?' *Rundfunk und Geschichte*, pp.38–42. (p. 40), Transl. B.T.
4. Radoslavov, S., & Thomass, B. (2010) 'Public Value – Die europäische Dimension', in M. Karmasin, D. Süßenbacher & N. Gonser (eds) *Public Value: Theorie und Praxis im internationalen Vergleich*, Wiesbaden: VS Verlag, (pp. 173–189).
5. Karmasin, M. (2009) 'Public Value: Konturen und Konsequenzen eines Legitimationsbegriffs', in Ilser Brandner-Radinger, (ed) *Was kommt. Was bleibt. 150 Jahre Presseclub Concordia* Wien: Facultas, (pp. 91-99).
6. Karmasin (2009) op. cit.
7. Goldmedia's market expertise builds on that hypothesis by calculating the eventual profit of ZDF's theoretical market exit for the market competitors: 0.4%. However, their market definition is restricted to the online advertising market, excluding mobile applications and pay services. Goldmedia GmbH (2010) *Gutachten zu den marktlichen Auswirkungen der ZDF-Telediensten*, Available at http://www.unternehmen.zdf.de/uploads/media/Marktliche_Auswirkungen_ZDF-Telediensten__Goldmedia_Salans.pdf.
8. Hyperlinking between contents online is described as one of the core drivers of the Internet's added value. Some authors regard the availability of links to existing content as a new credibility criterion.
9. ZDF Fernsehrat. (2010) *Drei-Stufen-Test: Fortschreibung des Teledienstenkonzeptes des ZDF FR 7/10 hier: Beschlussempfehlung*. Available at http://www.unternehmen.zdf.de/uploads/media/Beschluss_ZDF-Telediensten_Stand_25._Juni_2010_korr.pdf.

10. BDZV Bund Deutscher Zeitungsverleger (Association of German newspaper publishers)
VDZ Verband Deutscher Zeitschriftenverleger (Association of German magazine publishers)
VPRT Verband Privater Rundfunk und Telemedien (Association of Private Broadcasting and Telemedia)
11. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC1027%2801%29:EN:NOT> (accessed 10.5.2011)

Chapter 9

The Public Service Remit in Norway: What's In and What's Out?

Marie Therese Lilleborge

Monitoring of the public service broadcasters' content obligations has been carried out in Norway since the mid-1990s. Over a period of eight years the independent Public Service Council published a yearly assessment of how the public service broadcasters complied with their public service remits. In 2004 this supervisory task was transferred to the Norwegian Media Authority, which is an administrative body under the Ministry of Culture.

Until recently, the public service assessment was solely performed *ex post* and was based on traditional public service content criteria. In 2009, however, amendments were made to the Norwegian Broadcasting Corporation's (NRK) Statutes, hereby establishing a more precise definition of what activities fall within the public service remit. Together with the implementation in the Broadcasting Act in 2010 of an *ex ante* procedure for significant new services that the NRK wants to launch, this introduced new principles that require new methods in assessing public service broadcasting in Norway. These recent alterations are a response to the EFTA Surveillance Authority's handling of a case concerning the financing of the NRK and its compliance with state aid regulation applying the European Economic Area Agreement.

This chapter describes the process whereby new principles and methods were implemented in regulation, mainly focusing on the *ex ante* entrustment procedure which is now in place and operating. This procedure shall ensure that only activities that qualify as public service are included in the NRK's public service remit, or in other words interpret what is in and what is out of the current definition of the NRK's remit. The chapter will point out that the transparency in the evaluation of the NRK and the opportunity for interested parties to offer an opinion on the NRK's mandate through public hearings are strengthened by this new regulative mechanism.

The Norwegian public service landscape

In Norway there is currently a combination of two different types of broadcasters that have public service obligations. On the one hand there is the state-owned company NRK, which is primarily financed by licence fees.¹ The Minister of Culture exercises the owner's rights and convenes the NRK's General Assembly. The scope of the NRK's activities is based in the Norwegian Broadcasting Act² by a general provision in chapter 6 stating that the purpose of the NRK is to provide public service broadcasting and related activities. The NRK's public service remit is further defined in the NRK's Statutes (Articles of Association of the NRK³). The Statutes are stipulated by the General Assembly.

On the other hand, there are three private, commercial companies with a public service remit. The two radio broadcasters Radio Norge and P4 have their public service remit stated in their licences. The television broadcaster TV 2 has its public service remit stated in an agreement with the Norwegian State, represented by the Ministry of Culture. This agreement commits the State to secure an obligation for cable owners to retransmit the television broadcast of TV 2's main channel (must-carry obligation) in exchange for TV 2's delivery of public service content as stipulated by the agreement.

The EFTA Surveillance Authority's case on state aid to the NRK

The regulation of public service broadcasting in Norway is influenced by the European Union's (EU) regulations concerning member states' use of state aid. The definition of the public service remit falls within the competence of the member states in accordance with the European Commission's communication on services of general interest.⁴ Based on the European Economic Area Agreement⁵, Norway is obliged to implement parts of the EU legislation, including regulations concerning state aid to public service broadcasting. The EFTA Surveillance Authority (ESA) has adopted guidelines on assessing state aid cases, equivalent to the corresponding guidelines adopted by the European Commission.⁶

The guidelines clarify three conditions that have to be fulfilled to make state aid compatible with the European Economic Area Agreement;

1. a clear and precise definition of the public service remit;
2. the undertaking must be explicitly entrusted with the provision of the public service, and;
3. the exemption of the ban of state aid must not unfairly distort the functioning of the internal market (proportionality test).

On the basis of evidence provided by the EFTA State in question, the EFTA Surveillance Authority assesses whether these criteria are satisfied and whether there is an effective supervision of the fulfilment of the public service obligations.

Such an investigation was carried out by the EFTA Surveillance Authority concerning the financing of the NRK in Norway, and led to a substantial alteration of the NRK's Statutes and the implementation of new assessment methods in the regulations before the EFTA Surveillance Authority closed the case in 2010. Following a complaint in April 2003 from the private, commercial operators TV 2 Interactive AS and TV 2 Nettavisen AS⁷ on alleged claims of cross-subsidization of the NRK's teletext- and Internet-based services, the proceedings between the EFTA Surveillance Authority and the Norwegian authorities (the Ministry of Culture⁸) continued over a period of seven years. The main question concerned the scope of the NRK's public service mission, in particular services on new media platforms.

The conclusion of the EFTA Surveillance Authority's investigation was that the financing regime of the NRK was not compatible with the European Economic Area Agreement and the guidelines on state aid to public service broadcasting. The EFTA Surveillance Authority required certain measures to be taken both concerning the definition of the NRK's public service remit and the financing model.⁹ In short, the EFTA Surveillance Authority requested a clearer definition of the NRK's public service mission, including a clarification of the nature of certain services and an establishment of an entrustment procedure prior to the launch of new services in which the market impact and the added public value of the new service are assessed. In addition, the EFTA Surveillance Authority requested better compliance with market principles in commercial activities, a separate accounting system for public and commercial activities and, also, a more effective supervision of the public service mission at the national level and controls against any overcompensation.

The Ministry of Culture stated very early on in the correspondence with the EFTA Surveillance Authority that an important aim was to make sufficient room for the NRK to evolve according to both social and technological developments:

Despite the drastic increase of available media, it is, in the view of the Norwegian Government, important to maintain a national public broadcaster as a provider of reliable news, information and entertainment, in the Norwegian language and based on Norwegian culture and tradition. Commercial providers will not deliver everything we as a society want from broadcasting. If NRK is to serve ever more diverse and demanding audiences, it is important that it is able to evolve and adapt to the rapidly changing media landscape.¹⁰

Basically, the EFTA Surveillance Authority found the definition of the NRK's core activities, specified as radio and television broadcasts in the NRK's statutes, sufficiently clear to be granted an exemption in accordance with the European

Economic Area Agreement and the guidelines on state aid, but considered the definition of the NRK's related activities (i.e. new media services) to be too vague and too broad to meet the requirements. The Norwegian response defended a broad remit on the grounds that Internet and other new distribution technologies open up new channels of communication, and that 'interactivity, fragmentation and niche services and catering for individual needs is precisely what defines new media services and distinguishes them from traditional media'.¹¹

The Ministry of Culture argued that the state aid rules should not be interpreted in a way that prevents 'defining a public service remit which is in keeping with the technological development in the media sector and with the media consumption and habits of the population'.¹² However, the Ministry of Culture agreed with the EFTA Surveillance Authority that the NRK's Statutes 'could be more precise in regard to defining which new media services fall within the scope of the public service remit'.¹³

Changes in national law

After further dialogue with the EFTA Surveillance Authority, the Ministry of Culture initiated a review of the NRK's Statutes by presenting a White Paper on the NRK's Statement of Commitments, which was approved by the Norwegian Storting (Parliament) on 24 February 2009. These commitments were incorporated into the NRK's Statutes by the NRK's General Assembly in June 2009. The new Statutes represent a substantial alteration of the NRK's scope of obligations compared with the previous Statutes. At the same time the new Statutes give the NRK greater liberty in performing its mandate and magnify its scope of activities by explicitly specifying a number of new obligations.

The former Statutes stipulated that the NRK had to achieve its obligations within its core radio (P1, P2 and P3) and television channels (NRK1 and NRK2), but the new Statutes introduce to a greater extent platform-neutral obligations, which gives the NRK greater leeway in deciding where the required public service content shall be delivered. At the same time, the new Statutes amend specific content requirements for NRK's services on the Internet and, by so doing, include a set of criteria explicitly concerning new media services within the NRK's public service remit in addition to the requirements in relation to the traditional radio and television service.

As for EFTA Surveillance Authority's request for an entrustment mechanism, the Ministry of Culture accepted the establishment of an *ex ante* procedure for significant new services that the NRK wants to include in its remit. The Broadcasting Act was amended with a regulation requiring NRK to obtain the approval of the King in Council¹⁴ in order to extend its offer with significant new services. This amendment involves, for the first time in the Norwegian history

of public service broadcasting regulation, (1) an assessment of a service *ex ante* rather than just *ex post*, and (2) a market impact assessment rather than just an evaluation of whether the service complies with the established content criteria.

To ensure that services already offered by the NRK on new media platforms fall within its public broadcasting remit, the EFTA Surveillance Authority also requested that the Media Authority carries out an assessment of whether existing services belonged within NRK's remit.¹⁵ The Ministry of Culture accepted such an examination of the NRK's existing services on new media platforms, and underlined that 'the public service remit as formalized in the new company statutes, in particular article 17, will constitute the formal basis of this assessment'.¹⁶

The Norwegian Media Authority carried out an examination based on the NRK's new Statutes and presented its findings in a report that was published in June 2010.¹⁷ The requested task, as instructed by the Ministry of Culture, did not include an assessment of the market impact of existing services, and the scope of the examination and its delimitations were outlined in the introduction to the Media Authority's report.

The main findings in the report were that most of the NRK's existing services fall within the public service remit as defined by the newly amended Statutes and, thus, can be financed by licence fees. However, the Norwegian Media Authority was critical about a few services, as certain elements were assessed as not in accordance with the requirements of editorial independence and the premise that the NRK's services shall be non-commercial. These findings concerned a website that the NRK is offering in collaboration with the Norwegian Trekking Association¹⁸, called www.ut.no, containing travel advice and the tools to plan outdoor activities in addition to information on the Association's own commercial services.¹⁹ The Norwegian Media Authority was also critical of a number of mobile services in connection with the NRK's radio and television programmes that generate revenue for the NRK – for example, by using SMS-voting in programmes like the Eurovision Song Contest.

The Norwegian Media Authority's report functioned as an advisory assessment to the Ministry of Culture. The report was submitted to a public consultation in October 2010 that raised a number of critical viewpoints concerning the scope of the NRK's public service remit, especially from commercial operators in Norway as they consider it to be too broad.²⁰ In addition, the commercial operators called for an assessment of the potential restrictive market impact of the existing services on competition, which is obligatory in the *ex ante* procedure of new services. On 20 June 2011, the NRK's General Assembly considered the Media Authority's assessment of the NRK's existing services on new media platforms, and decided to endorse all the existing NRK services as being within the public service remit. One exemption was related to paid-for SMS-services.²¹

In the meantime, TV 2 has submitted a second complaint to the EFTA Surveillance Authority on 30 May 2011 alleging that the conditions set by the

Authority in its decision to close the case on the financing regime of the NRK have not been implemented correctly by the Norwegian authorities.²² The EFTA Surveillance Authority has requested information on several aspects: whether the Media Authority applied the added value test established for the *ex ante* entrustment procedure in the assessment of the NRK's existing services; and whether the decision on the approval of their existing services as being within the public service remit was taken by the Minister of Culture, in its capacity as the General Assembly, or by the Government (King in Council).²³

Implementing the new legal framework in regulatory practice

The EFTA Surveillance Authority's investigation also led to the amending of the Broadcasting Act on 19 June 2009 with a provision granting the Norwegian Media Authority full independence from the Government when carrying out the *ex ante* procedure and in its task of making an annual report on how the public service broadcasters comply with their remits. There were some concerns about the independence of the supervision of the NRK, since the Norwegian Media Authority is an administrative body under the Ministry of Culture and, therefore, could be subject to instructions from the Ministry, which at the same time constitutes the NRK's General Assembly.

The amendments to the Broadcasting Act, establishing an *ex ante* procedure whenever the NRK wishes to launch a significant new service, specify that 'only services that meet the democratic, social and cultural needs of the society' may be added to the public service remit. It are the newly-amended NRK Statutes that further define the scope of activities that fall within their public service remit and, accordingly, will constitute the basis of assessing whether or not a service may be included in their public service activities. The *ex ante* procedure represents an entirely new method of public service supervision in Norway. It requires the development of a new set of criteria in order to perform assessments where the market impact of a service is balanced with an assessment of how the service contributes to fulfilling the NRK's public service mandate.

The *ex ante* procedure presupposes a cooperation between the Norwegian Media Authority and the Norwegian Competition Authority and includes assessments in four steps. Initialization of a procedure is based on an initiative from the NRK through an application.²⁴ In step 1, the Norwegian Media Authority assesses whether the new service needs to be subjected to an *ex ante* procedure. This assessment must first and foremost consider if the new service represents a significant change in the existing range of public services that the NRK offers. In determining whether the new service needs an *ex ante* approval, the Norwegian Media Authority should emphasize, *inter alia*, whether the service

differs significantly from other services within the existing public service offer, the effect on the market as such and the costs associated with the service.

If the Norwegian Media Authority finds that the new service triggers an *ex ante* procedure, three simultaneous processes are activated in step 2: the NRK's application will be submitted to a public hearing in order to ensure that potential competitors are heard; the Norwegian Competition Authority will assess the potential effects of the service on any possible restriction of competition; and the Norwegian Media Authority will assess whether the service contributes to the fulfilment of the NRK's public service remit as laid down in the Statutes.

In step 3, the Norwegian Media Authority will assess whether the service is to be considered as a public service in accordance with the remit and whether the service contains an element of added public value relative to the potential commercial offers already existing in the market. This assessment is weighed against the potential restrictive impact of the service on competition. Based on this overall assessment in step 3, the Norwegian Media Authority will issue an advisory statement to the King in Council. The statement has to be issued no later than 12 weeks after receiving the NRK's application.

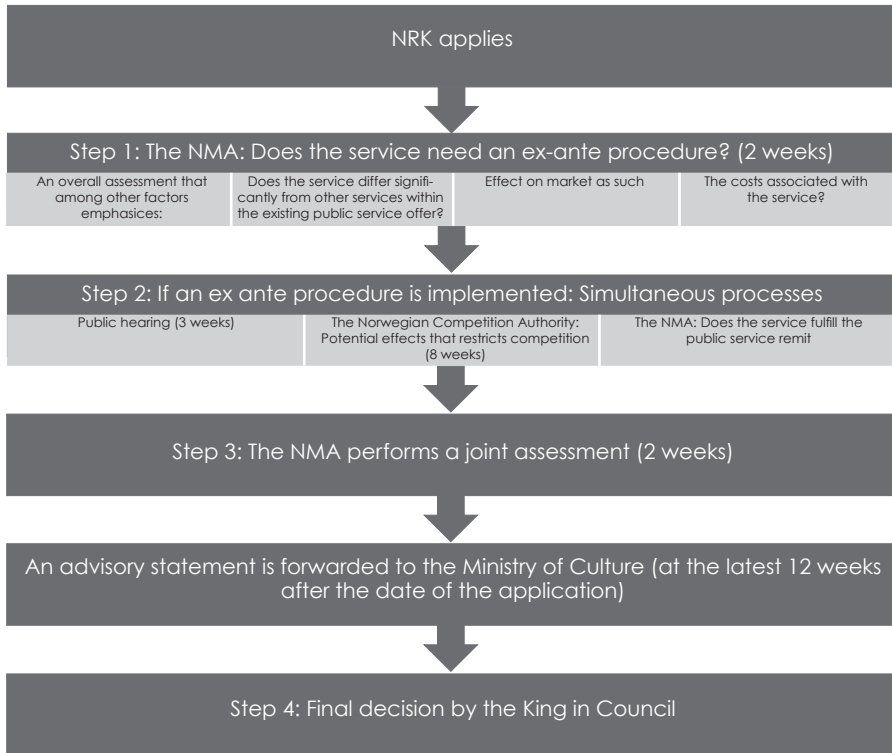
Only services that fulfil the democratic, social and cultural needs of the society can be included in the NRK's public service remit. It is the King in Council that finally decides whether or not to include the service in their remit in step 4. The Norwegian *ex ante* procedure is illustrated in figure 1.

The *ex ante* procedure in practice²⁵

The *ex ante* procedure was put into effect for the first time when the NRK applied for approval to implement a new travel and route planner²⁶ in its public service remit on 12 April 2011. The new service is a cooperation between the NRK, the Directorate of Public Roads, Trafikanten Ltd and Ruter Ltd.²⁷

In step 1 of the procedure, the Media Authority found that the new service had to be subjected to an entrustment procedure on the grounds that it represented a significant change from the NRK's existing services, that there is an existing market as well as a potential future market for this type of service and, finally, that the costs of the service were considered to be substantial.²⁸

The NRK's application was then, in step 2, submitted to a public consultation, in which several actors in the media market expressed concerns about the market impact of the NRK's expansion with new media services and the broad definition of the NRK's public service remit. The Norwegian Competition Authority concluded that the NRK's planned travel and route planner would have 'a substantial negative impact on existing commercial actors that are in the process of developing Internet search engines which provide travel and route planners, and also Internet portals that compete with nrk.no' and that it could

Figure 1. Illustration of the Norwegian *ex ante* procedure

‘reduce commercial actors’ incentives to invest in both establishing internet travel and route planners and development and improvement of existing services’.²⁹

The decisive factor in the Media Authority’s conclusion and advisory statement was, however, that such a travel and route planner cannot clearly be justified in the NRK’s Statutes.

The Media Authority is concerned that the assessment of whether new services can be included in NRK’s remit has to take into consideration the dynamics and high rate of change that characterizes new media services. It can be problematic, on the basis of the wording of the Statutes, to draw the line as to which services that can be justified in NRK’s public service remit. In order for the NRK’s Statutes to give a clear and precise delimitation of the NRK’s mandate, it is the Media Authority’s opinion that it is necessary to look to the media political aims that the public service’ democratic, social and cultural function are supposed to maintain.³⁰

The assessment was that, even though such a service could contribute to achieve certain socio-economic purposes by providing travel and route information in

one website, it could not be justified within the democratic, social and cultural needs of society as these are defined by the public service remit in the NRK's current Statutes. The Media Authority, therefore, did not recommend that the travel and route planner should be included within their remit.

By September 2011, the final decision by King in Council in step 4 has not yet been taken. The Ministry of Culture has, however, submitted the Media Authority's advisory assessment to a public hearing.

Closing remarks

In the NRK's newly amended Statutes, the principle of general availability was amended from concerning public service *broadcasting* to public service *media*, and makes it a clear purpose for the NRK, with its content, to be present on new media platforms: 'the NRK shall be present on, and develop new services for all major media platforms in order to reach out as broadly as possible with its overall programme provision.'³¹

The NRK's competitors in the digitized media landscape comprise both broadcasters and other stakeholders. Commercial actors are concerned about the broad scope of the NRK's public service remit, and the prospects for their journalism services in the digital era if the NRK offers something similar for free.

Following the technology neutrality that European legislation recognizes when it comes to public service media, a broad definition of the remit is accepted as long as it is clear and precise and thus ensures a clear separation between public service activities and non-public service activities. The newly-amended Statutes of the NRK and the implementation of an *ex ante* procedure are the Norwegian response to European state aid policy. The process underlines the general political will in Norway to maintain the NRK as a strong, viable national broadcaster and the main provider of public service content on all media platforms. At the same time, it seems that the implementation of an *ex ante* entrustment for any new services that the NRK wants to implement in its public service remit has stimulated the public debate on what should be in and what should be out of the NRK's mandate.

Notes

1. Regulation No 878 of 23 October 1980 on Television Receivers (*Forskrift om fjernsynsmottakere*).
2. Act No 127 of 4 December 1992 on Broadcasting (*Lov om kringkasting*), last amended on 19 June 2009.
3. 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, available at <http://www.medietilsynet.no/no/Oppslag/Lover-og-praksis/Allmennkringkasting/Vedtekter-for-NRK/>.

