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PUBLIC SERVICE MEDIA UNDER ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Study on behalf of the European Broadcasting Union
December 2013

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SUMMARY

1. The existence of public service broadcasters benefits from protection by Article 10 of the European Convention on Human Rights (ECHR). This protection is a consequence of a State's deliberate decision to establish a public broadcasting system. The kind of protection and its scope are influenced by the standards which have been developed by the Council of Europe and the EU with regard to the essential role and contribution of public broadcasting within a democratic society. This contribution comprises all tasks through which a public broadcaster serves the democratic, social and cultural needs of a democratic society.

2. Interferences by public authorities with media freedom must be justified under Article 10§2 ECHR. Measures taken against public service media, including restrictions of their funding, are to be considered as interferences in this sense. Therefore public service media are protected against arbitrary or disproportionate actions. This could be the case with a decision to close down an existing public service media organisation or to significantly reduce its service capabilities.

3. Moreover, under Article 10§1 ECHR, States have a positive obligation to ensure media pluralism. However, in this case they have a broader margin of appreciation of how to achieve this objective than in cases where they interfere with media freedom. A State may adapt its media policy in response to changing social situations and market developments, and accordingly reduce or alter the position of an existing public service broadcaster. Nevertheless, according to European standards, the so-called European audiovisual model involves the establishment of sustainable, independent and pluralistic public service media.

4. The reorganisation of a public service broadcaster and/or the reduction of its standing by the State might in many cases be justified under the conditions of Article 10§2. However, the positive obligations arising from Article 10§1 compel States to guarantee at all times a media landscape that is shaped according to the principles of pluralism and diversity, tolerance and broadmindedness, as well as those regarding independent and impartial information and reporting.

5. Due to its subsidiary nature, the human rights protection system of the ECHR is not intended to prescribe a certain model of how broadcasting should be organised in a given country. Nevertheless, Article 10 says more about the status of public service media than merely that a State "may decide" to establish a public service broadcasting system, or not. It gives existing public service media legal protection against State actions that are arbitrary or disproportionate, relative to legitimate aims that a State may pursue, and obliges the State to (re)establish a media system that meets the general requirements of Article 10 ECHR.

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I. THE CASE OF "ELLINIKI RADIOFONIA TILEORASI S.A." (ERT)

1. THE GUARANTEE OF FREEDOM OF EXPRESSION IN GREECE AND THE CLOSURE OF ERT

Freedom of expression is guaranteed by Article 14 of the Greek Constitution. The first paragraph provides that "every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State". According to §2 the press is free and censorship and all other preventive measures are prohibited. Any restriction to this freedom must be provided for either by the Constitution or by law and comply with the principle of proportionality. Additionally, §9 contains provisions regarding transparency, plurality, and control of the media, as well as rules referring to incompatibilities. Finally, §9 lists sanctions in cases of infringements of the right of freedom of expression, e.g. revocation of broadcasting licenses or the prohibition of conclusion or annulment of contracts.[1]

The Greek public broadcaster Elliniki Radiofonia Tileorasi S.A. (ERT) was founded by its own dedicated Law N. 1730/1987.[2] It was set up as a legal entity under private law owned by the State (public corporation under private law) and under the control and supervision of the State, but with administrative and financial autonomy.

On 11 June 2013 the Greek Government shut down ERT because of "unique lack of transparency and incredible waste".[3] A co-ministerial decision ordered (a) the abolition of ERT, (b) the interruption of the transmission of radio and television signals and of website operations, (c) the transfer of all assets and liabilities to the State, (d) the deactivation of all frequencies until the establishment of a new broadcasting agency, and (e) the revocation of all employment contracts.[4] At the same time, the Government announced that it would submit a draft bill for the creation of a new public broadcaster to the Parliament, which would include provisions to make the new broadcaster more independent from the State. The European Commission distanced itself from the Government's decision but welcomed its intention to re-establish public service broadcasting in Greece. Although there was a critical debate in the European Parliament, during which some MEPs strongly criticised the Government, no resolution was adopted.

On 17 June 2013, a special ruling (i.e. temporary injunction) of the President of the Council of the State (i.e. High Administrative Court) overruled the co-ministerial decision, suspending the enforcement of the decision exclusively with regard to items (b) and (d) (outlined above). According to this ruling, competent ministers were to take the "necessary organisational measures for the resumption of radio and television signal transmissions as well as the operation of websites owned by the public broadcaster until a new agency [is] activated (...)". The following decision (236/2013) of the Committee of Suspension of the Council of State found it imperative to rationalise the organisation of public service broadcasting. The judges considered it necessary to re-establish

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1 *Konstantinos Margaritis*, Freedom of Expression in the Greek Constitution and the Article 14, The Washington Review of Turkish and Eurasian Affairs, September 2012: http://www.thewashingtonreview.org/articles/freedom-of-expression-in-the-greek-constitution-and-the-article-14.html (23 August 2013).