4. See European Commission. (2001). *Communication from the Commission — Services of general interest in Europe* [OJ C 17, 19.1.2001]. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC0119%2802%29:EN:NOT>.
5. See <http://www.efta.int/eea/eea-agreement.aspx> in particular Articles 59 and 61.
6. The EEA's State aid guidelines, available at <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>.
7. Both companies associated to the private, commercial television broadcaster TV 2 AS. The two companies have since then merged and been transferred to TV 2 AS.
8. The correct name of the Ministry in 2005 was The Ministry of Culture and Church Affairs.
9. For further details see EFTA Surveillance Authority Decision of 8 July 2009 and EFTA Surveillance Authority Decision of 3 February 2010.
10. The Royal Ministry of Culture and Church Affairs. (2005, 20 June). Letter to the EFTA Surveillance Authority from the Ministry of Culture, *State aid – financing of NRK*. p. 5.
11. *ibid.* p. 21.
12. *ibid.* p. 21.
13. *ibid.* p. 20.
14. The translation 'King in Council' refers to 'Kongen i statsråd', which constitutes the highest administrative level in Norway. The King in Council's decision may not be subjected to an administrative appeal, but can be judicially reviewed in a court of law.
15. EFTA Surveillance Authority Decision of 8 July 2009, p. 40.
16. The Royal Ministry of Culture and Church Affairs (2009, 13 October). Letter to the EFTA Surveillance Authority from the Ministry of Culture, *Decision on appropriate measures – Norwegian Broadcasting Corporation*. p. 2.
17. See The Media Authority's report on NRKs existing services on new media platforms, June 2010.
18. See <http://turistforeningen.no/english/>.
19. See <http://www.medietilsynet.no/no/Nyheter/Nyhetsarkiv/Nyheter-2010/Juni-2010/MT-kritisk-til-UTno/>.
20. See <http://www.regjeringen.no/nb/dep/kud/dok/hoeringer/hoeringsdok/2010/horing--medietilsynets-gjennomgang-av-n.html?id=612876>.
21. See decision of 20th June 2011, available at <http://www.regjeringen.no/nb/dep/kud/presesenter/pressemeldinger/2011/kulturministeren-godkjenner-nrks-nett-tj.html?id=648544>. See also letter 20 Desember 2010 to the ESA from the Ministry of Culture.
22. Simonsen advokatfirma DA (30 May 2011). *Complaint against Norway regarding state aid and the public service remit of NRK*, complainant TV 2 Gruppen AS.
23. For further details, see EFTA Surveillance Authority's letter of 9 August 2011 to the Ministry of Government Administration and Reform, *State Aid – Complaint submitted by TV 2 Regarding incorrect implementation of NRK Decision – Request for information according to Article 6 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice*.
24. A mechanism for enforcing an application from NRK is implemented in the regulations by giving the Norwegian Media Authority the legal authority to determine whether a service needs to be subjected to an *ex ante* procedure in case of doubt: Regulations on Broadcasting § 6-1 section four.
25. All translations from the documents of this *ex ante* procedure are the author's own.
26. See the documents from the *ex ante* procedure concerning NRK's planned new travel and route planner (trafikkportalen), available at <http://www.medietilsynet.no/no/Nyheter/Nyheter/110426-NRK/>
27. For further information on NRK collaborating partners; see <http://www.vegvesen.no/>, <http://trafikkanten.no/> and <http://www.ruter.no/>.
28. The Media Authority (24 April 2011) *Decision to effectuate an ex ante procedure concerning the new traffic and route planner*.
29. The Norwegian Competition Authority, 5 July 2011, see <http://www.konkurransetilsynet.no/no/Aktuelt/Nyheter/Trafikkportal-kan-ha-negativ-virkninger/>.

30. Media Authority's assessment of the travel and route planner, advisory statement (12 July 2011), available at <http://www.medietilsynet.no/no/Nyheter/Nyheter/Anbefaler-ikke-trafikkportal/>.
31. Article 13 d.

Chapter 10

Ex Ante Limits Public Broadcasting and Gives the Public Less Attractive Services

Hilde Thoresen & Erik Bolstad

The *ex ante* evaluation regime in Norway was implemented under the Norwegian Broadcasting Act in January 2010. The Norwegian Media Authority is still working on guidelines and specific regulations. The NRK, Norway's public broadcaster, submitted its first *ex ante* application in April 2011.

We will give a general overview of the *ex ante* evaluations in Norway seen from the perspective of the public broadcaster, and then discuss the consequences for the NRK's public service remit and obligations.

The political authorities have indicated that the *ex ante* evaluation regime in Norway shall not affect the NRK's dynamic development and daily operations to any great extent. However, the NRK is concerned that the regime will damage the NRK's innovative abilities. To an increasing extent, new services will require detailed planning instead of being allowed to develop dynamically in cooperation with the public. There could also be a negative impact on the NRK's potential for entering into alliances and cooperation with external parties. This will limit and harm the NRK's public service offerings to the public. On the other hand a public pre-evaluation and acceptance of a new service could have a legitimizing impact on the NRK's strategic development.

About the NRK

The Norwegian Broadcasting Corporation (NRK) is Norway's public broadcaster, 96% financed by a TV licence fee. The NRK is Norway's largest media corporation, and reaches 85% of the Norwegian public during an average day. Its three TV channels have a 42% share in the TV market and the three radio channels have a 66% share in the radio market.¹

The NRK launched its first website in 1995. At the beginning, the websites functioned primarily as a supplement to the traditional radio and TV programmes. The web has since developed into an independent media platform,

and the new media activities have become an increasingly important part of the public service remit. The NRK's websites are today among the largest Norwegian websites, and include news, sports, web TV, radio, dedicated sites for children, etc. One of their greatest successes on the Internet is the weather site yr.no, which was launched in 2007. yr.no is probably Europe's most-used dedicated weather forecasting website with up to 3.9 million unique visitors to the site each week. The site is run by the Norwegian Meteorological Institute together with the NRK.

As will be demonstrated in this chapter, the public debate about the NRK's activities and also the most difficult issues regarding *ex ante* evaluation is about its activities on the Internet.

Ex ante in Norway

The new *ex ante* rules entail the NRK having to apply for permission to incorporate new services that would constitute a *significant* change in its public service remit. The NRK's bylaws stipulate the outer framework for services and offerings that can be included in its remit, and it is only those services that fall within this framework that would require *ex ante* evaluation. Commercial services and products can be launched without any pre-evaluation; such services will generally be established by the NRK's commercial subsidiary, NRK Aktivum.

Unlike elsewhere in Europe, the *ex ante* rules in Norway have a dual background:

- The EU requirements for the Member States to establish *ex ante* evaluation of new services provided by European public broadcasters. Although Norway is not a member of the EU, most of the EU Directives also apply in Norway through the European Free Trade Association agreements.²
- A judgement by the European Free Trade Association Surveillance Authority³ in 2009 instructing Norway to clarify the NRK's public service remit and to implement an independent investigation designed to find out if the NRK's new media services fell within its public service remit.

The European Free Trade Association Surveillance Authority's rulings were based on a complaint in 2002 from Norway's largest commercial broadcaster TV 2 accusing the NRK of cross subsidizing commercial teletext services with licence fee funded content. The European Free Trade Association Surveillance Authority initiated a general review of the Norwegian system for state supported public broadcasting, i.e. the funding of the NRK by a licence fee.

The dialogue between the European Free Trade Association Surveillance Authority and Norway took place at the same time as the European Commission was implementing similar investigations in several EU countries. The European

Free Trade Association Surveillance Authority decided that the NRK's funding failed to comply with the rules related to state subsidies in the European Economic Area. A number of conditions need to be fulfilled in order for state broadcasting subsidies to be legal, including the fact that there must be a clear official definition about which services should be part of the NRK's public service remit and are thus entitled to public subsidies. The European Free Trade Association Surveillance Authority also required Norway to review the NRK's existing services on new media platforms.

The Media Authority was requested by the Ministry of Culture to draft a report on the NRK's current new media activities and assess whether these services fell within the public service obligations. The report of the Media Authority was submitted to the Ministry of Culture in June 2010. The Ministry has made the report subject to a public consultation process. The case was closed at the General Assembly in June 2011.

The new regulations

The *ex ante* evaluation regime was implemented under the Norwegian Broadcasting Act in January 2010, with detailed rules incorporated into the Broadcasting Regulations. The Media Authority is responsible for the practical implementation of the test. In March 2011 the Authority presented draft procedures relating to *ex ante* evaluation. This draft was drawn up in consultation with the NRK.

It is the NRK's responsibility to take the initiative to apply for the inclusion of a service in its remit. The Media Authority can also, on its own initiative or on the basis of input from a third party, instruct the NRK to apply. Once the Media Authority has received such an application, the Authority has two weeks to assess whether or not the service in question will need to go through an *ex ante* evaluation. The basic condition for *ex ante* evaluation of a new service is that the service would constitute a *significant* change in the NRK's existing public service remit. In the evaluation, emphasis should also be placed on factors such as the impact of the service on the market and the costs associated with the service. If it is decided that the service requires *ex ante* evaluation, the NRK's application shall be circulated to other interested parties under a public consultation process, with a three week deadline for comments. The Norwegian Competition Authority shall also undertake an evaluation of any potential effects of the service that could have a detrimental effect on competition. At the same time, the Media Authority shall undertake an evaluation to find out if the service complies with the remit laid down in the NRK's bylaws, and if the service will constitute added value compared to what is already being offered in the market. The Media Authority shall issue a consultative statement to the Ministry of Culture within 12 weeks. The final decision about whether or not

a new service can be incorporated in the NRK's remit shall be made by the government (the cabinet). The Ministry of Culture may stipulate more detailed conditions for approval.

Where should the threshold lie?

In the preparatory works to the Act, the Norwegian parliament stressed that:

The NRK must have the opportunity to develop new services and be able to continuously relate to technological changes and new media trends. For this reason the threshold for *ex ante* evaluation shall be set high.⁴

Establishment of a new radio or TV station, or new Internet-based services, were given as examples of services that would require evaluation. The NRK's education portal was specifically cited as an example of an Internet-based service.⁵

While it is easy to identify a new radio or TV station, it is much harder to define what constitutes a new Internet-based service. What is a 'service', and how do you separate normal web pages from independent services? What criteria should constitute the basis of such a division? These are key questions relating to those future online services that might require *ex ante* evaluation.

When the Media Authority submitted its report on the NRK's current activities in June 2010, the Authority concluded that the NRK had around 120 services of varying types and scope in eight categories. The 'services' varied from tiny blogs and an information page on the Broadcasting Orchestra to the independent weather site yr.no and the NRK's large video-based education portal. The NRK disagreed and has advocated that it runs seven major online services: www.nrk.no (news and programme pages); the children's service nrksuper.no; p3.no, which is a separate service for young adults; the weather site yr.no; the trekking site UT.no; NRKbeta.no with technology news; and the NRK's school portal. These are all services with a certain size and scope. They stand out in different ways – by having independent profiles and having their own domain names, or because they involve cooperation with external parties.

The Media Authority's claim that the NRK runs 120 different online services has been used frequently by the major commercial media houses in Norway in order to prove that the NRK has far too many online services and an unlimited remit. For example, when commenting during the consultative process about the report, the Norwegian Media Businesses' Association stated the following:

If the Media Authority is correct about what the public service remit comprises or could comprise, then in reality this remit has been subjected to almost unlimited expansion. The report covers approx. 120 different services – and concludes that doubt may exist in two – 2 – cases about them being covered by the bylaws.⁶

This example shows that it is difficult to define the limits for Internet-based services. One of NRK's concerns is that the demands for *ex ante* control will be set at a lower threshold than was originally the intention once the remit has been implemented in practice. If this is the case, it will have a considerable impact on the opportunities available to the NRK for the renewal and development of new services.

What constitutes a significant change?

Another interesting question is what criteria should form the basis for a new service constituting a significant change in the NRK's existing public service remit. The Media Authority has stated that:

the service should represent something new, for example, in the form of topic or content or in the form of a new type of cooperation with external parties. The service could also involve something new in the form of new technology, if it goes beyond offering existing services on new platforms. It could also represent something new in the form of a change of course or a new area of commitment.⁷

In its dialogue with the Media Authority about the procedure and how an application should be formulated, the NRK has pointed out that the examples provide an erroneous impression that technical solutions in themselves can generate demands for *ex ante* evaluation. The conditions laid down in Odelsting Proposition no. 81 (2008–2009) were that:

The NRK must be able to make minor adjustments to existing services without having to ask the authorities. The same applies if the NRK wants to offer an existing service on a new platform. In practice this would not be a new service, but the exploitation of new technical opportunities.⁸

The NRK, therefore, believes that it is the content of the service that is relevant, rather than its technical solution.

How should a public broadcaster make trustworthy market assessments?

The Media and Competition Authorities require the NRK to provide data and background information for the market impact assessment. The requirements are set out in a list of questions that NRK will have to provide information on in an *ex ante* application. During the discussions with the Media and Competition Authorities, the NRK stressed that a public broadcaster should not conduct 'mini market assessments', and that it was unwise to ask the NRK to supply information about subjects outside the corporation's area of expertise. The NRK is required not to let commercial concerns influence the editorial decisions,

and market impact assessment is not a part of any of the ordinary strategy processes. The fear is that the NRK's market information will be erroneous or incomplete, and that this will lead to criticism from the commercial sector.

The NRK's first application

The NRK's first application for *ex ante* evaluation in April 2011 concerns a new traffic portal that the NRK plans to launch in cooperation with the Norwegian Public Roads Administration (Directorate of Public Roads), Ruter (the public transport authority for the counties of Oslo and Akershus) and Trafikanten (public transport information company for Eastern Norway).

Traffic information has always constituted part of the NRK's remit and the programmes it offers. The portal thus represents no significant change in the production of the NRK's content, although the service will mean an increased commitment to traffic information and a new joint venture with external parties. The portal aims to gather all Norwegian route and traffic information in one place, with a travel planner and traffic information for buses, boats, the underground subway, trams, trains, aircraft and car traffic. This service is also supposed to contain dynamic information such as messages about traffic problems and information about queues and traffic flow. Traffic and route information is currently spread over to more than 60 different Norwegian websites. The new traffic portal would therefore enable the population to make decisions on the basis of better knowledge about the traffic situation.

The NRK believes that it is primarily cooperation with external organizations, not the topic covered by the portal, which generates the demand for *ex ante* evaluation. The Norwegian Media Authority assessed the portal in June 2011 and recommended that it should not be approved. The Ministry of Culture will make the final decision, probably in November 2011.

Consequences of *ex ante*:

Less attractive services to the public

We have described the *ex ante* regime and the implementation in Norway, and will continue discussing how this may affect the NRK and public service.

Less dynamism

Following the introduction of the new Act, the NRK is concerned that the dynamism of the NRK's services to the public will suffer. It is a condition that the *ex ante* evaluation regime should not undermine the NRK's opportunities to engage in dynamic innovation and continue developing its range of services.

However, despite political indications, we believe that there is a great chance that the innovation and quality of the services provided by the NRK to the public will be weakened over time.

Development in cooperation with other parties

The opportunities available to the NRK to enter into alliances and joint projects with external parties in order to develop the best possible services within the framework of the NRK's public service remit could suffer as a result of the new regime. As regards yr.no, UT.no, and the planned traffic and route portal, the fact that the NRK is a non commercial broadcaster has been important for the NRK's collaborative partners. Doubts about the establishment of new services and time consuming administrative procedures can result in the NRK being a less attractive partner in the future. The role that the NRK could play in such projects could not necessarily be filled by a commercial company dependent on making profits.

Development in cooperation with the public

Ex ante evaluations can make it hard to create new services that could develop over time in conjunction with feedback from the public. One key to success in the past has been dynamic development of web-based services in close cooperation with the users. Several of the NRK's greatest online successes – yr.no, NRKbeta.no, the *Urørt* music service, and NRK Super – have been developed gradually in conjunction and consultation with users and the general public. The services have not been planned in detail beforehand but have been allowed to develop dynamically, focusing on parts of the services which have proved to be popular and useful for the public.

Online services are also different from traditional services because it is harder to predict the user potential. This means that it should be possible to experiment on a small scale without finalized plans before development starts. The *ex ante* evaluation regime is better suited for traditional broadcasting services: when the NRK launches a new TV or radio station; detailed plans, public surveys and reports are usually implemented. Online services are very different because it is harder to predict which services will be popular and, not least, how functions and services will develop dynamically over time.

The common denominator for the three most used online services in Norway and the world (Facebook, Google and YouTube) is that they all started as small, private hobby projects without any specific market plans or targets. It is highly likely that the developers of Facebook in Boston in 2004 did not envisage that they would have over 2,000 employees six years later. Nor did they probably plan that half of the Norwegian population would be using the service by then!

When the NRK and the Norwegian Meteorological Institute launched yr.no in 2007, the project was hoping to reach 200,000 weekly users a year and a half after the launch. This goal was reached after just three months, and four years later almost 4 million people used the service during one week. Neither the NRK nor anyone else had expected that the service would become so popular. Similarly the NRK and other companies have launched services which they initially thought would reach large user groups, but which for various reasons never attracted much popularity. One relevant example is VG's Netby,⁹ which went from being one of Norway's largest online services to losing almost all of its users after Facebook was launched. Another example is UT.no, which is a similar NRK project to yr.no, but which so far has far fewer users.

Legitimation of the NRK's commitments

Several large media companies in Norway argue that the NRK's remit needs to be reconsidered and limited, especially on new media platforms. They are trying to create the impression that the NRK is extending its public service remit into new areas, without respecting the limits drawn up by government. The pressure on the NRK has increased noticeably in connection with the financial crisis and the media industry's doubts about future funding models for print media on digital platforms. The NRK's view is that the content and services that are currently published by the corporation is well within limits and regulations, and that the online services provide a significant part of the NRK's public service remit. Without being allowed to develop independent web services, public service will be weakened and harmed over time.

There is broad political agreement about the outer limits to the NRK's remit. The NRK's current bylaws are developed from 'the NRK statutes'¹⁰ that the government presented to parliament (the Storting) in 2007. These statutes were sent out to over 800 consultative bodies (media companies, government institutions, NGOs, etc.) during a large public consultation process. The statutes were presented to Parliament for the second and third time in 2008 and 2009, and were incorporated in its entirety in the NRK's bylaws in June 2009. The NRK's duties have also been discussed in the extensive white paper 'Broadcasting in a Digital Future' to Parliament in 2006. The NRK's new remit stipulates that the NRK should make use of different media platforms in order to reach a wide cross-section of the population with its overall programme services, and that the NRK should develop attractive content on the Internet and other new media platforms.

§ 13 d. The NRK shall be present on, and develop new services for all major media platforms in order to reach out as broadly as possible with its overall programme provision.

§ 17 The NRK shall provide attractive content on the Internet, mobile TV, etc.¹¹

The large commercial media houses seem to believe that limiting the NRK's online services will result in a stronger financial position for them. The different consultative processes have shown that these companies devote a lot of time and resources trying to document the harmful results of all of NRK's online activities. The NRK's strategy is to focus even harder on public value and user satisfaction instead of trying to avoid upsetting the commercial sector. *Ex ante* evaluation also means that the NRK would have to tighten up its communications regarding the public values that the service would have in society.

The *ex ante* evaluations make it harder to criticize services that have been evaluated and accepted by the authorities. In this way an *ex ante* evaluation would serve to legitimize the NRK's activities and the services that the NRK decides to focus on. The Minister of Culture has been clear that the NRK has an obligation to be present on new media platforms with public service content for the Norwegian people, and refers to the new and stricter regulations as a way to face the dilemmas and challenges connected to the NRK's new media activities.¹²

Conclusion

The *ex ante* regime has been implemented in full in Norway. Now that the regime has been implemented, the manner in which it is executed will be crucial for its impact on the NRK's dynamic development. The Norwegian Government has stressed that there should be a high threshold for an evaluation process, and that the evaluation should be focused on content rather than distribution technology. The NRK fears that eager and bureaucratic authorities will lead to a lowered threshold, and that the *ex ante* process itself will be scaled up because of the demand for extensive information about all aspects and market impacts of a new service.

When developing new Internet-based services, the NRK seeks projects where it is especially suited to launch a good service to the public, and where we see that such a service would enable the NRK to deliver its remit in a new or better way. The NRK's overall goal for its online activities is to help develop a better Norwegian Internet, and to give the licence fee payers full value for their money.

It would be unfortunate for the development of new Norwegian online services provided by the NRK if the services have to be planned in detail in advance instead of being allowed to develop dynamically in cooperation with the public. All of the large online services today have been gradually and dynamically developed. The *ex ante* process is contrary to this because the evaluation demands extensive and detailed pre-planning of every aspect of a

new service. The process itself is also very time consuming, and will often lead to stagnation, with development teams spending more time on bureaucracy than on services for the public.

The *ex ante* evaluations also means that the NRK, in practice, has to launch services that have been planned: there are no retreat options even if the project underway develops in the wrong direction. Because of the detailed service descriptions required by the authorities, it will be harder for the NRK to change the service dynamically to adapt to user requests.

The NRK recognizes that *ex ante* evaluation is a way to legitimize their online activities and curb some of the criticism from the commercial sector. The regulations can be a way to secure public broadcasting, although the NRK fears that the process will harm dynamic development. The main question is to what extent the political authorities want to keep an innovative, creative public broadcaster; and how the authorities will use the regulation regime. This will become clearer in the years to come.

Notes

1. Audience data from 2010 as stated in the annual report from the NRK. Viewer/listener/user data from TNS Gallup.
2. The European Free Trade Association (EFTA) is a free trade organization between Norway, Iceland, Switzerland and Liechtenstein that operates parallel to, and is linked to, the European Union (EU).
3. The EFTA Surveillance Authority performs the executive role of the European Commission in the countries of the European Free Trade Association (EFTA) which are part of the European Economic Area (EEA). The authority is tasked with ensuring laws and regulations are properly enacted by the member states.
4. Parliamentary proposition to the Odelsting, no. 81 (2008–2009).
5. NRK Skole is a separate online portal containing clips from NRK's radio and TV archives which have been adapted for pupils and teachers.
6. Norwegian Media Businesses' Association, *Høringsuttalelse: Medietilsynets gjennomgang Av NRKs tjenester på nye medieplattformer*. Letter sent to the Ministry of Culture, October 26th 2010, during the public consultations about the NRK's new media services. Available at <http://www.regjeringen.no/pages/14072934/27-Mediebedriftenes-Landsforening-m.pdf>
7. Norwegian Media Authority's procedure document published March 3rd 2011, describing the *ex ante* regulations and implementations. Available at http://www.medietilsynet.no/Documents/Aktuelt/Presedenssaker/Allmenkringkasting/Orientering_prosedyre_forhands-godkjenne_nye_NRK-tjenester_april_2011.pdf
8. Odelsting (Upper House of the Norwegian Parliament) Proposition no. 81 (2008–2009), page 3.
9. VG is Norway's largest newspaper. Nettby was a highly-successful online community. It was launched in 2006, had close to 1 million users in 2009 (Norway's population is close to 5 million), and was closed down in 2010 after most of the users had migrated to Facebook.
10. 'NRK-plakaten' in Norwegian, which can be loosely translated to 'Statutes for the NRK'.
11. NRK's bylaws.
12. Speech by Anniken Huitfeldt (Labour Party), Minister of Culture, at the Nordic Media Days in Bergen May 12th 2011.

Two Steps Towards a Public Value Test

Danish Public Service Broadcasting between Two Lines of Control

Erik Nordahl Svendsen

Two lines of approach fight each other in Danish media politics on public service broadcasting. The traditional line of confidence gives considerable space for the autonomous public service broadcaster to fill in the broad definitions in the remit. A newer line of mistrust, motivated by politicians representing special interests, by highbrow culture and by commercial competitors, leads to a line of accountability or more control. The idea of a value test had already arrived in Denmark in 2007 and was first introduced as a compromise between the two approaches, in a 'soft' version without market impact assessment, and left solely up to the public service broadcaster, DR. After the 2009 Broadcast Communication, the Danish government said there was no alternative to a full introduction of an external public value assessment combined with a rigorous market impact assessment. Also, the service contract with DR becomes more and more detailed. Is the second approach winning? And, if that is the case, does a stricter control of public service make sense for society?

DR (originally Danmarks Radio) is very much the BBC of Denmark. According to the Broadcasting Act, DR delivers public service through television, radio, Internet or the like, and it is financed solely by the licence fee.¹ Details of the public service remit have been settled in a service contract since 2002, renewed every four years as based on the general media agreement for the same four years. Note that the Act had mentioned the Internet as early as 2000. DR was in fact already very active on the Internet from 1996 and this development was politically accepted in 2000.² Because DR carries no advertising, Danish private TV stations like MTG/Viasat or SBS – on British licences – have not seen DR as their main competitor. They have, on the other hand, complained strongly over TV 2/Denmark, because this other public service station, established by the state in 1988, got some licence fee money until 2004 and, simultaneously, competes for commercial advertising with the private stations. This conflict lead to several court cases over the definition of public service at the European Court of Justice. Suffices to mention here that the case against TV 2 quite as-

tonishingly made it clear that the Member States are quite free to define what public service shall be in their country (Case T-309/04 TV 2/Danmark A/S).

The adversaries of DR are, rather, the private newspapers and new online media, which claim DR ought to remain a radio and TV company, only using the Internet as an accessory rather than as a new medium or platform. This policy is often formulated by DDF – Danish Newspaper Publishers' Association – which is the Danish daily newspapers' trade political organization.

Taking the first step

Denmark introduced a 'Value Test' in DR's service contract in 2007.³ It was inspired by the BBC but only went half the way, since there was no market impact assessment (MIA). The public value assessment of 2007 was about major new services, and DR had the right to decide if a test was due, i.e. if the service was expected to be used by many people, had a certain financial weight, really differed from existing services as stipulated in the contract and/or was to be permanent. DR should then assess whether the service added value for society and/or the individual in fulfilling cultural, social or democratic needs as mentioned in the Amsterdam Protocol, and if it would be available to all Danes without extra payment. DR then had to file the test with the independent regulator, the Radio and Television Board. Other parties were not involved and no public consultations were organized. Formally, the Radio and Television Board should only publish its comment on the test from DR, and DR could decide against the Radio and Television Board's opinion in the end, but in reality the Radio and Television Board's comment was taken as a decision. Since 2007, DR has passed three public value assessments to the Radio and Television Board, and all were accepted. No one knows what would have happened if the Radio and Television Board had disagreed.

The three tests dealt with services using the Internet in different ways. The first was about *distribution* of news and other programmes by the Internet to private screens in public places like commercial centres, trains, etc. where DR's content would be shown among other pieces including advertisements (which are not allowed on DR's own channels). It was accepted as public service when it was made clear that DR was in full editorial control of its contributions – otherwise it could have been a commercial activity (which DR can undertake besides its public service activities). The public value of the service was considered to be that news from DR on screens in public places reached more and other audiences than through its own channels.

The second and third tests were about *new portals* on the web (www.dr.dk): one about health was open for all parties except the medical or pharmaceutical industry, with messages and advice about health, and with DR having the

ultimate editorial control. Some private health web portals protested publicly about the service but, since the test was only a public value assessment which did not include a market impact assessment, the health portal was judged by the Radio and Television Board to be an excellent public service. The last test was about a portal with advice for youth. Again it was open for all types of advisory bodies, and the Radio and Television Board thought this would meet clear social needs among Danish youth. Nobody protested about this service; on the contrary, half the initial budget was covered by a private foundation (which is allowed under the Broadcasting Act) and, after the Radio and Television Board had an assurance from DR that the portal was expected to be permanent, the Radio and Television Board had no objections.

In 2008 the newspaper publishers' organization DDF published a pamphlet titled 'Competing with the state' (*I konkurrence med staten*), with the subtitle: 'DR threatens the newspapers on the Internet'. DDF was critical of the fact that Denmark only used the public value assessment and not the market impact assessment, and argued for a roll-back by DR on the Internet and for a negative list of forbidden services, like the one introduced in Germany. Cases in point were portals with local news from every municipality in Denmark launched by DR, which the public service institution did not consider test-worthy. It was rather embarrassing when DDF could demonstrate that news was copied by DR from local newspaper sites – right down to the spelling errors. DR withdrew voluntarily from these ultra-local news services. In Britain, 2009, the BBC Trust decided not to approve a local video proposal from the BBC, because '[t]he trust is not satisfied that any likely adverse market impact is justified by the likely public value of the proposal'. This was mentioned in the Danish debate.

The complaints from DDF over DR's Internet activities are however not well founded in data: dr.dk covers only 1 per cent of the time spent by Danes on the Internet (2010), and, in 2008, while 15 per cent of the time was on Danish media sites, 39 per cent, was on American sites, and dominated by Google. Advertising revenue is moving from print to the Internet – estimated, in 2009, at 3000 million DKr (€402 million), of which Google earns over 1000 million DKr (€134 million). Denmark is thus the number one Google market in the whole world in terms of turnover per capita. This describes a serious challenge to Danish newspapers, but DR is hardly the explanation for it.

Taking the next step

In the next media agreement for 2011–2014, published in June 2010, the centre-right government decided to take the next step and follow the European Commission's 2009 Broadcasting Communication on state aid to public service in full measure.⁴ Even after the TV 2 judgement stressed the sovereign right of the

Member State in defining public service activities, there was no discussion in Denmark of the necessity or legitimacy of the demand for PVT. The government probably thought the European Court of Justice would follow the European Commission's demands on procedures, or the communication simply helped the government in its policy making against DR.

The main features of the new regime in the Act of December 2010 are described below.⁵ Since the rules are so new in Denmark, no cases have yet gone through the test. DR has indicated it does not expect more than one or two tests per year because its finances are not sufficient for big new initiatives.

What shall be tested?

'Essential' new services or major changes to be tested are such that are not imposed through the service contract. Examples mentioned in the proposition to the law are new web portals, as those mentioned above, new services with indicative limits for size of average yearly costs of over 1 MDK (€130.000), or of over four-month duration. These are not very big projects. On the other hand, it is mentioned that the profiles of DAB radio channels (which can be important competitors to private radio) are not subject to testing. For the first time the new service contract describes the profiles of DR's three FM channels and its five TV channels. It must follow that a change in the format of, for instance, an FM radio channel should go through the test. All tests shall encompass both a public value assessment and a market impact assessment.

Focus is expected to be placed on Internet or mobile services because that is the field of competition identified by the newspapers and online media. DR's activities on the Internet were very broadly defined in the public service contracts from the outset. In the new contract 2011–2014 it says:

DR shall provide public service content on a technology-neutral basis and support the Danes' use of the Internet. Thus, DR on the web shall offer content that contributes to DR's public service purposes and is editorially founded on an equal footing with the content on other platforms. DR's Internet site must include programme-related information, independent news and relevant content for children and young people, opportunities for user interaction and information about DR as well as productions with sound, image and text.
(author's translation)

New, potentially explosive, wording is that content on the web must be 'editorially founded'. Perhaps there is no intention to create new regulations, but the wording indicates that actual or potential parts of the web (e.g. games, dating) may or may not be editorially founded. Here is, potentially, one starting point for private media, print or electronic, to make future demands for public

value and market impact assessments. On the other hand, Denmark has not followed the German principle with a negative list, as DDF had proposed in its 2008 pamphlet.

It is noteworthy that only new services are subject to the test. The theory behind this is that a fresh public service contract implicitly includes all the existing services of DR and, therefore, it is not relevant or possible to ‘go back’ and test *ex post*, as was the case in Norway and Germany. The rules are about *ex ante* testing of new services.

Who conducts the test?

DR prepares an application that will describe the proposed service and give a thorough analysis of the relevant market(s). This alone is a workload and cost that will make DR hesitate to have too many new ideas! DR must, of course, also argue which of the PSB needs the service fulfils and how far. The Radio and Television Board shall then decide within two weeks if the service qualifies for a test and, if so, it shall open extensive public consultations on its website. Within 20 weeks, the Radio and Television Board then decides the overall result of the public value test, finding the right balance between a public value assessment and a market impact assessment. In its decision, the Radio and Television Board can give conditional provision to allow use of public funds for the service. The Radio and Television Board can, *ex officio*, call for such an application from DR, and also after suggestions from other parties, if they think DR has started a new service without the necessary tests. In such a situation, the Radio and Television Board can demand a temporary cessation of the service.

While the Radio and Television Board’s members and secretariat are professionally qualified to make the public value assessment, the new market impact assessment requires other abilities. Among the public authorities, the Danish Competition Authority, of course, has this ability, but the Authority cannot carry out the market impact assessment because the Authority must not be implicated if a complaint about the service is made under the general Competition Act (‘misuse of dominant position’, etc.), which applies alongside the public value assessment according to the Broadcasting Act. Therefore, the Radio and Television Board shall recruit a private consultancy with expertise in competition law and market economics, and the consultancy shall undertake the market impact assessment within 12 weeks, including a public consultation. The consultancy must follow guidelines from the Competition Authority, and the Authority shall comment on the results of the market impact assessment before it is submitted to the Radio and Television Board by the consultancy. At the end, DR gets a chance to comment on the Radio and Television Board’s decision before publication.

Assessment of the situation

The last decade has put DR under many constraints – some people compare it to the adventure of Gulliver and the Lilliputians; one string has no effect, but suddenly the giant is unable to move: first the public service contracts (2002, 2006 and 2010), absorbing more and more detail, then the first step towards a public value test (2007) and now (2011) both a public value assessment and a market impact assessment with pomp and circumstance.

Is it sensible? The starting point for an assessment, in my opinion, is that the introduction of competition for the broadcast audience (in 1988) and partly for the money (till 2004) let loose strong market powers, which DR could hardly resist. When the viewing share is declining, it takes almost superhuman powers and morals to resist a more popular entertainment oriented programme policy combined with a downgrading of classic public service areas.⁶ At the same time, the Public Broadcasting Council (comparable to German Rundfunkrat) has, since 1986, been replaced by a more closed board-like organ (comparable to the BBC Governors) without active politicians as members. Thereby, the political governance of DR became less direct. Already, in the 1990s, legislation had experimented with a 'Public Service Budget' and 'Public Service Accounts'. Accountability became a catchword of the time. But where could one find the (external) basis for the accounts except in the (internal) budget? As a logical consequence of the competitive pressure on classic public service and the depoliticized governance, politicians in government and parliament wanted to have a direct tool to set targets and limits for DR; the second line of accountability and control became stronger. The public service contract was, also in my opinion, the appropriate solution. Although a one-sided 'contract', this construction made DR's duties more clear – and, thereby, also what *not* to deliver to, or to expect for, society at large. From the first contract, focus was on hours of news, of Danish drama and of children's programmes – three classic and costly public service areas, which need protection. The latest contract for 2011–2014 as presented by the minister of culture is less specific. Yet his press release immediately mentions three new details (HD current affairs programmes for the young, news for children and editorial quality of DAB channels) and there are others in the text as well. The trend after three contracts is about more and more detail.

The political processes behind a media agreement, and, later, the public service contract, are informal and closed to the public. Only when legislative change is implied do public consultations happen, but they are *ex post*, not *ex ante*, the political decisions. No drafts or green papers have been published. The lack of drafts and public papers impede subsequent interpretations of the contract. The closed process also means that only the most influential and well organized actors can find ways to have their interests catered for. While the coming public value assessment, and in particular the market impact assessment,

indeed include public consultations, it is, however, stressed that contributions shall be based preferably on business plans or market analysis, so this is again primarily a game for the big boys. Still we see a paradox in regulation here: the general definitions of the public service remit in the media agreement and public service contract is born discretely in the darkness, while minor expansions or changes are now to be discussed in strong floodlight during the public value- and market impact assessment. Asking for the reverse would be odd, but the new open style of the public value test should inspire more openness of the first, basic process.

Many signs thus indicate that the second line of detailed control is winning over the traditional autonomy of DR. It is, however, not safe to draw this conclusion because the closed process defining its basic remit may in fact benefit DR, as it can argue its case for the politicians without contradictions or interventions from outside.

Even if the second line of detailed control is corroborated, the balance of this trend is subject to a new discussion. Is there a level playing field? The whole idea of a public value test is that public service broadcasting threatens, with state support, to compete unfairly against the private media, and that it must be stopped. What if we change the perspective and ask about the competition from the private broadcasters against public service broadcasting?

The second line of control is often represented by private TV stations transmitted to Denmark, as mentioned, operated from Britain, licensed by Ofcom. The basic principle in the Television Directive, now AVMS, is the free right to establishment in any Member State (Article 2) as long as you respect the minimum rules as implemented in the country of origin. Besides regulation of advertising and protection of children, the essential rule is the 50 per cent quota of European works (Article 16) as the 'entry ticket' to other member states. For obvious economic reasons, public service broadcasting in small markets is more exposed to cheaper competition if the quotas are not respected by foreign channels, because these private channels mostly buy popular American fare at low prices. Yet it is well known that the quotas are not hard law and are not respected by many stations and certainly not by the British authority, Ofcom.⁷ Thus the most recent report documents that key channels in Denmark are far below the 50 per cent mark of European works within the relevant programme types:⁸

European Works (pct.)	2005	2006	2007	2008
Viasat TV 3 DK	19 %	22 %	14 %	15 %
Viasat 3+	19 %	25 %	18 %	18 %
SBS Channel 4	n.a.	31 %	12 %	30 %
SBS Ch. 5 (DK)	10 %	8 %	3 %	18 %

With not the slightest sign of improvement in the amount of European programmes, Viasat has given this motivation to Ofcom, which has accepted it and posted it as the official explanation to the European Commission:

TV3 Norway, TV3 Denmark, TV3 Sweden, 3+, Viasat 4:

There is a limited demand for European programming in the territory. The audience is more familiar with American programming; therefore there is greater demand for this. A great amount of European programming does not translate well in the language of the territory and is not well received by the majority of the audience due to the language limitations.

On top of this, Denmark has even opened a special fund from licence fee income to support Danish drama or documentaries on these channels (about 5 million Euro per year; cases N 360/2007 and N 599/2009). The fund is not open to DR, and the new agreement put a maximum on the part TV 2/Denmark can have from the fund. It is reminiscent of how the British, once upon a time, tried to bribe the Vikings to go away but just the other way around – and with the same poor result.

My assessment of the new public value and market impact assessment must be seen in this wider context of trends in European and Danish media politics. The regulations behind public service broadcasting and the privates are not symmetrical, so it is not obvious whether the playing field is becoming more or less levelled. In my judgment there is an imbalance against public service broadcasting where, on the one hand, the contracts get more specific and the public value test is hardened because public service broadcasting is regulated by a competition policy that is not very sensitive to cultural regards (or the national government unfairly uses the EU as an excuse for a policy against public service broadcasting) and, on the other hand, the privates are only loosely regulated by the AVMS quotas and, locally, are supported by a portion of the licence fee, not to mention the handsome direct and indirect support for the printed press in Denmark. Of course, the public service broadcasting's strength in Denmark and the other Nordic countries is still the reasonable amount of licence fee funding. In the end, the tipping factor in this balance is the political and cultural support for the public service broadcasting. When that is broad and strong, public service broadcasters – and DR in particular – can have a future, even with a public value test. If the political support continues to weaken, the public value test can become a real and dangerous weapon in the hands of the private media industry. As always in questions of media development, we end with an open question. We must follow the future carefully.

Notes

1. The Act is available in English, yet not with the last amendments about PVT from December 2010, see <http://kum.dk/Documents/English%20website/Media/Promulgation%20of%20the%20Radio%20and%20Television%20Broadcasting%20Act%202010.pdf>.
2. DR's online history and policy is analysed in Brevini, B. (2010) 'Under siege by commercial interests? BBC and DR Online between the national and European policy frameworks', *Interactions: Studies in Communication and Culture*, 1(2): 203–215.
3. It was a two-page appendix to the contract, available in English at http://www.bibliotekogmedier.dk/fileadmin/user_upload/dokumenter/medier/radio_og_tv/landsdaekkende_regional/DR/public_service_dr/valuetest_app2.pdf.
4. The new rules also apply to the eight regional TV stations on TV 2, which are public service stations financed fully from the licence fee like DR and each with its public service contract.
5. The ministerial order (in Danish) is: Bekendtgørelse om godkendelse af DR's og de regionale TV 2-virksomheders nye tjenester, bek. nr. 198. Marts 2011.
6. I have argued more in this direction (in Danish), see Svendsen, E.N. (2004) 'Tillid er godt – er kontrol bedre? Aktuelle tendenser i reguleringen af public service i Europa', in H. Bruun, K. Frandsen & F. Mortensen (eds) *Forskning i mediepolitik mediepolitisk*, Århus: Modtryk.
7. I have treated this theme more basically in Svendsen, E.N. (2011) 'From Sovereignty to Liberalisation: Media Policy in Small European Countries.', in G.F. Lowe & C.S. Nissen (eds) *Small among Giants: Television Broadcasting in Smaller Countries*. Göteborg: Nordicom.
8. European Commission (2010) *Commission Staff Working Document Accompanying Document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. Ninth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC as amended by Directive 97/36/EC and Directive 2007/65/EC, for the period 2007-2008 (Promotion of European and independent audiovisual works) COM(2010) 450 final* [SEC(2010) 995 final]. Available at http://ec.europa.eu/avpolicy/docs/reg/tvwf/art_4_5/sec_2010_0995_en.pdf.

Chapter 12

Swedish Pre-screening of New Services

Treading Lightly

Nina Wormbs

Just before Christmas 2010 the news broke that the government had decided on pre-screening of new services for public service broadcasting. An intense debate soon followed. It is not uncommon for ministers to publish news pieces pertaining to decisions to be taken by the government that same day. The most popular outlet for such communications is the biggest Swedish daily, *Dagens Nyheter*, but this time the Minister of Culture Lena Adelsohn Liljeroth chose the daily for media issues, *Resumé*, widely read within media circles.¹ The same day, the director of Swedish Radio Mats Svegfors declared, to the news agency TT, that the demand for pre-screening was in conflict with the constitution. The director of Swedish Television, Eva Hamilton, also expressed concern and referred to the popular service *SVT Play* which she believed would not have been accepted had the rules applied a few years earlier.²

The same day, the Ministry of Culture clarified a few things about the process and the decision and a new press release was published on the government website. Here, the internal legal adviser to the ministry explained that this was the result of a long process and that a distinction should be made between permission to broadcast and the conditions connected with the use of the licence fee. Pre-screening had nothing to do with the content of the programmes and it was up to the public service companies to report new services for pre-screening.³ This clarification was in vain, however, and soon there was a quickly-growing Facebook group protesting against censorship of programme content. One should not attribute too much value to Facebook groups when it comes to public understanding of things, but it is striking that the misunderstanding concerning censorship of programme content was so widely distributed and so hard to deflect. A few days later, a short FAQ was published on the government webpage and the minister's political expert tried to correct the misconceptions that had arisen in different social media.⁴

Leaving the misunderstanding aside, the debate on pre-screening continued well into the new year and was revitalized in the spring in connection to the

process of formulating the terms of the upcoming public inquiry on public service. In short, commercial media thought that pre-screening was too lax whereas the public service broadcasters deemed it to threaten and constrain their innovation and creativity. As so often happens when it comes to public service, popular views were heavily polarized.

This chapter presents an overview of the Swedish system that was put in place. I argue that general guidelines from the European Commission must be sensitive to national specificities of the Member States or round pegs will have to be forced through square holes with obvious consequences. I believe that the Swedish pre-screening is a minimal implementation of the Communication from the European Commission, but that it still needs to be applied with caution. If this is achieved, however, pre-screening might offer a way of legitimizing the development of the public service, which is a hybrid in the media world. The combination of guaranteed funds from licence fees together with the organizational form of a company and a comprehensive remit that more resembles that of a public authority, and which few understand, gives ample opportunities for misunderstandings. Hopefully, greater openness can contribute to a more peaceful coexistence of different forms of media, of which public service is one very strong and important part.

In connection to this I should declare an interest. I am an academic by training and profession. In this case, however, I am also an actor. I was charged with the task of formulating a suggestion on how a pre-screening could be implemented in a Swedish context in the autumn of 2009 and submitted my report in early 2010. Apart from the occasional radio interview, I have not taken part in the subsequent public debate on the test. My aim here is to offer an insight into how pre-screening is envisioned to work and to discuss what problems might emerge.

The Swedish context

The Swedish public service companies are Swedish Radio, Swedish Television and the Swedish Educational Broadcasting Company. The present organizational structure, with three companies owned by a state administrative foundation, dates from the 1990s when the previous shareholders wanted to opt out. This was, in part, because some of them had competing interests with the public service companies as the broadcasting market liberalized. The foundation controls the shares of the companies and its board works as a normal company board, except that it cannot interfere with matters of programming. Hence its task is very different from that of the BBC Trust, for example. This set-up was chosen in favour of direct state ownership since it was regarded as a way of keeping the state at arm's length.

The public service companies are given permits to broadcast for periods of three to four years at a time. Before new permits are given, a public inquiry is authorized to investigate the conditions of operation. The inquiry is typically headed by a politician or by several politicians, in which case it is termed parliamentary. The aim is to analyse the operation, collect facts on developments and assess a wide array of opinions on public service and its mission. The inquiry publishes a public report circulated for consideration among interested parties in an open consultation. Anyone can respond. Based on the responses and after a political process the government writes a bill which states the guidelines for the next permit period. The bill is passed by the parliament.

Closely connected to permits to broadcast are the conditions relating to the use of licence fees. The Swedish public service system has been licence fee based since 1925 and, since the late 1980s, the fee is collected by a subsidiary of the public service companies. However, the fee goes straight into a separate account within the Swedish National Debt Office and each year the parliament decides how much money is to be made available to the companies from this account. The terms and conditions connected to this transfer are formulated in a special document, renewed annually.

The licence fee in 2011 corresponds to €235 and is divided between the three companies. Swedish Radio gets almost 38 per cent, Swedish Television almost 58 per cent and Educational Broadcasting just under 5 per cent. All in all, the appropriation amounted to €760 million during 2011.

Of central importance is also the fact that the Swedish public service companies have not had a dual financing of licence fee and commercials, on either the air or the Internet. However, sponsorship has been allowed in connection with certain kinds of arrangements, especially those pertaining to EBU-cooperation and big sports events. The revenue from these have been in the order of €4 or 5 million during the last years, and it is only Swedish Television that has used sponsorship for co-funding.

Each year the companies have to report to the government how they have fulfilled their public service remit. This public service report is then reviewed by the Swedish Broadcasting Commission, which is part of the Broadcasting Authority. From a few years ago, the Broadcasting Commission has also assessed whether the companies have actually fulfilled the remit, based on the information given in the report. The Broadcasting Authority is also the institution ensuring that broadcasters, public service and others follow the terms and laws pertaining to their respective activities.

Britain as a questionable role model

The *Communication from the Commission on the application of State aid rules to public service broadcasting* was published in October 2009. It was preceded by intense discussions and efforts from the different member states. In response to the questionnaire that the European Commission distributed in January 2008 and, later, together with other states, the Swedish government stressed that a revision of the communication should not result in greater intervention in matters of detail. On the contrary, the importance of autonomy of the member states in designing their own systems was underscored. Partly, this was against the backdrop of the expected testing of new services against the Amsterdam protocol and the fear that the British public value test would be taken as a role model. This proved a well-founded suspicion.

The BBC has had a very strong influence on public service media in Europe, arguably in the world. This is evident not only from how it functioned as a role model. The BBC has been referred to and compared with other services continuously since the 1920s when it comes to technological change, programme formats, news services or organizational change, to name but a few. The fact that the public value test of the BBC was already implemented before the European Commission sent out the questionnaire also set it up as a reference for what a test might look like for other places. The notion that the European Commission expected the public value test to be exported to other Member States sent shivers down the spines of many, not just the public service media even though they were most vociferous. The title of this volume, *Exporting the Public Value Test*, is a case in point: it exemplifies the potency of the British example.

However, Britain is different in many ways. The BBC way might not be the Swedish way. One obvious difference is the size of the country and, consequently, the turnover for public service. The difference is a factor of 6.5. The size naturally affects the size of the domestic market. Added to this is the fact that English is an international language, whereas Swedish is the first language of only about ten million people in Finland and Sweden, (and understood by a fair number of Danes, Norwegians and Icelanders) which naturally limits the possibility of non-domestic business. Furthermore, and as hinted at above, the organizational structure is different. Sweden has three public service companies owned by a state administrative foundation in principle comprising the board members and practically lacking an office. Its mission is not strategic but simply a way of increasing the distance between the state and the public service companies, while allowing for state ownership.

Having said this, however, the task of finding a Swedish model also used the public value test as a starting point and reference, keeping in mind that it had to be altered and adjusted to another setting.

What should be subjected to pre-screening?

The suggestion for a Swedish model takes as its basis the interpretive prerogative of the public service companies in regard to their remit.⁵ This principle is part of the independence of public service and an important starting point for any regulation. In the Swedish pre-screening it is therefore up to the public service companies to decide what it is that needs to be reported for pre-screening. Hence, the difficult question is: What is, in the terminology of the communication, a 'significant new service'?

In some cases it is pretty straightforward and the new pre-screening is actually not presenting the public service companies with new regulation. This is true when it comes to new channels, for example. Already before pre-screening the government decided whether to increase the number of channels for Swedish Radio and Swedish Television. Partly, this was because new channels demanded radio frequencies, long regarded a scarce resource. Moving from one to two to three radio channels entailed inquiries and was debated for years. In the case of television, the focus was rather on the budget for an expansion from one to two channels.⁶ With the liberalization of broadcasting in Europe and in Sweden, the demand for radio spectrum grew even bigger, but this could also be met with new technological solutions.

The difference with the pre-screening is that the government has to decide not only on new channels on the air but on all new channels, whether on the air, on the Internet or on something else. (If it is the same channel but on a new platform, it is exempt from pre-screening.) However, the new model also stipulates that other significant new services should be subjected to pre-screening. What is, then, a significant new service that is not a new radio or TV channel? It is around this question that much of the debate has circulated on a European level. In Germany, there is a list of things off limits for the broadcasting companies. To me, this seems problematic. Because the media develops so fast, such a list risks becoming not only technologically but also legally, economically, socially and culturally dated rather quickly. It is a real challenge to foresee the future with accuracy, thus the primary assessment of what could be significantly new should be made by those directly involved.

To subject something to pre-screening

When the public service company has decided that a service should be subjected to pre-screening, a report is sent to the government. This report should contain (1) a detailed description of the service and its value to the public; (2) a motivation of how the service fits into the remit and what it contributes in relation to the existing services both within the remit and among other com-

peting service providers; (3) a discussion on target group and expected use; (4) details on launch and expansion; (5) an assessment of the market impact; and, finally, (6) a short summary of the above to be publicly circulated to form the basis for an open consultation.

The government sends the report to the authority in question, namely the Broadcasting Authority, unless it feels that no pre-screening is needed and can make an immediate decision based on the report itself. The summary is then published and an open consultation starts. Within three weeks, anyone can comment to this consultation.

Evaluation of public value and market impact

The Swedish test takes as its basis the report from the public service company. The report is, therefore, the starting point for the evaluation of public value. However, the authority can gather additional information if necessary.

As for market impact, one could envisage a model where this evaluation is carried out by an institution different from the authority. In Sweden there are two authorities that might be of interest: the Post and Telecom Agency and the Competition Authority. However, the first one has no specific knowledge of the media market and does not execute evaluations of this sort, whereas the second one does evaluate market impact, but not *ex ante*. In fact, the authority was forbidden to give notice of that sort a few years ago. The argument was that making *ex ante* evaluations could not be combined with the assignment to also evaluate situations of inappropriate competition *ex post*. It would be strange if the authority at one point gave its blessing to an establishment and then later on had to try its own decision when a complaint against that same establishment was made. Therefore the Competition Authority cannot make the evaluation in this case. This means that the Broadcasting Authority is also left with the task of evaluating market impact. If the Broadcasting Authority needs to, it may of course call on external expertise. However, this particular part of the pre-screening has evoked a rather unique critique. In late spring, the parliamentary Committee on the Constitution questioned if the demand for an evaluation of market impact can be combined with the autonomy of the public service companies. Moreover, the Committee argued that the fact that market impact had not been explicitly mentioned in the bill from 2009 (where the public value test was mentioned the first time) meant that the issue had not been sufficiently prepared for an official discussion. The parties forming the present minority government registered a reservation.

Central to the Swedish model is the autonomy offered by the European Commission to the member states. It is clearly stated in point 89 of the Communication that: '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.’ This should also be valid for the assessment of market impact. The main basis for this assessment is the discussion within the report itself and the opinions archived from the open consultation.

After having taken both the public value and the market impact into consideration, the authority makes a concluding assessment that is communicated to the government, with the archived opinions attached as appendices. This should be done no later than three months after the report has been filed from the public service company. It is then up to the government to make the decision.

Complaints

What happens if new services fail to be reported for pre-screening? What happens if someone regards a service to be new enough or no longer temporary and believes it should then be assessed? One reason for this particular communication is the complaints that the European Commission has received regarding breaches of the rules on state support. No complaint has been filed against the Swedish public service companies, but it would be ironic if the establishment of pre-screening resulted in the first complaints to the European Commission. This, however, can be resolved through the already established procedure of annual review of the remit mentioned above. In the public service report, filed to the Broadcasting Authority on a yearly basis, changes in the operation should be described, and will apply henceforth. Also, temporary efforts should be discussed and plans for their permanent implementation should be revealed. The Broadcasting Commission, which decides on whether the public service companies have fulfilled the remit, also has the option to evaluate change and can alert the companies to the need for pre-screening in its decision. After that, it is the prerogative of the companies to actually report a service for pre-screening.

If a third party thinks a certain service should have been subjected to pre-screening, this can be called to the attention of the authority, which in turn can include it in the yearly assessment of the remit.

Discussion

I have already mentioned that there have so far been no complaints to the commission regarding public service and state support. This points to either a non-confrontational media climate or, and more likely, that public service has not been regarded as invasive or disruptive to markets. One reason for this is possibly that Swedish public service is not dually financed with licence fee and

commercials. This is true for a few other public service systems, but in Sweden it is complemented with a *de facto* ban on advertisements on the Internet. The system is thus not competing for advertisements with commercial media, which is also a good condition for peaceful co-existence on the Internet. I have also highlighted the system by which the remit is regularly renewed and the relative openness of that process.

Nobody seems to be happy with the proposed model. Commercial media regards it as harmless and not far-reaching enough. Public service media hold the opposing view, that it might hamper their capacity to be innovative and to develop. The polarization might be resolved, depending on how the model is implemented. To some extent, this is trivial and goes for any regulation. However, just because things are trivial does not mean they are false. If used cautiously, the implementation of pre-screening might bring some order into the word-war of the media where accusations and allegations are innumerable and discussions on the manoeuvring of space for the public service are continuous. The supplementation of the yearly assessment of the fulfilment of the remit with pre-screening could, in the best of worlds, give legitimacy to new services from the public service companies, also from their critics. But, for that to work, both parties need to take the process seriously, albeit without overdoing things.

Public service media is media for the public paid by the public. The openness of its operation is essential for its extremely high credibility and trustworthiness. The one strong argument for pre-screening in Sweden, implemented at this minimum level, is that it further opens up the public service to public scrutiny.

Notes

1. Adelson Liljeroth, L. (2010) *Nya tjänster från SR, SVT och UR ska godkännas på förband*, 16 December. Available at <http://www.regeringen.se/sb/d/12545/a/158009>. The author thanks the editors and Libby Robin for valuable comments on an earlier version.
2. Svenska Dagbladet (2010) *Kritik mot statlig förbandsprövning av public service*, 16 December.
3. Regeringskansliet (2010) *Förtydligande om förbandsprövning av nya tjänster från SR, SVT och UR och yttrandefrihetsgrundlagen*, 16 December. Available at <http://www.regeringen.se/sb/d/12628/a/158037>.
4. Regeringskansliet (2010) *Frågor och svar om förbandsprövning av nya tjänster från SR, SVT och UR*, 22 December. Available at <http://www.regeringen.se/sb/d/14036>.
5. Kulturdepartementet (2010) *Förbandsprövning av nya tjänster: Förslag på svensk modell*. Stockholm: Kulturdepartementet.
6. For the historical development of infrastructure for broadcasting in Sweden, see Wormbs, N. (1997) *Genom tråd och eter: Framväxten av distributionsnätet för radio och TV*, Stockholm: Stiftelsen Etermedierna i Sverige.

Dutch Public Service Broadcasting Between Bureaucratic Burden and Political Choice

Implementing the Amsterdam Test in the Netherlands

Jo Bardoel & Marit Vochteloo

The European Commission has promoted prior evaluation of new media services of public service broadcasters by calling it the ‘Amsterdam Test’. Just like the Amsterdam Protocol,¹ the 2009 Broadcasting Communication² is indeed another temporary appeasement in the battle between commerce and culture within the EU. But this time member states have far less autonomy to shape their national broadcasting policies. During the recent revision of the 2001 Broadcasting Communication,³ member states opposed a marginalization of public service broadcasting that was based on purely economic reasoning. The argument of market failure indeed seems less valid for sustaining and even widening the scope of public service broadcasting. Digitalization of networks, a proliferation of special-interest channels and on-demand services, the convergence of audiovisual media and print – all this feeds the argument that scarcity has come to an end and that the market provides for most of society’s needs. On the other hand, high production costs, low to zero reproduction costs, problems with protecting copyright, and high uncertainty of success all tend to limit diversity and quality of audiovisual output – and this would remain so if the Internet were to replace television as the dominant distribution platform, especially in smaller and/or poorer countries. Leaving economic interests aside, the strongest case for public service broadcasting surely rests upon the impact of television on society and the political – some call it ‘paternalistic’ – wish to maintain standards on society’s main channels of communication. Thus, the role of public service broadcasting, its budget and the scope of its activities are essentially a matter of political choice. In this chapter we will first describe the Dutch procedure for prior evaluation of new media services, then indicate the first experiences with prior evaluation and finally evaluate the benefits and risks of the newly-introduced Amsterdam Test in the Netherlands. We will demonstrate that prior evaluation of new media services implies that legal procedures and administrative burdens gain influence over public broadcasters’ future role in Dutch society at the expense of deliberate political choice and design.

European intervention

The Dutch public broadcasting system became the object of a European Commission investigation in 2004, following complaints by commercial broadcasters and press companies. The investigation was split into two cases, one concerning (alleged) ad-hoc financing and one concerning existing aid.⁴ In the case of new State aid the European Commission reached a decision in 2006 requiring the Dutch government to recover €80 million from the public service broadcaster. In January 2010 the Dutch government and the European Commission reached an agreement in the case on existing State aid. By then the 2008 Media Act had incorporated most of the appropriate measures required by the European Commission.

The net result is the following system for the definition, entrustment and supervision of the public service remit:

- The 2008 Media Act introduces a new definition of the public service remit, which abolishes the distinction between main tasks (three television and five radio stations) and side tasks (thematic channels, websites, mobile services, etc.). The scope of the public service remit, and thus public financing, is limited to electronic offerings (images, sound and text) in the areas of information, education and entertainment. Hence other services such as print media, DVDs, merchandizing, and e-commerce are treated as commercial activities. Furthermore, qualitative criteria regarding variety, quality, independence and reach continue to determine the public service remit.
- Every five years the public service broadcaster, the NPO (*Nederlandse Publieke Omroep*) sets out how it will carry out its duties in a strategic plan, the *Concessiebeleidsplan*. This describes the overall programme strategy, including quantitative and qualitative objectives. In addition, the plan must describe ‘the nature and number’ of programme and distribution channels, the required spectrum and the required financial means. Changes to the plan can be made annually as part of the budget procedure.
- In the strategic plan the NPO also has to describe what significant *new* channels it plans to offer. Before new services can be launched, they are subject to prior evaluation and approval by the Minister, taking into account the interests of commercial media companies. This was a much-disputed element in the agreement between the Dutch authorities and the European Commission. In the next paragraph, the procedure is discussed in greater detail.
- On the basis of the strategic plan, the NPO and the Minister conclude a Performance Agreement (*Prestatieovereenkomst*). This contract contains

a selection of measurable objectives to be achieved and seeks to ensure the variety of public media offers in the digital age. The performance agreement replaces former programme requirements that only covered the three general TV channels. The public service broadcaster reports annually to the Minister on the implementation of the agreement. Besides its regular supervisory tasks, the Media Authority (*Commissariaat voor de Media*) verifies the annual performance reports for the Minister. If the public broadcaster fails to deliver, the Minister can impose (financial) penalties.

- Every five years, the entire public broadcasting system is subject to an evaluation by an independent committee, established by the board of governors of the NPO. Evaluation reports came out in 2004 and 2009. A recent amendment to the 2008 Media Act made the renewal of the licences of individual broadcasting associations (partly) dependent on a positive evaluation.
- Complying with the 2009 Broadcasting Communication, the 2008 Media Act limits the financial reserves of public service broadcasting to 10 per cent of the annual budget; any excess will be recovered by the government. The European Commission accepted existing regulation of ‘side activities’, which should be carried out under market conditions.

The Dutch decision circle for prior evaluation of new media services

The procedure for prior evaluation starts every five years with the strategic plan of the NPO. One appendix to the plan gives the required overview of the ‘nature and number of channels’. This includes general and thematic radio and television channels, web channels, larger umbrella websites or portals and online catch-up services (*Uitzending Gemist*) – some are of course available on different distribution devices. There is no obligation to list all individual programmes and websites, as this would hamper creative and journalistic operations and bring government too close to editorial content. In legal terms the overview should refer to ‘a coherent clustering of media offerings under a recognizable (brand) name’.⁵ The overview of all channels serves three purposes:

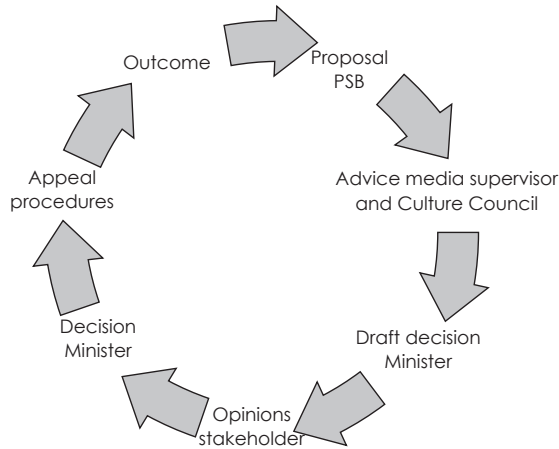
- Entrustment: the Minister determines whether the NPO can indeed carry out the public service remit through the described portfolio of channels. Any significant *new* channels are subject to a prior evaluation and approval procedure.

- Transparency: the overview helps third parties, such as commercial media, to plan their activities taking public offerings into account if necessary.
- Underpinning of extra claims on spectrum for public service broadcasting.

A second appendix to the strategy plan contains the proposal for new media services; that is, any new channels in the portfolio (of old and new channels). Besides channels that did not previously exist or which carried completely different content, prior approval is needed when an existing channel is distributed through another network or platform with distribution scarcity or when payment by end users is introduced. In the proposal the public broadcaster must explain why the new channels would fit into the strategy, paying attention to qualitative aspects of the remit, audience behaviour and needs, existing market offers, and so on. The public broadcaster's proposal is the first step in the evaluation and approval procedure, which is based on general administrative law (*Algemene Wet Bestuursrecht*). The next steps are:

- The Council for Culture (*Raad voor Cultuur*) and the Media Authority (*Commissariaat voor de Media*) advise the Minister on the strategic plan, including the proposal for new media services. The role of these two independent and expert bodies is to evaluate new offerings against the public service remit as defined in the Media Act. Moreover, they validate the arguments for new offerings in relation to the wider programme strategy and objectives set out by the public broadcaster.
- Based on the advice and his own assessment, the Minister then draws up a draft decision which summarizes the planned new media services. In this phase, the Minister may already decide to discard the proposal partially or entirely.
- The draft decision is then submitted to an open public consultation. Interested third parties can submit comments within six weeks of the publication of the draft decision and the Ministry will hold a general public hearing and/or bilateral meetings with stakeholders. This consultation allows commercial media and other societal and market stakeholders to bring forward whether and how planned new media services of the public broadcaster may entail negative effects on their operations.
- In his final decision, the Minister will balance the value of a new public service broadcasting media service for society against its negative effects on the market, as required by the Broadcasting Communication. The Minister's final decision may reject, amend or approve a new service. The decision will be published. Third parties as well as the public broadcaster can appeal against the decision in the administrative court.

Figure 1. The Dutch decision circle for approval of public broadcasters' new media services



New services will thus be entrusted by means of circular approval procedure – evaluation of public value, evaluation of market effects and balancing of the two – which culminates in a decision of the media Minister approving (or rejecting/amending) the launch of new services by the public broadcaster. Changes to the services approved can be made annually as part of the budget cycle, in which case a similar procedure is followed. Experiments can start without prior approval if they are limited in duration (one year), size (up to 2 per cent of annual budget) and scope (restricted audience).

First prior evaluation procedures and court cases

The prior evaluation procedure has been carried out twice in the Netherlands. The first procedure came out of the NPO's annual budget proposals for 2008 and 2009. The public broadcaster requested the launch of several new media services: twelve thematic radio channels for digital cable; three video channels for mobile handhelds; audiovisual services on screens in public transport and train stations; extra information on programmes available to people by their remote control (interactive service menu); and a download function in the catch-up programme service on the Internet. Both the *Raad voor Cultuur* and the *Commissariaat voor de Media* had questions about the proposals, which led to adjustments of the plans by the NPO, but eventually they found that the new services were in accordance with the public remit. The Minister then published a positive draft decision for consultation by third parties. Commercial broadcasters and newspaper publishers gave their comments on the Minister's

draft decision. In essence, they argued that any expansion of public service broadcasting would harm their operations. Negative effects on the market were hardly substantiated. The comments criticized the evaluation procedure, claiming that it would not present a market impact assessment as required by the 2009 Broadcasting Communication. In response to the views of third parties, the Minister set limits on the proposed new media services. In April 2009, ministerial approval was given for a short period, effectively turning the new services into experiments to be evaluated before September 2010. Furthermore, the presence of public broadcasting on public screens is not to exceed half of the distribution capacity. The commercial media were not satisfied and appealed against the final decision in court.

The second procedure came out of the strategic plan for 2010–2016 from the NPO, which was published in spring 2010. The NPO requested permission to prolong the temporary approval for the new media services until January 2012. The reason for this was that the start up was delayed and there had been no time for a proper evaluation. The *Raad voor Cultuur* and the *Commissariaat voor de Media* gave a positive advice for prolongation of the new services. Commercial media again raised objections. This time, they sent in a joint report from a consultancy firm to substantiate their concerns. The report calculated the potential effect of the new public media services on the audience market share and advertising income of the commercial media. In response to the consultation, the Minister in August 2010 approved a temporary prolongation of the new public service broadcasting services until January 2012. She reasoned that the benefits for the public outweigh possible negative effects on the market. Although she welcomed the market impact report by the commercial media as such, she questioned the basis of some calculations in the report.⁶ Again, the commercial media appealed against the final decision in court.

In December 2011 the court ruled on both cases (in one ruling). The court accepted the ‘public value’ part of the evaluation procedures but ruled that the Minister fell short in providing a market impact analysis. Both the government and the commercial media have appealed against this ruling in the highest administrative court, the *Raad van State*. The case has not yet been settled at the time of writing. Commercial media also went to court to contest the granting of a concession to the NPO on the basis of the strategic plan for 2010–2016.

It is important to note that since the first evaluation procedure the NPO has not proposed any new services, but only asks for renewed approval for a delayed start to the 2008/2009 experiments. In fact, in the strategic plan for 2010–2016 the NPO promised to rearrange existing channels according to their public value and audience reach, which should result in a more concentrated portfolio by 2012. This was done for two reasons. One was that the decentralized organization of Dutch public broadcasting had led to a proliferation of digital offerings. This fostered pluralism and innovation but it also led to

waste and sub-optimal performance. So, the NPO board of directors decided that the pioneering days were over. Secondly, the new rules of the 2008 Media Act played a role. The NPO felt that in future it had to deliver better proposals for new services in order to survive a prior evaluation procedure. In autumn 2010 a third factor added to the need to be selective in the new media domain: the new Dutch government announced serious budget cuts on public service broadcasting and took a critical stance towards new public service broadcasting services. These first prior-evaluation procedures demonstrate that the NPO acted cautiously, but also quite naively and defensively in these first cases. The commercial media, on the contrary, and not only commercial broadcasting but also the press, have offensively used all available political and juridical means to try to limit the role of public broadcasters in new media services and – last but not least – the Minister tried to settle the conflict between the main actors by quite pragmatically setting limits on the proposed new public broadcasting services.

Prior evaluation: bureaucratic burden or political choice?

Prior evaluation of new public service broadcasting media services implies that administrative and legal procedures will gain influence over the role of public service broadcasting in society. The Dutch experience gives ample evidence of this, with two cases pending in court. We call this *depoliticization of (national) media policy*. Of course there are possible benefits. Prior evaluation encourages public broadcasters to use new media in a more selective and effective manner. At the same time, the commercial media are gaining opportunities to underline their interests. In order to serve their respective needs, all stakeholders need to invest in research and intelligence to substantiate either positive public value or negative market impact of new public service broadcasting media services. This will serve the legitimacy of public broadcasting and, at the same time, protect commercial media from disproportionate competition in the marketplace.

The flipside of the coin is a growing administrative burden. The European Commission reasons that both elements of the Amsterdam Protocol are now truly accounted for whilst ensuring subsidiarity for member states: member states have control over the remit and test the impact on competition too.⁷ In case of complaints the European Commission would be able to refer to a rigorous national approval procedure. On the other hand, one might predict that the 2009 Broadcasting Communication will not discourage but promote complaints from commercial media companies, as they now have more precedents to follow. Complainants might first go to the national government and national courts. But eventually the European Commission cannot absolve itself of its duties under the treaty; complaints are bound to draw the European Commission back into the details of national procedures. At best, member

states will have to go to greater lengths to demonstrate that their public service broadcasting systems remain within the EU rules. At worst, administrative and legal procedures will come to overshadow political choices about the role of public service broadcasting in society.

This adds up to the abundance of transparency procedures and accountability measures that were imposed on public service broadcasters over the last 20 years in response to the new dual broadcasting market and the growing suspicion between politics and public service broadcasting. Moreover, EU regulation might prevent member states from developing their own national media policies in the future. At the same time, prior approval by the government might lead to a *politicization of editorial strategies*. Germany was especially eager to amend draft versions of the 2009 Broadcasting Communication to protect the independence of its public service broadcasters. There is indeed a real risk. Some Southern European countries and many post-communist countries are showing features of ‘state paternalism’ or ‘political clientelism’, where politics pervades other social systems, including business, the judicial system and indeed the media, and where the development of liberal institutions, critical journalism and an independent public sphere is weak.⁸ Other European countries, including the Netherlands, are not immune, as they are witnessing the emerging of populist styles in politics.

All in all, the power balance within the EU might be shifting from the liberal and democratic corporatist media cultures to more state paternalist and clientelist media cultures.⁹ In this context, a prior evaluation of new media services can become one of the instruments for exerting political influence over editorial decisions within public broadcasting – alongside budget cuts, appointments and performance agreements. Against this background, one may note that Germany has delegated the decision about new services to internal supervisory bodies of the public broadcasters. In the United Kingdom, the BBC Trust is responsible. In contrast, the Dutch procedure lays the ultimate decision about approval of new services with the Minister. Although this protects political primacy on the public remit, such a procedure does present a risk for editorial independence of public broadcasters.

Notes

1. European Commission (1997) ‘Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European communities and certain related acts’, *Official Journal of the European Communities*, C340, 1–144.
2. European Commission (2009) ‘Communication from the Commission on the application of State aid rules to public service broadcasting’, *Official Journal of the European Union*, C257: 1–14.
3. European Commission (2001) ‘Communication from the Commission on the application of State aid rules to public service broadcasting’, *Official Journal of the European Communities*, C320: 5–11.

4. When new aid violates the Treaty, the European Commission can require Member States to recover funds from organizations that have profited. When existing aid is found incompatible with the treaty, the European Commission can only require appropriate measures to ensure future compliance. Existing aid includes all aid that existed prior to the entry into force of the Treaty (1958) in the respective Member States.
5. To enhance transparency, the NPO counted the number of websites at the reference date of 1 March 2010. There were just above 1000 websites; 90% were directly related to radio and television programmes, another 10% had substantial extra offerings or were produced only for the Internet.
6. The motivated decision is available in Dutch at www.rijksoverheid.nl/onderwerpen/omroepen/documenten-en-publicaties/besluiten/2010/09/06/besluit-goedkeuring.html.
7. Kroes, N. (2008) *The way ahead for the Broadcasting Communication*. Speech at the expert meeting on *Public service media in the digital age*. 17 July, Strasbourg.
8. See Jacobowicz, K. (2007) 'Public Service Broadcasting in the 21st Century. What a Chance for a New Beginning?' in G. Ferrell Lowe & J. Bardoel (eds) *From Public Service Broadcasting to Public Service Media* Göteborg: Nordicom (pp. 29–51); and reports by the Open Society Institute.
9. See Bardoel, J. (2007) 'Converging Media Arrangements in Europe', in G. Terzis (ed) *European media governance: national and regional dimensions* Bristol: Intellect Books (pp. 445–459); Baldi, P., & Hasebrink, U. (eds) (2007) *Broadcasters and Citizens in Europe. Trends in Media Accountability and Viewer Participation*. Bristol: Intellect Books; Hallin, D., & Mancini, P. (2004) *Comparing Media Systems. Three Models of Media and Politics*, Cambridge: Cambridge University Press.

Publishers' Fight for Fair Competition in the Digital Era

Herman Wolswinkel

The media landscape is changing rapidly. The newspaper as a print-only product is far behind us. New subscribers are often subscribers to digital news products. Although publishers' revenues are under pressure, news products in general are consumed even more than before, e.g., due to smart phones and tablets. These developments offer new business models for online publishing; the first to monetize valuable news content in the digital era. But publishers are not the only organizations convincingly entering the digital environment. Private as well as public broadcasters have to invest in their digital presence. Dutch public broadcasters in particular spend a lot of money on their digital activities.

To support the digital initiatives of the Dutch public broadcasters, the former Minister of Culture explicitly broadened the public service remit. The new wording of the remit was previously anchored in the Media Act, which is often called the Multimedia Act. That underlines the strong multimedia remit of the Dutch public broadcasters. The public service remit¹ consists of (a) providing public media services on local, regional and national level, by offering media offers in the areas of information, education and entertainment through all available distribution channels and (b) providing public media services of which the media offer is aimed at countries and areas outside the Netherlands and for Dutch people living outside the Netherlands. It is in fact stated policy of the government that the Dutch public broadcasters should be 'everywhere, anywhere at all times'.

The course of events in recent years gives rise to serious concerns about the compliance by the Dutch authorities with the appropriate measures and commitments set out in the Broadcasting Communication 2009, in particular the commitment to conduct a transparent *ex ante* market impact assessment. According to the Dutch Commercial News Media Association (*NDP Nieuwsmedia*), and this is the basic argument of this chapter, the Dutch situation does not comply with EU requirements and harms the interests of private competitors due to the lack of a thorough market impact assessment. As the representative

of the interests of all (paid-for) daily newspaper publishers in the Netherlands, the Dutch Commercial News Media Association submitted a complaint to the European Commission in January 2009. Below, we outline what particular competition distortions the Dutch publishers encounter in their day-to-day business operations and which solutions are necessary for a vital, durable Dutch press.

Publishers' interests

Publishers and public broadcasters are head-on competitors. In the past it may have been possible to consider print media and television as separate markets. In the current media landscape, content of both publishers and broadcasters is increasingly offered on multiple platforms, with a central role for online and mobile provision of information, news, entertainment, culture and sports.

While most policy makers would agree that newspaper publishing is not enclosed in the remit of the Dutch public broadcasters, the convergence in the industry will mean exactly that. Mobile and tablet devices are eminently suitable for both text and audiovisual news content; and both publishers and public broadcasters are expanding their offers online. In this respect, it is very likely that these offers will become interchangeable, at least to some extent. More and more it becomes clear that competition for media attention (i.e. 'the battle for the eyeballs') is the heart of the matter.

As far as commercial television and radio is concerned, and as long as intellectual property rights are respected, newspaper publishers accept the competition with broadcasters. Competition is a sound fact of life in a free society. However, this very flexible attitude is changing if a publicly-funded institution is competing without taking an existential risk comparable to commercial risks, and executes its policy as one integrated marketing model, as is stated in the five-year strategy plan of the Dutch public broadcasters.² Where public service broadcasters offer online services which are similar or identical to online services offered by private operators, it is obvious that public funding of such activities may have an impact on the business model of private operators either through the competition of paid-for services offered by private operators with services offered by public service broadcasters for free or through the competition for users which ultimately determines the advertising revenues of private operators.

The impact of the activities of the Dutch public broadcasters on daily newspaper publishers is substantial. In general, private newspaper publishers have to carefully select innovative projects and ensure that related investments will yield proper results, as their position is at stake in case of failure, especially in the current transition phase of publishers. Any intended innovation will require a proper earnings model, because it must be funded from existing income and turnover. Initiatives to innovate by newspaper publishers are, consequently, vulnerable.

Whereas the publishers are private-market operators and must make their decisions to invest in new product developments and online and mobile innovations in offering their content, the Dutch public broadcasters are not restricted by commercial considerations in launching their initiatives. They can launch numerous initiatives (including seventeen digital theme channels, a lot of mobile services, and more than 1,100 news sites, sports sites, specific sites for children and other target audiences) without a clear link to the vague public remit and without the need to calculate and balance the invested amounts against the risk of success and the time span required to let an initiative mature and prove itself.

In fact, the Dutch public broadcasters are very active in the online environment (e.g. development of news sites, broadcasting online, digital theme channels) and are strongly encouraged to do so by the government. To this end, the Dutch public broadcasters receive dedicated and significant amounts of funding, in addition to the general compensation and the use they make of staff and resources available for their other tasks. €49 million can be spent on new activities alone, of which no less than €23.9 million is intended for Internet activities. It is clear that a commercial party would have a very difficult if not impossible task to formulate a profitable business case that would justify the investment of such an amount, regardless of the current economic circumstances.

Hence, publishers oppose the volume of new media activities catered for by public broadcasters and the regulation sustaining these. In the end, the different means of private publishers and the public broadcasters will have the effect of undermining media pluralism as publishers, faced with unfair competition of public broadcasters, will no longer be able to sustain their business models in competing for audiences with the various Dutch public broadcasters.

Regulatory framework to set bounds to competition distortion

The current definition of the public service remit in the Media Act does not provide for an adequate distinction between public and commercial services. This was acknowledged at the Dutch level itself by the Council of State,³ referring also to an apparent failure to meet the requirements of European state aid control. Indeed, the *Altmark* criteria for the application of Article 106 (2) TFEU are clearly not met by the Dutch Media Act. What is also not respected is the Amsterdam Protocol, which sets requirements for significant new audiovisual services envisaged by public service broadcasters, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account their potential effects on trading conditions and competition.

The clearest regulation on this issue is the Broadcasting Communication 2009. Paragraph 88 of the Broadcasting Communication reads:

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, based on the outcome of the open consultation, 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. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer.

In line with the Broadcasting Communication, the European Commission considers that it is, in the first place, up to national authorities to ensure that public service broadcasters respect market conditions. But the course of events in the Netherlands gives rise to serious concerns as to the compliance by the Dutch authorities with the appropriate measures and commitments set out in the Broadcasting Communication.

Achieving a level playing field

Two measures are needed to ensure a level playing field, for both public and private media organizations. Firstly, a stricter definition of the public service remit is necessary. The definition of the remit must be as precise as possible so as to leave no doubt whether a certain activity performed by the entrusted operator is intended by the member state to be included in the public service remit or not. Secondly, a strong and serious market impact assessment is needed to enforce the borders of the public service remit in respect of the activities of private media companies. Until now a serious market impact assessment for new media initiatives does not exist in the Netherlands.

These measures are currently lacking in the Netherlands. The former Minister of Culture (Social Democrat) even said:⁴

I am therefore trying to convince the European Commission that we should not dedicate a market test to every activity – I mentioned the example of the news on mobile phones. I have great concerns as to how this market test will look. Moreover, the test will give third parties the opportunity to submit objections every time. This would restrict the public broadcasting system too much.

This quotation is exemplary for the attitude of the Dutch former Minister towards the *ex ante* market test. Earlier the Minister had engaged in active lobbying amongst his colleagues from other member states against a mandatory *ex ante* market impact assessment during the preparation of the Broadcasting Communication. The Minister also confirmed that the government is of the opinion that the Dutch public broadcasters distorts competition but do so 'in the public interest' because, otherwise, the Dutch public broadcasters would only remain active in 'a very small field'.⁵ The Dutch Commercial News Media Association notes that the approach of the government is not only at odds with the requirements of Article 107 (1) and 106 (2) TFEU, but is also contradictory. On the one hand, an *ex ante* test that takes market impact into account is considered too cumbersome and restrictive for Dutch public broadcasters, on the other hand, it is undeniable that the law requires ministerial *ex ante* approval for amendments to the policy plan that underlies the performance agreement that is the basis of the public remit. It is thus rather more likely that where the government advocates an approach whereby the activities and remit of the Dutch public broadcasters are viewed on an 'overall basis' and not 'per individual activity', to ensure 'broad and strong' Dutch public broadcasters, it attempts to ignore the existence of, and impact on commercial operators.

In order to achieve the measures, even against what the Minister wants, publishers have followed two strategies. Firstly, they attempt to gain support among politicians. Compared with some years ago, political support for a more confined public service remit is growing. The provisions on the funding of some new media activities have become more clearly spelled out and the number of websites of the Dutch public broadcasters has been reduced. These actions remain inadequate and need to be furthered to a refinement of the public service remit definition in the Media Act.

Secondly, publishers have attacked the consequences of the phrasing of article 2.1 of the Media Act through legal means. The Broadcasting Communication and the decisional practice of the European Commission make clear that even though the member states enjoy considerable discretion in defining the public service remit of public broadcasters, procedural safeguards must be observed, so as to allow the European Commission to perform its role as supervisor of state aids, as enshrined in the EU Treaty. Therefore, the Dutch publishers filed a complaint for unfair competition with the EU's DG Competition, which resulted, although without a formal legal procedure, in a decision in which an *ex ante* evaluation is required according to the appropriate measures.

The major point of the complaint was the lack of an explicit market impact test in the Media Act 2008. This flaw is in line with the stated policy of the Dutch government to oppose such a test and to ignore the market impact of new services of the Dutch public broadcasters. The decision of the former

Minister to allow the Dutch public broadcasters to expand their remit explicitly confirms the lack of a market test. This policy is contradictory and in breach of the provisions of the EU Treaty. This non-compliance can be remedied by the application of a clear procedure that involves all interested third parties and the application of a clear and well-defined test that takes market impact into account, as required under the Broadcasting Communication 2009. In the opinion of the Dutch Commercial News Media Association the Media Act 2008 falls short. Due to the non-compliance of the Dutch government, the Dutch Commercial News Media Association together with the commercial broadcasters (VESTRA⁶) and commercial radio (VCR⁷) submitted complaints to the European Commission in 2008 and 2009.

In response to the complaints, the European Commission started an investigation. To avoid an infringement procedure, the Dutch government submitted by letter, 26 November 2009, an extensive summary of their commitments given in the context of the European Commission's investigation. The Dutch authorities committed themselves to two major changes. The Minister would improve, in a binding way, the Dutch public broadcasters' strategy plan to enable third parties to understand which specific services the Dutch public broadcasters would like to develop as part of the public service remit in the next five years. The draft approval decision of the Minister should be as detailed as necessary for third parties to make substantiated comments to the nature and number of envisaged new services. As the European Commission said, 'third parties should be able to understand which specific services are being considered to meet the democratic, social and cultural needs of society'.⁸

Besides this detailed strategy plan, the Dutch government committed itself to assess in particular the (negative) effects on the market of a new audiovisual service via an open consultation. The minister will balance possible negative market impact with the public value of the new audiovisual service. Carrying out such an assessment, and balancing, is the only good reading of paragraph 88 of the Broadcasting Communication.

These commitments were announced in the European Commission's decision of 26 January 2010. By this decision, the European Commission cleared the annual financing regime for Dutch public broadcasters, following the commitments of the Dutch authorities to ensure that new audiovisual services will be subject to a transparent *ex ante* market impact assessment, in line with the Broadcasting Communication of 2 July 2009.

The Dutch market test: paying lip service to commitments

Due to the entrustment of a new concession period and four new activities, Dutch government commitments had to be implemented in 2010. The Dutch

government seemed to have a minimalistic view on the mandatory task to assess the market impact of new audiovisual services of the Dutch public broadcasters.

Dutch legislation provides for a general procedure for public consultation prior to the adoption of formal decisions. This so-called uniform public drafting procedure is outlined in §3.4 of the General Administrative Law Act.

The procedure consists of the following steps:

- a. a draft decision and the underlying documents are made publicly available for a period of six weeks, following suitable public notice thereof;
- b. interested parties (in any event those to whom the decision will be addressed) will be sent the draft decision prior to the moment in which it is made public, so as to ensure they are notified on time;
- c. interested parties can submit written or oral comments on the draft decision, and
- d. the public authority will adopt a decision as soon as possible after the six-week period but in any event within six months. This decision is binding and subject to judicial review.

Both at the procedural level and the level of implementation, a number of problems arise. At the procedural level there is, first of all, no guarantee that new audiovisual services are subject to a transparent, objective and thorough market impact assessment. The chosen procedure is a very general one, applicable to almost every government's decision. The generic character of the procedure is shown by the absence of the way in which the Minister decides; it is altogether unclear. Another flaw in the procedure is the duty for commercial media suppliers to perform an expensive market impact assessment themselves, because the Minister does not research the market impact at all. The voices of (smaller) media companies that are not able to perform an assessment are not heard in the procedure. It seems insufficiently ensured that an independent decision is taken in all cases. The view of the former Minister, in favour of the Dutch public broadcasters, was not reassuring.

Secondly the Dutch government has opted for a very light, selective version of the market test – too light by the standards of the Broadcasting Communication. Essentially, the Dutch public broadcasters only need to mention whether services similar to the ones they propose are already available. In so doing, there is no trace whatsoever of a genuine market test.

At the level of implementation, the first experiences with the *ex ante* procedure also reveal several problems. On 31 August 2010 the Dutch Minister of Culture approved the package of several new activities by the Dutch public broadcasters. The approval was preceded by a procedure within the context of which the members of VESTRA and the Dutch Commercial News Media Association submitted their comments and participated in an oral hearing. In

order to provide substantive comments, the Dutch Commercial News Media Association together with VESTRA and VCR ordered a market study. Needless to say, such an effort is expensive and difficult to perform within the tight period of six weeks provided for submitting comments. The study, performed by PricewaterhouseCoopers, foresaw serious market damage due to the proposed new digital activities. As no independent body conducts a market study and only private players are forced to do so, it is not clear how the market test results can be, and were, taken into account by the Ministry of Culture. As already stated, the new services were approved on 31 August 2010 and this without a proper and independently-conducted market impact analysis. The decision only contains limited – and partly incorrect – reference to the views of the Dutch Commercial News Media Association, VESTRA and VCR, and the PricewaterhouseCoopers report, but does not contain any evidence showing that the Minister made her own analysis. This means that the obligation of conducting a market impact assessment was not carried out. In fact, the Dutch government had already done an evaluation of certain new services prior to their launch by public broadcasters in 2009. This evaluation, which resulted in several approvals on 21 April 2009, does not, in practice, differ from the exercise conducted in 2010 – which is inspired by a different set of more specific rules grounded in the European decision on the Dutch public broadcasting system of January 2010. The procedure, therefore, was not materially different from the previous procedure mentioned in the Decision,⁹ which resulted in the decision of 21 April 2009 (i.e. well before the commitment to conduct a market impact analysis that was made on 26 November 2009¹⁰).

It can only be concluded that the Dutch authorities have not introduced any change in their assessment and have, consequently, not implemented the commitments they have made towards the European Commission in this regard. In other words, the Dutch authorities are merely paying lip service to the commitments, without actually transposing them into practice. The consequences of non-observance of binding commitments are clear: such non-observance results in the aid scheme being considered new aid, and requires a new evaluation of DG Competition.

The current market test falls short

The Dutch Commercial News Media Association (together with VESTRA and VCR) appealed against the approval decision at the administrative law chamber of the Amsterdam District Court *inter alia* on the ground that the Dutch authorities have failed to adhere to their commitments towards the European Commission by failing to conduct a proper market impact assessment. By the judgment of 24 December 2010, the District Court ruled in favour of the Dutch

Commercial News Media Association, VESTRA and VCR.¹¹ The District Court held (§3.15) that:

... it does not follow from the decision of the Commission that the defendant [the Minister of Culture] may suffice with merely going through the procedure of section 3.4 of the Awb [General Administrative Law Act]. The Commission after all refers to this procedure as a procedural framework that will add to the compliance with the European rules regarding state aid. In the opinion of the court it follows from the decision that within this framework the defendant is required to conduct a substantive market test that is not limited to merely examining of the remarks submitted by market parties in the context of this procedure.

The District Court annulled the contested decision and ordered the Minister of Culture to adopt a new decision within three months of the judgment, i.e. no later than 24 March 2011. In January 2011, the Minister lodged an appeal against the judgment of the District Court, with the Council of State. The private media also lodged an appeal on less important points, e.g. whether the new services were sufficiently described beforehand by the Dutch public broadcasters and the likelihood of overcompensation for the public broadcasters. A core question in the administrative appeal before the Council of State and the interim relief proceedings will be the correct reading of the European Commission's decision.¹²

Conclusion

Although the current procedure offers the possibility to comment on the Dutch public broadcasters' new audiovisual services as a private media company, the market impact assessment is not at all satisfying. The minister's balance of the value of a new audiovisual service for society with the negative effects of such a new service is insufficient. The Dutch commercial media organizations doubt that the media Ministry verifies whether new audiovisual services represent any added value in terms of satisfying social, democratic and cultural needs of the Dutch society. The government has not fully responded to their own commitments to balance the substantiated effects on the market with the planned new services' value for society in line with paragraph 88 of the Broadcasting Communication, not even for exact duplicates of already-existing channels of commercial broadcasters.

The grounds of appeal submitted by the current minister confirm that the Dutch authorities are still fighting a battle against any proper *ex ante* market test (indeed, they always opposed that test and conducted an EU-wide lobby to avoid it) and are now trying to interpret the commitments as confirmed by the decision in an overly restrictive manner, thus essentially rendering them meaningless.

The current ‘market test’ is not functioning properly. It does not help the search for a new balance between publicly and privately funded media in the digital era. In the current difficult newspaper market, publishers are particularly vulnerable to distortions of competition. By trying to avoid a serious market test, the Dutch government damages the commercial media and ultimately harms media pluralism. It is a governmental duty to pursue a level playing field in order to maintain media pluralism. But up until now this is not the case. It requires a step-by-step approach for the Broadcasting Communication to come into force in the Netherlands.

Notes

1. As is formulated in article 2.1 of the Dutch Media Act.
2. The five-year strategy plan of the DPBS, see Nederlandse Publieke Omroep (2010) *Concessiebeleidsplan 2010-2016*. Available at http://corporate.publiekeomroep.nl/data/media/db_download/254_0c8a93.pdf.
3. Advice of the Dutch Council of State of 19 October 2007 on the Dutch Media Act 2008.
4. Minister of Culture, Plasterk, in a speech on 5 September 2008.
5. Minister Plasterk, in the parliamentary debate on the proposed Media Act, TK 101 – 7207, 25 June 2008.
6. The Commercial Broadcasters Association consists of the following members: RTL Nederland, SBS Broadcasting, MTV Networks Benelux, Disney Channels Benelux, Discovery Networks Benelux and Eurosport.
7. The Commercial Radio Association consists of the following members: Sky Radio Nederland B.V., BNR Nieuwsradio B.V., Q-Music Nederland B.V. and Radio 538 N.V.
8. Para. 247 of the European Commission’s decision, see European Commission. (2010) *State aid E 5/2005 (ex NN 170b/2003) – Annual financing of the Dutch public service broadcasters – The Netherlands* [C(2010)132 final. Available at http://ec.europa.eu/competition/state_aid/register/ii/doc/E-5-2005-WLWL-en-26.01.2010.pdf.
9. Footnote 147 of the European Commission’s decision.
10. Para. 215 of the European Commission’s decision.
11. The District Court did not dispute the qualification of the services in question as public services.
12. On 14 September 2011 the Dutch Council of State ruled in favour of the Minister of Culture. Since national legal means are exhausted, the commercial media will submit a complaint at the European Commission.

Chapter 15

Ex Ante Test in Flanders

Making Ends Meet?

Hilde Van den Bulck

This chapter analyses the *ex ante* tests for significant new services of public service broadcasting in Flanders. After the introduction of the main actors and a background sketch of the introduction of *ex ante* testing in Flemish media law, the text explores the reality of such a test as it is caught between legal requirements and practical-financial constraints and, at a deeper level, between the search for transparent accountability measures and the threat of a bureaucratizing audit culture. This chapter argues that the *ex ante* test implementation is, at least in Flanders, a case of making multiple ends meet, and an example of the apparent struggle between stakeholders, not just over this specific issue but over wider-reaching ideas regarding accountability and state-media relations.

The key players

Founded as a radio institution in 1930 and ‘self-evidently’ incorporating television in 1953, public service broadcasting in Flanders (today called VRT) enjoyed a monopoly backed by a licence fee in return for a ban on advertising for almost 50 years in radio and more than 55 years in television. The advent in the late 1970s of local radio and the subsequent liberalization of the radio waves did not hit public service broadcasting at its core. Yet, the 1987 ‘cable bill’ that made room for commercial television and the subsequent 1989 introduction of commercial channel VTM (an alliance of the Flemish press) took public service broadcasting’s breath away. The cumbersome, centralistic, hierarchically-organized and strongly-politicized institution witnessed an immediate and dramatic drop in audience ratings. The introduction of radio advertising in 1990 did not provide the necessary change. After a failed (because too limited) restoration attempt in 1991, 1995 saw the start of a wider-reaching restructuring and refurbishing of public service broadcasting at the level of

organization and remit; confirming its role in radio and television and giving it a lead in technological innovations. As a result, public service broadcasting managed to change its image and position from ‘underdog’ to ‘trendsetter’ in radio, television and, increasingly, new media platforms, giving commercial competitors a sore eye.

Indeed, like elsewhere in Europe, commercial media players – pushed towards economies of scale and scope, struggling for commercial revenues in a small and tight market, and with limited options for international expansion – see the successful VRT as disturbing the level playing field by ignoring its social responsibility in favour of popular programmes and audience maximization and by unfair competition due to its public funds. These private media companies have proven powerful stakeholders in lobbying the case against public service broadcasting both with the Flemish government and the EU. The latter – especially the European Commission – has been increasingly interested and interfering in the area of media and ICT since the 1980s. With regards to public service broadcasting, this attention is mainly of a negative nature. While the Amsterdam Protocol (1997) recognizes the legitimacy of public service broadcasting institutions, they do not sit well with EU state aid and competition policy.¹ Various complaints to the European Commission resulted in the 2009 Broadcasting Communication stipulating, amongst other things, the need for *ex ante* tests for significant new services for public service broadcasting.

From complaint to legal provisions

Following complaints by private competitors filed with the European Commission in 2004 against various aspects of VRT’s state financing, the European Commission initiated a number of consultation rounds (2004–2008). In an Article 17 letter of July 2006, it asked the Belgian government to clarify a number of issues, including a definition of the remit in general and in relationship to new media services in particular, and an effective supervision and control of the way in which VRT fulfils its obligations. Subsequently, the Flemish government made a number of commitments, communicated to the European Commission in late 2007, and accepted by the European Commission in its final decision of 27 February 2008, conditional on their implementation by February 2009.²

These commitments included, with regards to new services, first, a legal framework that guarantees that VRT cannot launch new services or activities not covered by the standing management contract without an *ex ante* evaluation and explicit entrustment. Second, they ensured the establishment of criteria to determine a new service and to assess whether or not it contributes to the public service goals. Third, the Flemish government committed itself to obtain advice of an independent specialist advisory body to be in charge of the *ex ante* tests.

The new Radio Broadcasting and Television Bill of 27 March 2009 transposed these commitments into legal provisions. It states a clear definition of VRT's remit, including in the final paragraph: 'VRT is on top of all technological developments so that, if needed or so wished, it can offer its programmes to listeners and viewers via new media applications' (art 6 §1-2). At the same time, the Bill stipulates:

Art. 18. § 1. VRT cannot execute any new services or activities not covered by the management contract, until after explicit permission of the Flemish government

§ 2. To this end, the Flemish government asks advice from the Flemish Media Council (SARC), established by Flemish law on November 30, 2007. In its advice, the Flemish Media Council takes into consideration observations of third parties. The advice of the Flemish Media Council is published on its website. The advice takes into account important evolutions in the media market and technology, as well as the evolving media landscape and the role of VRT herein.

§ 3. The Flemish Media Council evaluates the media market on the basis of changes in the economic situation of the Flemish media landscape, the overall media offer in the Flemish market, technological evolutions, international trends, protection and promotion of Flemish Culture and Identity and the expectations and needs of the media user.

Making legal and financial-operational ends meet

The operationalization of these legal provisions so far has proven complicated and contested for a number of reasons.

In a first step, on June 6, 2009 VRT and the Flemish government signed an explanatory addendum to the existing management contract (2007–2011) between both parties. Rather than providing criteria for what constitutes a new service, it lists all existing services implied in the operative agreement: activities and services with regards to radio, television, broadband Internet, mobile services, distribution and two-year media innovation projects. These were considered as part of the management contract so not 'new' and therefore not subject to an *ex ante* test. All other services are considered as new and, hence, open to an *ex ante* test.

The addendum was announced as the last step towards the European Commission's demand for a complete and clear definition of the public service broadcasting remit and of a 'new service', yet it provoked considerable criticism from a number of stakeholders. They claimed the list went beyond VRT's current activities and was so extensive as to include any foreseeable new

media service. As such, they saw the addendum as an attempt by the Flemish government and VRT to dodge any *ex ante* tests for many years to come. Different from the stress on the digital theme channels that dominated discussion in 2006 in the run up to the current management contract,³ concerns now focus on broadband and mobile phone services, considered as potential economic growth areas for commercial competitors.

An important forum for this discussion was the Flemish Media Council. Set up in November 2007 as part of the wider Flemish Council on Culture, Youth, Sports and Media (SARC), the Flemish Media Council succeeded the old Media Council as an independent policy advisory board. It consists of a number of independent experts and of representatives of all main stakeholders in the field of media, namely representatives of VRT, private television stations, private radio stations, daily and weekly press, professional journalists, electronic communication networks (providers), the independent audiovisual production sector, copyright organizations and media users.⁴ The Council is obliged by law to provide *ex ante* advice on new services. The fact that the tests are executed by those with a clear and wide-ranging stake in the outcome (VRT and its main competitors) is nevertheless seen by some as undermining the impartiality of the outcome. While this threat is modified by the stipulation that the Council's decision is to be based on scientific research, there are no financial provisions to commission such studies, as the funding of the SARC is limited to personnel and expenses. To obtain the necessary funds, the Flemish Media Council has to turn to the cabinet of the media Minister (currently, Lieten) and/or the Culture, Youth, Sports and Media Administration of the Flemish government, themselves subject to considerable financial cut-backs following the recent economic crisis and the EU-controlled national debt reduction.

The search for an affordable compromise between the critics of the addendum and the lack of a financial and operational framework for *ex ante* testing was helped by considerable overlap in the Media Bill between criteria set out for the *ex ante* test and those for the obligation that: '[i]n preparation of each new management contract with VRT, the Flemish Media Council organizes a public survey about the extent of the public service remit and the operationalization hereof' (art. 20. § 1). It is expected to advise:

taking into account important evolutions in the media market and in technology, as well as the evolving media landscape and the role of VRT therein. The Flemish Media Council, evaluates the media market on the basis of changes in the economic situation of the Flemish media landscape, the overall media offer in the Flemish market, technological evolutions, international trends, protection and promotion of Flemish Culture and Identity and the expectations and needs of the media user' (Art 20. § 1).

With the Council's advice on the new (2012–2016) management contract expected in the autumn of 2010, stakeholders reached a gentlemen's agreement: the Council was to opt for a maximum interpretation of the Media Bill. On top of the legally-required audience and stakeholder analysis, it was to commission a market impact assessment, and all commissioned studies were to include facts and views on new services.

As a result, the Council commissioned (1) a survey of a representative sample of the Flemish public (#1500) enquiring after expectations and views regarding Flemish public service broadcasting; (2) an analysis of the views of all relevant stakeholders; and (3) a study of the economic impact of VRT on the Flemish media landscape. Each study had a budget of about €60,000, paid for by the Flemish Administration that also financed an update of studies it had commissioned for the legally-required intermediary (after 2 years) evaluation of VRT performance *vis-à-vis* its management contract. The updates added a forward-looking perspective to what were originally *ex post* evaluations of (4) the way in which VRT (can) fulfil(s) its legal requirement to enhance and protect Flemish national identity; and (5) key technological developments in the field of media and ICT. Finally, to obtain an insight into general audience expectations with regards to media, it was decided to (6) subscribe to an existing international study.

While not an *ex ante* test as such, this extensive exercise provided valuable lessons for any future steps in that direction. For one thing, it became clear that the turn-around period is considerably longer than anticipated. It takes several months to go through the administrative steps of tendering academic institutions over actual research to formulating advice. This raises concerns regarding the negative consequences of protracted *ex ante* procedures, a danger strengthened by the fact that certain stakeholders may have a competitive interest in a prolonged *ex ante* testing period. The time issue is combined with financial limitations that are not expected to be solved any time soon, given the cut-backs in government spending. While the quality of the public survey and stakeholder inquest was never contested, the market impact assessment was considered insufficiently extensive and thorough for its results to be taken into consideration towards the Council's advice.⁵ It appears that the existing financial constraints seriously hamper the feasibility of a professional and all-encompassing market impact assessment – not a promising observation for any future *ex ante* tests.

Making public management ends meet: accountability versus audit overload

Digging a little deeper, it becomes clear that beneath the intense but surface dispute about making legal and operational-financial ends meet is a more

fundamental debate about acceptable public management models for public service broadcasting.

The changes that Flemish and many other European public broadcasters underwent throughout the 1990s were heavily influenced by the New Public Management doctrine that stresses entrepreneurial management styles, a client (rather than a citizen) orientation, competition, marketization and outsourcing (rather than in-house production), and contractualization of relations with political principals (rather than traditional hierarchy).⁶ The Flemish public service broadcasting institution's administrative hierarchy was replaced by a more flexible management structure and the corporation was turned into a public liability company – VRT (1997). The relationship between state and public service broadcasting was redefined through the introduction of the above mentioned management contract, to be renewed every five years, stipulating aims and objectives. Such a long-term contract allows for a level of freedom and independence to develop middle-term strategies. Finally, new accountability instruments were installed, based on performance rather than hierarchy. While the first contract (1997–2001) introduced performance indicators based on viewing and appreciation figures, subsequent editions added quality and diversity standards (2002–2007) and a re-enforcement of the cultural remit (2008–2012). Public service broadcasting's performance is monitored by independent bodies such as the Flemish Media Regulator, amongst others.

The debate about *ex ante* tests for new services is illustrative of the pressure this model is under and echoes recent criticism of the New Public Management doctrine in general. Proponents of *ex ante* tests and an overall increase in accountability measures claim that the shift from a cultural-educational logic to a competitive business logic in the 1990s has led public service broadcasting astray, ignoring its core public service remit to the benefit of competition, audience maximization and channel branding. These views are reminiscent of criticisms expressed about New Public Management's stress on a narrow definition of performance as efficiency. As a result, within public management studies a shift in views can be observed towards a focus on performance as 'public value'.⁷

Public service broadcasting critics further maintain that the absence of clearly delineated public service goals and objectives goes hand in hand with a lack of transparency resulting from inadequate accountability instruments. They propose a public service broadcasting contract stipulating that everything that is not in the agreement is not allowed, rather than the current situation where everything is possible that is not explicitly forbidden. *Ex ante* testing of new services is considered as a necessary step towards greater accountability and, thus, improved transparency. Supporters of this view claim that this will ultimately help to improve the legitimacy of public service broadcasting, while opponents believe it may 'lead to a further narrowing of the remit and revenue

streams of public service broadcasters, especially in the field of new media',⁸ a concern based on British and German cases of *ex ante* testing of new services.

The criticism regarding the lack of transparency is made in spite of what others consider an abundance of and even steady increase in the number of accountability and audit instruments. For instance, VRT is subjected to (annual) screening by a list of controlling bodies and has its performance measured against an extensive list of criteria (viewing and appreciation figures; functional, ethical and operational quality, among other things). Another example is the Flemish government administration's mid-term evaluation of the existing contract which comes only months before the advice of the Media Council regarding the next contract, on top of the Media Regulator's annual monitoring, and on top of any number of potential *ex ante* tests. Meant to improve public service broadcasting performance – i.e. better fulfil its social responsibility remit – these accountability instruments are lamented by some as accomplishing the exact opposite of their aim, as they stifle the flexible and efficient functioning of public service broadcasting. The observation that an inflation of managerial accountability instruments has led to bureaucratization, and a control culture that turns auditing into a ritual rather than an accountability measure, is a more broadly-shared critique of New Public Management, as Richard Collins elaborates on in this volume. From this point of view, increasing interference by the EU and a growing demand for accountability measures will further strengthen an evaluation overload, paralysing both public service broadcasting activities and policy-making.

Evaluation: making political ends meet

Flanders is not the only small state struggling to meet EU requirements with regards to public service broadcasting and new services. In the wake of a complaint against Irish public service broadcasting RTÉ, and subsequent action by the European Commission, the Irish government committed itself to define the scope of the remit, improve transparency measures and the implementation of an *ex ante* test. In 2009, Ireland adopted a new Broadcasting Bill that provides an enumeration of public service broadcasting aims and tasks, including new media activities. It further includes the establishment of a public value test and market impact assessment for any significant new public service broadcasting activities. The newly-founded Broadcasting Authority of Ireland (BAI) was authorized, among other things, to control the fulfilment of the RTÉ remit and the assessment of any new public service broadcasting activities. So far, though, no evidence has been found of actual operationalization or implementation of this new framework. Other countries such as Austria and Denmark also seem to struggle to move from the legal framework to the actual testing phase. It

appears that practical yet consequential issues such as administrative and financial costs stand in the way of small states' efforts.

In Flanders, the *ex ante* issue promises to resurface. For one thing, the gentlemen's agreement seems to be on shaky ground as the Media Council's policy advice towards the new management contract explicitly stipulates that the addendum is not to be considered as an attainment but needs to be renegotiated. This opens the door to a more limited definition of existing services, thereby putting the need for an *ex ante* procedure back on the table. Furthermore, the failure of the Media Council to obtain a thorough market impact assessment caused a measure of parliamentary commotion (a debate on media commission, parliamentary questions put to the media minister, and so on, which seems to have put the desirability of a market impact assessment of VRT onto the political agenda). This is tantamount to the unfavourable attitude towards VRT in general and its management in particular that has characterized political debates in recent years. This puts pressure on the institution and the media minister to increase accountability instruments and measures including *ex ante* testing. In the end, the European Commission itself may provide the final blow to any attempts at dodging the tests. While the European Commission has left it up to the Member States to decide on the precise nature of the *ex ante* test, it has made it clear that:

subsidiarity does not mean a blank cheque. Someone has to assess the market impact and if Member States do not do it, the Commission would be obliged to carry out the full assessment itself under the EC Treaty rules. However, the Commission's *ex post* intervention is likely to be significantly more 'invasive' than an *ex ante* reflection at national level on the shape new services should take.⁹

Doubtless to be continued.¹⁰

Notes

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10. Note of the editors: Since writing this contribution the Flemish Government has adopted a new definition of 'new services', identifying more clearly that new channels, new thematic channels or strategic re-orientations of existing services beyond the scope of the management contract require an ex ante test. This has no immediate impact on the absence of an ex ante test in Flanders for which still no procedure has been developed.

Chapter 16

Long Live the Ex Ante Test

The Ex Ante Test Is Dead!

Ben Appel

In June and July 2004 several private media companies, among which VMMA,¹ filed complaints against the funding of Flemish public broadcaster VRT with the competition authorities of the European Commission. Initial complaints addressed several aspects of the financial support for VRT, including the unfair pricing strategies of the public broadcaster in the market for radio advertising, the insufficiently precise definition of the tasks of VRT, the deficient controlling systems in place, and an overall lack of transparency in the public broadcaster's financial and organizational structures.

The complaints of the private sector should not be seen as an attack on public service broadcasting as such. In Flanders, there is no private sector opposition against a comprehensive public service delivery in the markets for radio and television. Nevertheless, private competitors feel justified in asking for a clearly-defined public service remit and a transparent cost allocation, thus ensuring a fair competitive market environment in which all players can compete on equal footing.

In 2004, complaints were provoked by the apparent unwillingness of both the Flemish government and the public broadcaster to significantly adapt the latter's behaviour in a competitive broadcasting market, delivering a huge diversity of both public and commercial services of high quality to Flemish citizens. More specifically, complaints were triggered by VRT's launch of a dedicated sports channel called *Sporza*. VRT launched the channel in 2003 in order to schedule several popular sports events and, in so doing, avoid a disruption of its other channels' programming schedules. The private television sector asked the Flemish government to prohibit *Sporza*. For them *Sporza* was a tangible evidence of overcompensation. Indeed, if VRT had acquired so many rights that it could not secure their broadcast on its existing channels, it had, basically, bought too many rights. VRT counterargued that *Sporza* was a mainly temporary solution and was eventually forced to limit the duration of the channel to three months.

The Commission initiated a preliminary investigation and requested information from the Belgian authorities. Meanwhile, the authorities initiated a number of modifications in the legal framework governing broadcasting in the Flemish Community of Belgium.

The Commission welcomed the changes implemented in 2005 and 2006 but considered, in July 2006, that a number of points needed to be further clarified, in particular the definition of the public service remit (also in relation to new media services), effective supervision and control and adequate mechanisms to prevent overcompensation for public service activities.

In February 2008, the European Commission took a decision in the Flemish case,² largely ignoring most private sector complaints. A number of appropriate measures were listed. The most important ones concern the further explicitation of the public service remit, the introduction of an *ex ante* assessment and the introduction of a 10% cap on reserves.³

The outcome of this decision is often mentioned in correlation to the decisions on the funding of public service broadcasting in Germany, Ireland, the Netherlands and Austria. However, the implementation of appropriate measures in Flanders is lagging behind and continues to exemplify an unwillingness to comply with relevant legislative principles at EU level.⁴ The lack of implementation of the *ex ante* evaluation of new media services is a case in point.

This chapter begins with a brief description of the legal framework as adapted after the decision issued by the European Commission on 22 February 2008. It continues with an analysis of the practical and more fundamental problems of the current framework for *ex ante* evaluation. Finally, some conclusions are outlined. The core argument is that, whereas in policy and academic discourse the *ex ante* test for public broadcasters' new media services is vibrant, little or no action can be observed in Flanders. Hence, the title of this chapter: 'Long live the *ex ante* test, the *ex ante* test is dead'.

The Flemish Media Decree

The Flemish Media Decree was adapted after the decision issued by the European Commission on 22 February 2008. The two most important changes in the light of this chapter concern articles 18 and 20, respectively dealing with the *ex ante* evaluation of new media services and a wide-ranging consultation before the renewal of the management contract between the VRT and the Flemish government every five years.

article 18 provides that:

§1 VRT can deliver new services or activities that are not covered by the management contract after an explicit approval of the Flemish government only.

§2 The Flemish Governments asks the advice of the Flemish Media Council of the Council for Culture, Youth, Sports and Media, which was created by the decree of 30 November 2007. In its advice, the Flemish Media Council takes into account observations of third parties. The advice of the Flemish Media Council is to be published on its website. The advice of the Flemish Media Council takes into account important evolutions in the media markets, technology, the evolving media landscape and the role of the VRT therein.

§3 The Flemish Media Council of the Council for Culture, Youth, Sports and Media evaluates the media market on the basis of changes in the economic situation in the Flemish media landscape, the general offer of media services in the Flemish market, the technological evolutions, international trends, the protection and promotion of Flemish culture and identity, and the expectations and needs of the media users.

Concretely, VRT can deliver new services only after an explicit approval of the Flemish government. Such an approval should be preceded by an advice of the Flemish Media Council. This body, representing the media sector, civil society stakeholders (like consumer organizations and copyright collecting societies) and consisting of several of its representatives and independent academic experts, takes into account several elements in drafting its advice and gives third parties the opportunity to react. The crux of article 18 concerns its almost implicit definition of a new media service. A new media service is a service not covered by the management contract. Services covered by the management contract are existing and, thus, do not require a test. I will discuss later which problems emerge from this.

Article 20 complements article 18. Whereas the latter foresees in a procedure for new services, the former concerns a bigger exercise conducted for the entire collection of services that are covered by the management contract.

§1 To prepare the new management contract with the VRT, the Flemish Media Council of the Council for Culture, Youth, Sports and Media shall organize a public consultation about the scope of the public service remit and the interpretation thereof during the implementation of the new management contract, taking into account the important evolutions in the media market and in technology, the evolving media landscape and the role of the VRT therein. The Flemish Media Council shall evaluate the media market on the basis of changes in the economic situation in the Flemish media landscape, the general offer of media services in the Flemish market, the technological evolutions, international trends, the protection and promotion of Flemish culture and identity, and the expectations and needs of the media users.

§2 The Flemish Media Council of the Council for Culture, Youth, Sports and Media uses scientific experts for the public consultation.

§3 On the basis of the results of the public consultation the Flemish Media Council of the Council for Culture, Youth, Sports and Media shall formulate an advice for the Flemish Government about the new management contract with the VRT. This advice is to be published on the website of the Flemish Media Council.

The exercise portrayed in article 20 concerns a large, full-scale, investigation into the role of the public broadcaster for the coming five years. It serves as the core input for the new management contract to be concluded between the Flemish government and the VRT. In 2010, the Flemish Media Council already complied with the provisions of article 20, organizing a consultation on the future role of the VRT in Flemish society. In order to draft a grounded recommendation, the Council decided to order three scientific studies, dealing with (1) the Flemish citizens' opinions about the public broadcaster;⁵ (2) sector and civil society stakeholders' opinions about the public broadcasters;⁶ and (3) a market impact assessment of the VRT's positive and negative effects on the Flemish media market. The economic study of the impact of the VRT on the market was not entirely accepted by the Council, clearly exposing some methodological problems in the assessment. The Council drafted an advice, advocating for a holistic public broadcaster, offering high quality and distinctive services on all platforms but with a clear and sharp focus on television and radio. It warned against further commercialization by the public broadcaster and for more transparency in terms of the public broadcaster's financial and organizational structure.⁷

The advice of the Flemish Media Council was presented in Parliament in January 2011. The Flemish Government had already received the advice in November 2010.

Practical problems

The current organization of both the *ex ante* evaluation for new media services and the consultation before the renewal of the management contract reveals some severe practical and fundamental problems. Practical problems relate foremost to the lack of expertise and budget to conduct certain procedures. Fundamental problems concern:

- the definition of new services;
- the absence of a spelled-out procedure for *ex ante* tests;
- the absence of a genuine market study of the VRT's impact, being a necessary input for both the *ex ante* assessment of new media services and the public consultation before the renewal of the management contract; and

- the unclear relation between the studies and recommendations produced and policy outcomes.

Starting with the practical problems, it is fair to say that the Flemish Media Council is not equipped to handle the serious task of executing an *ex ante* evaluation of new media services. In its decision of 22 February 2008, the European Commission describes the Flemish Media Council as ‘an independent and specialized advice body’. Being a member of the Sectoral Council myself, both adjectives are – in spite of the good intentions and human capital in the Council – difficult to ascribe. The Council is not fully independent, as most of its members represent the media sector. Publishers and private broadcasters are represented in the Council and, hence, need to decide on the offer of a service of a competing media company. That is, to say the least, somewhat problematic and also uncomfortable. The public broadcaster itself is also represented in the Council for Media and can thus influence the outcome of a debate that is of direct importance for its functioning. Indeed, sector interests are balanced by the presence of academic independents and consumer interest groups. Nevertheless, the presence of the latter does not offset the problem of independence, which is aggravated by the simple fact that not all media companies are represented. In case confidential information is required for the market impact assessment of a new media service, the absence of some and the presence of other media companies in the Sectoral Council poses self-evident problems. In addition, the Council cannot be called specialized either. Of course, many members of the Council are experts in media law and policy. Nevertheless, they are not qualified economists, equipped to execute or evaluate the results of a full-blown economic analysis of a proposed new service.

Leaving the competencies of the Sectoral Council aside, there are some basic issues as regards the budgetary requirements of an *ex ante* assessment. To date, no *ex ante* assessment has been performed (I will come to the reason for that later). A budget for executing an *ex ante* assessment is lacking. In fact, when the Sectoral Council launched the consultation preceding the renewal of the management contract, it was unclear which budget was available for ordering studies and managing the overall process. Eventually, the Flemish administration for Culture, Youth, Sports and Media intervened and allocated some funds for invoking scientific expertise. However, this of course limited the room of manoeuvre of the Sectoral Council and increased the risk of government intervening in a supposedly independent and objective evaluation of the role of the Flemish public broadcaster in the future.

Fundamental problems

Next to the more practical problems raised above, there are also some more fundamental problems to be observed in relation to the *ex ante* assessment of new media services in particular and the consultation before the renewal of the management contract. I would like to highlight three problems:

1. What is a new service?
2. What is the procedure to be followed for new services?
3. What happens with all the studies and advices?

What is a new service?

First of all, there is a severe problem in defining what a new service is. The decision of the European Commission and the Flemish media decree indeed specify that new services are services not covered by the management contract. In its decision, the European Commission obliges the Flemish Government to define a set of criteria on the basis of which it can be determined whether a service is new or not.⁸ The deadline for the adoption of a set of criteria was 22 February 2009, as it is specified in the decision that the Flemish authorities have exactly one year to implement all appropriate measures.⁹

Regrettably, the Flemish Government and the VRT abandoned the set of criteria and opted to annex a list of services allegedly covered by the public service remit to the management contract.¹⁰ This ‘clarifying addendum’ was published in June 2009, a couple of months after the deadline of the European Commission expired and, hence, it can be assumed that the addendum was in fact an emergency solution to overcome the problems of defining a set of criteria. Having said that, the explanatory or clarifying addendum basically lists all services that are, according to the Flemish Government and the VRT, covered by the management contract valid between 2007 and 2011. Hence, it offers in retrospect an interpretation of the management contract and the services included in it.

The addendum is in fact a long and all-embracing list, mentioning the following services for which a test would be suitable:

- Text message alert services
- Podcasts
- Websites
- Multimedia and participative online platforms (including blogs, chatrooms, etc.)
- Games

- Traffic and weather pay-services
- Catch-up services
- Websites of all main public broadcaster brands
- News websites including regional news, sports news, etc.
- Webshops
- Etc.

Needless to say that many of the included services require an *ex ante* test in other EU member states. In addition, the services mentioned in the addendum are in fact umbrellas. A website or a brand, for example, is a platform for different services such as catch-up services, blogs, forums, text-based services, etc. It seems rather odd that all (even non-existing) services offered on a platform covered by the addendum are automatically covered by the management contract. Moreover, it remains unclear how far the service delivery of some services listed in the addendum can go. For example, for catch-up services offered online, many questions remain pressing. How long can the VRT offer catch-up services on its websites? Can the public broadcaster offer all its programmes as catch-up services? Is it allowed to commercialize the catch-up service through pre-rolls or other forms of commercial communication? These are but a few questions that remain unanswered and fuel, rather than limit, legal uncertainty for private media players. The allowed testing period of two years for a new service – not limited to a specific region – before a test is required even adds to this legal uncertainty. It is in reality unlikely that a new service, once implemented in the market (as no limits on audience reach have been identified), will be disapproved of by government. The entire idea of the *ex ante* assessment is to evaluate *ex ante* whether a service fits the public service remit and will not overly distort the market. When you allow an extensive testing period for an entire population, few policy makers will decide to reverse the situation *ex post*.

Another important element in the addendum that deserves mentioning concerns the ‘silent’ introduction of new channels in the management contract. The addendum mentions that the so-called ‘plus’ channels of VRT are covered by the management contract. Technically speaking, these channels are genuine channels. They occupy a separate space on cable or other distribution platforms and are distinguishable for consumers as such. VRT has three ‘plus’ channels: one branded as an additional channel to its generalist channel één and the other branded as an addition to its second and third channels, focusing on children on the one hand and information and culture on the other. VRT claims these ‘plus’ channels are not real channels as they are mere ‘enrichments’ of the existing channels. Although this interpretation has been fiercely disputed, certainly in the Flemish Parliament, the VRT’s approach has been fully adopted

in the addendum, giving some sort of ‘absolution’ to the ‘plus’ channels. There was, however, no prior assessment, no approval by government, no consultation of the sector, etc. By including the ‘plus’ channels in the addendum, they were suddenly recognized as legitimate parts of the public service remit, even though the addendum itself explicitly mentions (and this in reaction to the *Sporza* affair and as a consequence of the decision of the European Commission, see above), that new channels cannot be launched without prior approval of the Flemish government.

What procedure for new services?

Even if it is unlikely, given the width of the addendum, that one could find a service that qualifies as new, there is still no fleshed-out procedure in case the VRT would seek to launch a new service. To date, the Flemish Media Council has not developed a procedure for new services. The Flemish Government has not encouraged the Council to do this either. Indeed, there have been several meetings on the approaches other countries follow with regard to *ex ante* assessments of public broadcasters’ new media services. There seems to be a consensus that the specific context of a small region like Flanders necessitates an adapted procedure, fit to evaluate both the public value and possible market impact of a new service in a pragmatic and effective way.

Related to this, the necessity of a market impact assessment has not yet been fully embraced. Certainly private media companies argue that such an assessment is indispensable to secure pluralism and competition in the market. In addition, some politicians and academics also favour a market impact assessment. They strive for a clarification of both the positive and negative effects of the public broadcaster on the market. However, others find a market impact assessment too burdensome in terms of financing and human resources. Such criticism is unjustified, however, as the European Commission has recognized on multiple occasions that the specifics of each *ex ante* assessment have to be determined at the level of the relevant government authority, taking into account the size of the market and other relevant circumstances.¹¹

The market study ordered by the Flemish Media Council in light of the consultation before the renewal of the management contract was inadequate. It did not answer the main questions asked by private media companies and policy makers. Its analysis was mainly qualitative in nature, not addressing in a quantitative nature the effects of VRT’s online activities on publishers, advertising strategies on private broadcasters, etc.

It is not only the necessity of a market impact assessment that is undecided but also the concrete way to tackle it. When the Flemish Media Council launched a call to attract expertise on the economic analysis of the impact of the VRT, it got only one response. Essentially, the budget foreseen for such an exercise

was too low, the timing too strict and the questions identified by the Flemish Media Council probably too all-embracing for the budget and timing foreseen. Hence, there is a need for further discussion on the role and place of a market impact assessment in both the *ex ante* evaluation of new media services and the consultation before the renewal of the management contract; and the funds made available for in-depth scientific research on the matter.

What happens with all the studies and recommendations?

A final problem I see with regard to the *ex ante* assessment, and certainly with regard to the public consultation before the renewal of the management contract, is the unclear relation between the inputs provided by the sector within the formalized setting of the Flemish Media Council and the policy outputs. There are several studies and heaps of recommendations. The Flemish Government has received all documents. However, it remains unclear what exactly happens with all the materials.

To date, management contracts have been the results of extensive political bargaining¹² and rational decision-making often seems absent from the policy process. Currently, discussions pertain to the launch of a third channel by VRT under the new management contract. Evidently this seriously impacts the broadcasting sector, taking into account that VRT has already a market share of 42 per cent. Surprisingly, no market impact assessment is foreseen. The exercises put forward by the European Commission are intended to result in more evidence-based policy-making. The actual evidence of an evolution towards more evidence-based policy-making is missing and calls for an evaluation by the European Commission about the public service broadcasting strategies of the EU member states.

Conclusions

In conclusion, the *ex ante* test in Flanders exists *de iure*, but is dead in reality. The absence of a test and the inadequate economic analysis supporting the Flemish Media Council's advice for the renewal of the management contract means that there is no balanced evaluation of the Flemish public broadcaster's new media services.

Even if Flanders is, again *de iure*, complying with the appropriate measures of the European Commission's decision of 22 February 2008, it is going against the overall line of the 2009 Broadcasting Communication. Representatives of the European Commission themselves confirm that an ineffective test or the absence of an *ex ante* test for new media services will provoke new investigations at European level:

In practice this means that the Commission will take account of a prior evaluation at the national level if faced with a complaint on the subject. The test however does not in itself rule out the Commission opening an investigation, in particular if it finds that a test was unfair or ineffective. Without the test, the Commission has no choice but to enter into a detailed substantive assessment of new services.¹³

The question then is whether the Flemish Government is indeed prepared to accept yet another intervention of the European Commission in its public service broadcasting policies or whether it will adapt its current strategies in the new management contract, to be adopted before 1 January 2012.¹⁴

Notes

1. Vlaamse Media Maatschappij is the largest private broadcasting company in Flanders. It operates five free-to-air television channels (vtm, 2BE, Jim, Vitaya and vtmKzoom) and two radio channels (Q-music and JoeFM).
2. European Commission, 22 February 2008, *Financiering van de openbare omroep VRT*, E8/2006.
3. *Idem*: §228ff.
4. Most importantly the principles of the 2009 Broadcasting Communication (European Commission, 2 July 2009, *Communication on the application of the State aid rules to public service broadcasting*, [2009]OJ C 257/1).
5. Dhoest, A., Van Den Bulck, H., Vandebosch, H. & Dierckx, M. (2010) *De publieke omroepopdracht gewikt en gewogen: publieksbevraging over de toekomstige taak van de VRT*, Antwerpen, Universiteit Antwerpen & MPC.
6. Donders, K., Raats, T., Moons, A. & Walravens, N. (2010) *De toekomstige plaats en rol van de openbare omroep in Vlaanderen: stakeholderbevraging*. Brussel, Vrije Universiteit Brussel & IBBT-SMIT.
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8. European Commission, 22 February 2008, *Financiering van de openbare omroep VRT*, E8/2006: §239.
9. *Idem*: §264.
10. Vlaamse Regering and VRT (2009) *Verklarend addendum bij de beheersovereenkomst 2007-2011 inzake de activiteiten en diensten die binnen het toepassingsgebied van de beheersovereenkomst vallen*.
11. See, for example, Repa, L., Tosics, N., Dias, P. & A. Bacchiega (2009) 'The 2009 Broadcasting Communication', *Competition Policy Newsletter* 3: 10–16.
12. Saeys, F. & F. Antoine (2007) 'Belgium', in L. D'Haenens, and F. Saeys (eds) *Western Broadcasting Models: Structure, Conduct and Performance*, New York: Mouton de Gruyter (pp. 105–144).
13. Repa, L., Tosics, N., Dias, P. & A. Bacchiega (2009) 'The 2009 Broadcasting Communication' *Competition Policy Newsletter* 3: 15.
14. Note of the editors: Since writing this contribution the Flemish Government has adopted a new definition of 'new services', identifying more clearly that new channels, new thematic channels or strategic re-orientations of existing services beyond the scope of the management contract require an ex ante test. This has no immediate impact on the absence of an ex ante test in Flanders for which still no procedure has been developed.

Ex Ante Assessments for Public Broadcasters in Southern Europe *Delayed Europeanization?*

Benedetta Brevini

The idea of a compulsory ‘*ex ante* assessment’ for public broadcasters’ new media services was first introduced in the UK and is now gaining ground in several member states of the European Union. Certainly, since the implementation of the European Commission’s 2009 Broadcasting Communication, the introduction of the test has been gaining momentum. There has been a common rationale behind European public broadcasting aimed at developing a ‘new kind of access to virtually the whole spectrum of public life’.¹ Still, each public broadcasting system developed according to its own nation’s particular set of historical, cultural and political traditions. Importantly, when public broadcasters started expanding into new media, they followed a path dependency pattern.² As a consequence, the influence and scale of public broadcasters in the new media world is not homogeneous across European states.³ While in countries like the UK, Germany and Denmark, public broadcasters have been able to seize the opportunities offered by new media and establish their supremacy in the digital world, the situation in Southern Europe is very different, as expansion of public broadcasters into new media is a more recent phenomenon.

This chapter aims to explore the extent to which the new *ex ante* assessment, as delineated by the European Commission’s 2009 Broadcasting Communication, has been introduced in Southern Europe. It investigates the most recent policy initiatives on public broadcasting in France, Spain and Italy and asks how different political, historical and cultural factors are determining the implementation of the test in Southern Europe. Is Europeanization – conceived as a top-down mechanism – taking place?

An analytical framework for the *ex ante* assessment: from bottom-up to top-down Europeanization

The first document that introduced the idea of an *ex ante* assessment for new services was the BBC Royal Charter. The ‘public value test’ – framed as a new element of media governance⁴ – consists of a public value assessment, carried out by the BBC Trust, and a market impact assessment carried out by Ofcom. Likewise, the structure proposed in the 2009 Broadcasting Communication by the European Commission shows striking similarities, as article 88 explains:

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, based on the outcome of the open consultation, 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. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives.⁵

Hence, it could be argued that the *ex ante* assessment introduced by the 2009 Communication constitutes an example of policy transfer⁶ between the UK and ‘Brussels’. This pattern could also be used as an example of Europeanization as a ‘bottom-up’ mechanism, which occurs when a policy initiative of a European member state is then implemented at the European level.⁷ Indeed, there is evidence of continuous contact between the BBC and the European Commission regarding the introduction of the public value test in the UK framework. In fact, most European public service broadcasters have, directly or through the European Broadcasting Union, been constantly receiving briefings from the BBC about its plan to adopt a public value test.⁸

Yet, after the implementation of the 2009 Broadcasting Communication the *ex ante* assessment is likely to gradually be adopted by European Union member states, even in states where such an initiative would not necessarily have been implemented in the absence of the Communication. The adoption of the test could indeed constitute another example of Europeanization as a ‘top-down’ mechanism, ‘wherein the European institutions mandate the form that national policy choices should take’.⁹

Public broadcasting policy frameworks in Southern Europe: high levels of politicization

As Hallin and Mancini have argued, the history of broadcasting policy in Southern Europe has been characterized by a ‘politics over broadcasting system’.¹⁰

Spain, France and Italy belong to the so-called ‘Mediterranean or polarized pluralistic model’. Amongst the model’s principal traits are a ‘low circulation of press, high level of political parallelism, weak professionalization, a strong state intervention and politicized public service broadcasting’.¹¹

Yet, a recent study has unveiled substantial differences between RAI’s, RTVE’s and France Télévisions’ policies on Internet expansion – even though the three countries belong to the same cluster. Because of their intense politicization, the three broadcasters have developed different responses to the Internet world.¹² Hence, the strong politicization that has characterized broadcasting policy in Southern Europe still remains an important feature of its public policies concerning new media. With this clear hypothesis in mind, I now move to explore the adoption of the *ex ante* assessment in France, Spain and Italy.

Spain and France: a fundamental policy change and the role of the European Commission

Public broadcasting in France and Spain has recently undergone landmark reforms that have changed their legal and policy frameworks. In March 2009, the French parliament adopted a law that radically changed the financing and organization of France Télévisions. The reform, strongly advocated by Nicolas Sarkozy – the first *téléprésident* of the French Republic – has for the first time banned advertising from French public broadcaster France Télévisions.¹³ The French reforms have triggered the adoption of very similar policies in Spain concerning RTVE, arguably constituting a policy transfer between the two European countries. In September 2009, a new law was adopted in Spain that banned commercials on RTVE, radically changing the traditional funding system of the Spanish broadcaster.¹⁴

The European Commission investigated the reforms in France and Spain. Firstly, it attempted to ascertain whether the new mechanisms financing France Télévisions and RTVE were compatible with the state aid rules and would not, therefore, constitute an overcompensation. Secondly, it verified – in a separate procedure conducted by the Information Society Service – whether the taxes on telecommunications operators (to offset the eliminated advertising revenues) were in breach of the rules of the EU framework on Electronic Communication.

Clearly, in the procedures that investigated and approved the new funding system of the broadcasters, the European Commission focused more on the lawfulness and transparency of the new funding system than on the remit of the two institutions.¹⁵ It could be argued that this reasoning is in line with traditional European Commission decision-making on Southern public broadcasters, aiming to secure more accountability, efficiency and sustainability. In other words and, in this, differing from decisions involving other EU member

states, the European Commission did not explicitly demand the introduction of an *ex ante* test in its decisions on France and Spain.¹⁶

Spain: the novelty of the new audiovisual communication law

Analysis of policy documents, containing exchanges between the European Commission and Spain during the state aid procedure, is extremely revealing, as regards discussion on the *ex ante* test. In fact, the European Commission acknowledges, in its decision on the legitimacy of the new funding scheme of RTVE, the importance of the introduction of a new *ex ante* control scheme by the new reforms of March 2010.

Article 41(3) of the law on Audiovisual Communications explains that the new *ex ante* control entails a public consultation and the evaluation of the overall impact of each new service on the market, to be conducted by the *Consejo Estatal de Medios Audiovisuales* (Council for Audiovisual Media).

Still, the new Council for Audiovisual Media has not been established yet. So it is difficult to predict the effective implementation of the law. The fact that the adoption of the new law of 2010 took four years since the policy discussion on the first Zapatero reform of 2006 does not make a fast implementation of the *ex ante* test very likely.

Likewise, according to art. 5 of Act 17 of 2006, the objectives of the public service have to be defined by a '*Mandato Marco*'¹⁷, issued by Parliament every nine years. The first *Mandato Marco* signed at the end of 2007 explains that a '*contrato programa*' – service contract between RTVE and the government – will better define the type of activities, organization, and budget of RTVE. Surprisingly, the first *contrato programa* – that had to be signed by 30 June, 2007 for the period of 2008–2010 – has yet to be signed by the government. It thus remains to be seen what type of 'new services' will have to go through a public value test. The only hint comes from the draft of the *contrato programa* that seems to indicate that new services will be clearly different from services already offered by RTVE.

France: no *ex ante* test required

Despite the obvious similarity between the public broadcasting reforms in Spain and France, the French case presents substantial differences on what constitutes an *ex ante* test for new services. Indeed, when the European Commission legitimized the new funding scheme for France Télévisions, it took an interesting standpoint, clarifying that:

the obligations of France Télévisions are specified again in the terms of reference and the agreement relating to objectives and means and are accompanied by precise, quantified indicators to be achieved in its programme schedule, to which the competing broadcasters are not subject.

Moreover,

These public service obligations which derive from the law, contrary to those deriving from membership of the EBU, are moreover subject to regular external controls, notably by Parliament, concerning their fulfilment.¹⁸

Hence, the European Commission recognized that France Télévisions' strict legal regime entails rigid public service obligations and objectives which guarantee the same level of accountability and control as an *ex ante* assessment. Public broadcasting in France is in fact highly regulated by three tiers of legal provisions. Firstly, a framework law sets out the most important principles that France Télévisions should follow. The second tier of legal provisions is represented by the *Cabier de mission et charges* that is adopted from a decree issued by the government in which the objectives of public broadcasters are listed. Until 2009, there were different *cabiers de charges* for each channel, but the reform of 2009 has introduced a single *cabier de charge* for France Télévisions. The third tier is represented by the *contrat d'objectifs et de moyens*, a contract between the government and France Télévisions to achieve the objectives requested by both law and the decree, and which also stipulates the resources and the budget allocated to achieve those aims.

The European Commission therefore takes the view that:

this positive assessment on the definition and control of the public service mission of France Télévisions must be extended to the mechanisms applicable to the launch of significant new audiovisual services, within the meaning of the Broadcasting Communication which entered into effect after the decision initiating the present procedure. These services, which extend the offer of broadcasted programmes to other media or formats, are included in the terms of reference and the agreements relating to objectives and means of France Télévisions, which specify and translate the service of general economic interest missions provided for by the law. These documents have been adopted by decree, as indicated above, so that the new services already provided for and those possibly to come are the subject of the same specific ex-ante consultation procedures and ex-post annual performance checks as these missions.¹⁹

Hence, as things stand, France Télévisions does not intend to propose an adoption of any *ex ante* assessment or market impact assessment. It could be argued that, on this point, the French implementation clearly differs from the requirements of the *ex ante* test, as set out by the 2009 Broadcasting Communication.

Italy: *ex post* public value indicator

RAI (Radio Televisione Italiana) is the provider of public service broadcasting in Italy, and is subject to a 20-year licence contract with the state. As with the two other Southern European broadcasters we have looked at, the Italian framework is highly regulated as regards the aims of its public broadcaster. The second tier of legislation is in fact represented by the *contratto di servizio* – RAI service contract, signed every three years – between the Ministry of Communication and RAI that lays out objectives to be achieved by the public broadcasting provider during that time. The Italian framework has not been changed as radically as was the case in Spain and France. Yet, the policy discussions that preceded the signing of the *Contratto di servizio* for 2010–2012 showed no evident intention of introducing *ex ante* controls on new services by RAI. In fact, while the contract reaffirms – as the previous one – the importance for RAI to invest in new media services, no measures have been introduced to request a public consultation on new services; and no measures assigned to AGCOM (the Italian Communication Authority) to carry out *ex ante* monitoring on new services.

Instead, the new contract reiterates the need to introduce a system of quality measurement. It introduces a public value indicator, which in fact was set up by the previous contract and never implemented. However, the new indicator concerns just the *ex post* evaluation of RAI services that entails constant monitoring of the quality of RAI's offers, 'taking into account the current European and international models'.²⁰

As article 3 explains, the assessment of the perceived quality and public value of RAI will be based on two components:

1. Monitoring the quality of the programmes in terms of public value with the aim of taking into consideration the views of the users/public
2. Monitoring the corporate reputation of RAI.²¹

Conclusion

This chapter reviewed recent policy changes concerning public broadcasting in three different Southern European countries, focusing on the adoption of *ex ante* evaluations for public broadcasters' new media services.

Clearly, the intense politicization of broadcasting policies in Southern Europe has held back the implementation of *ex ante* evaluations. Consistent with Humphreys'²² 2006 comparative study of telecom and broadcasting policy in EU, "because of its more politically and culturally sensitive character, broadcasting regulation has remained much more domestically 'embedded' than telecoms".

Even though the three countries belong to the same Mediterranean cluster, they each present very different policy solutions precisely because of the intense politicization that determines policy priorities within each member state. This has slowed down the process of Europeanization as a ‘top-down’ mechanism. In its recent revision of the RAI service contract, Italian policy makers did not consider adopting an *ex ante* assessment for new services. France and Spain, despite the similarities in their public broadcasting framework reforms, also presented two different ways of implementing them. The French policy makers embraced the European Commission’s view that the legal controls on public broadcasting output were satisfactory. As a consequence, French policy makers consider the implementation of an *ex ante* test unnecessary. Spain, on the other hand, has adopted a radically different approach, introducing an *ex ante* assessment in the new reforms. It will be interesting to keep an eye on Spain, and see if they promptly implement the test introduced by the new law or if the implementation will in fact take years to materialize. The fact that the service contract – due in 2007 – has yet to be signed, and that the much-sought-after Authority for Audiovisual Media has yet to be established, would suggest that early implementation is unlikely. It might also be that, as happened in France, Spain will take the view that the tiers of legal obligations imposed on RTVE make the need for an *ex ante* assessment less obvious. Also, Italy, with its high level of legal requirements for RAI, might embrace France’s approach. Unquestionably, at the time of writing, Southern European policy makers are not rushing to implement the new assessment as envisaged by the 2009 Broadcasting Communication.

It seems that the urgency to adopt *ex ante* assessments has been far stronger in the north of Europe than in the south. This can be explained by the fact that public broadcasters’ new media activities in Southern Europe are still far less established and successful in comparison with their Northern European counterparts. The demands of commercial competitors and publishers to limit the expansion of public broadcasters’ new media activities have been far stronger in Northern than in Southern Europe. Southern Europe’s less-developed new media activities by public broadcasting do not yet represent a significant threat to the commercial world, as has already happened in Northern Europe. It is arguable that if public broadcasters in Southern Europe start investing in new media activities, complaints from commercial operators at the national and European level will increase and the accelerated implementation of an *ex ante* assessment will become observable.

Throughout the chapter I have argued that the *ex-ante* test constitutes an example of policy transfer between the UK and ‘Brussels’, being that the test is substantially modelled on the BBC’s public value test. While some argue that the public value test is an effective instrument of increased accountability for the BBC, the same conclusion cannot be drawn for all public service broadcasters

in Europe. Rather, the test could prove too costly and bureaucratic to encourage innovation and new media expansion of the weaker Southern European public broadcasters, thus further deterring their expansion beyond broadcasting.

Southern European public broadcasters with their high levels of politicization need robust political backing to invest in new activities. Yet, recent framework changes, with their lack of clarity in terms of long-term funding, seem not to have brought the solidity that public broadcasters need to engage in innovation and experimentation. Nor does the introduction of an *ex ante* test appear the most appropriate solution.

Notes

1. Scannell, P. (1989) 'Public service broadcasting and modern public life', in *Media Culture and Society*, 11(2), p. 140.
2. Brevini, B. (2010) 'Towards PSB 2.0? Applying the PSB Ethos to Online Media in Europe: A Comparative Study of PSBs' Internet Policies in Spain, Italy and Britain', *European Journal of Communication*, 25(4), pp. 348–365.
3. See Brevini, B. (2010b) 'Under Siege by Commercial Interests? BBC and DR Online Between the National and European Policy Frameworks', *Interactions: Studies in Communication & Culture*, 1(2), pp. 203–315. See also Moe, H. (2008) 'Public Service Media Online? Regulating Public Broadcasters' Internet Services – A Comparative Analysis', *Television & New Media* 9(3), pp. 220–238.
4. Moe, H. (2010) 'Governing Public Service Broadcasting: 'Public Value Tests' in Different National Contexts'. *Communication, Culture & Critique* 3(2), pp. 207–223.
5. Furthermore, art 89 clarifies that '[s]uch an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties which is effectively independent from the management of the public service broadcaster.'
6. Dolowitz, D. & Marsh, D. (2000) 'Learning from Abroad: the Role of Policy Transfer in Contemporary Policy-Making', *Governance*, 13(1), pp. 5–24
7. Harcourt, A. (2002) 'Engineering Europeanisation: the role of the European institutions in shaping national broadcasting regulation', *Journal of European Public Policy*, 9(5), pp. 736–755
8. Collins, R. (2007) Public Value and the BBC. A report prepared for The Work Foundation's public value consortium, The Work Foundation, March 2007, p. 65.
9. Harcourt, op. cit.
10. Hallin, D.C & Mancini, P. (2004) *Comparing Media Systems: Three Models of Media and Politics*, Cambridge: Cambridge University Press.
11. Hallin & Mancini, op. cit.
12. Brevini, B. (2011 forthcoming) 'PSBs Move Online in Southern Europe: A Comparison of Spain and Italy', in Maureen Burns & Niels Brügger (eds) *Public Service Broadcasters on the Web – A Comprehensive History*, Peter Lang.
13. According to Law 2009-258 of 5 March 2009 on audiovisual communication and new public service, the revenues that will be lost as a result of the reduction and cessation of advertising on public TV channels by 30 November 2011 will be compensated for by:
 - A state budgetary grant (of €450 million for 2009, €460 million in 2010, €500 million in 2011 and €650 million in 2012. (EC, 2010a: 15)
 - The TV licence fee that amounted to €1,945 million in 2008, and is indexed to inflation (France Télévisions, 2008 and 2008a)

- A new system of taxation on advertising revenues of commercial broadcasters and electronic communication operators (TV Law 2009, 2009: art 32).
Yet, the complete abolition of advertising before 8.00 pm that was due to start in November 2011 has been put on ice.
14. According to Law 8/2009 on the financing of RTVE, the funding will now be provided by three fiscal measures, in addition to the existing state funding of RTVE that amounts to approximately €500 million: a tax of 3% on the revenues of free-to-air commercial broadcasters and of 1.5% on pay-TV broadcasters; a tax of 0.9% on the revenues of operators of electronic communications; a share of 80% of the existing levy on radio spectrum use of up to €330 million.
 15. See ‘State aid: Commission approves long-term funding mechanism for France Télévisions.’ Brussels, 20 July 2010, case C 27/2009, IP/10/979; ‘State aid: Commission approves new tax-based funding system for Spanish public broadcaster RTVE.’ Brussels, 20 July 2010, case C 38/2009, IP/10/978; ‘Digital Agenda: Commission requests France and Spain to end ‘telecoms taxes’’. Brussels, 30 September 2010, IP/10/1211.:
Commission Decision of 20 July 2010 on State Aid C 27/09 (ex N 34/B/09) Budgetary grant for France Télévisions which the French Republic plans to implement in favour of France Télévisions, OJ L59/57.
 16. On 28 January 2009 and on 18 March 2010, the Commission opened two infringement procedures against France and Spain respectively for breach of the EU electronic communication framework and specifically Article 12 of the Licensing Directive that details the rules on administrative charges that member states can impose on telecom/network providers. On 30 September 2010, the Commission requested Spain and France to abolish the ‘telecoms tax’ as it found the scheme incompatible with the EU electronic communication framework. However, at the time of writing, both the countries failed to amend their reforms and are still imposing these charges on the turnover of telecoms operators in breach of EU law.
 17. The first Mandato Marco was signed on 18 December, 2007. The subsequent ‘contrato programa’ that will better define the type of activities, organization, and budget of RTVE has yet to be signed by the Government.
 18. Art 91, Commission Decision of 20 July 2010 on State Aid C 27/09 (ex N 34/B/09) Budgetary grant for France Télévisions which the French Republic plans to implement in favour of France Télévisions, OJ L59/57.
 19. Art 93, Commission Decision of 20 July 2010 on State Aid C 27/09 (ex N 34/B/09) Budgetary grant for France Télévisions which the French Republic plans to implement in favour of France Télévisions, OJ L59/57.
 20. Art 3, count 2, Service Contract between the Minister of Communications and RAI, 2010–2012.
 21. Art 3, count 3, Service Contract between the Minister of Communications and RAI, 2010–2012.
 22. Humphreys, P. (2006) ‘Globalization, Regulatory Competition, and EU Policy Transfer in the Telecoms and Broadcasting Sectors’, *International Journal of Public Administration*, 29(4), pp. 305–334.

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