2 Amended by Laws 1772/1988, 1866/89, 1902/1990, 1941/91, 1943/91, 1961/91, 2008/92, 2065/92, 2145/93, 2173/93, 2218/94, 2251/94, 2303/95, 2322/95, 2328/1995, 2412/96, 2414/96, 2644/98, 2831/00, 3021/02, 3166/03, 3419/05, 3429/2005, 3444/06, 3592/07, 3851/2010, 3878/2010, as well as Presidential Decrees P.D. 234/93 and 285/93.

3 Statement by the Deputy Minister of the Prime Minister and Government Spokesperson, *Simos Kedikoglou*, 11 June 2013, see *Alexandros Economou*, Greek Public Broadcaster in Crisis, MMR-Aktuell 2013, 347680 – beck-online.

4 Ibidem.

a new public broadcaster which met the requirements of the Greek Constitution, mentioned above, the democratic, social, and cultural needs of society, and the need to preserve media pluralism. They invoked the High Administrative Court's opinion that the public broadcaster has to serve the public interest and other constitutional purposes and must comply with the principle of continuous operation governing public administration in Greece. Therefore, items (b) and (d) of the co-ministerial decision were suspended. Only one judge referred to the fact that the abolition of the legal entity of ERT without the simultaneous creation of a new equivalent institution violates the rights and obligations of ERT as a public service administrator. For this reason and in view of the principle of continuity in public services he pleaded – unsuccessfully – for the suspension of the entire decision.[5]

2. THE LAUNCH OF AN INTERIM PUBLIC BROADCASTING SERVICE AND THE NEW PUBLIC SERVICE BROADCASTER NERIT

Exactly one month after the closure of ERT, the Government introduced, in response to the Court's ruling, an interim public broadcasting service called HPRT (also referred to as DT), which is meant to serve as a transition to a new public service broadcasting network and to ensure a certain continuity of the public service provision. This transitional service shall be operating until a permanent replacement for ERT has been established, but there continued to be problems with laid-off ERT journalists and media workers.[6]

In parallel, on 11 July 2013, the Greek Parliament adopted a new media law laying the legal foundations for a new independent public service media organisation, NERIT.[7]

The members of the first (interim) Supervisory Council of NERIT were appointed by the Government in August 2013; the Council, after organising an open competition, appointed the first Managing Director and President of the Executive Board alongside four other Board members. However, the setting up of a new public service media organisation from almost nothing takes time, and NERIT is not expected to become operational before the first or second quarter of 2014.

In the meantime, the programme output of the interim broadcasting service has gradually been extended, from the initial broadcasting of old movies and documentaries to own productions and the inclusion of other programme categories, in particular news.[8] In fact, on 21 August 2013 a two-hour news programme started, produced by newly-recruited staff of the interim public broadcasting service (a number of whom are ex-ERT staff) and anchored by two journalists.[9]

5 Ibidem.

6 *Niki Kitsantonis*, Greece resumes Official State TV Programming,http://www.nytimes.com/2013/07/12/world/europe/greece-resumes-official-state-tv-programming.html?_r=0 (23 August 2013).

7 Published in the Government Gazette dated 26 July 2013.

8 See http://www3.ebu.ch/cms/en/sites/ebu/contents/news/2013/08/greece-ebu-looking-forward-not-b.html (27 August 2013).

9 See http://www3.ebu.ch/cms/en/sites/ebu/contents/news/2013/08/interim-public-tv-in-greece.html (27 August 2013).

3. AIM AND SCOPE OF THE STUDY

The closure of ERT not only engendered criticism throughout Europe but also raised the question whether, and if so, to which extent, public broadcasting services are protected by the freedom of expression and the media as laid down in Article 10 of the European Convention of Human Rights (ECHR), particularly with regard to the services' legal existence and funding as well as their independence, functions and aims. The case of ERT was the cause for this study, but public service media could be threatened in other States as well, mainly due to the severe economic crisis in public funding.

Therefore, it is the aim of the present study to analyse the relevant case law of the European Court of Human Rights (ECtHR) on Article 10 ECHR, but also to examine whether European standards with regard to the above-mentioned aspects of public broadcasting services can be identified, referring to EU law, studies, reports and recommendations of the Council of Europe (CoE) and the EU as well as national legislation and case law. Such standards could serve as a means of interpretation of the ECHR's guarantee of freedom of expression and the media. An additional important source of interpretation will be Article 11 of the Charter of Fundamental Rights of the EU (hereafter "Charter") which became EU primary law and directly applicable before the Court of Justice of the EU (CJEU) since the coming into force of the Lisbon Treaty of the EU on 1 December 2009.[10]

The study should serve as a reminder of the protections under Article 10 ECHR to any State in a similar economical position to Greece that may lead to measures putting the existence of public service media at risk, as well as to any government intending to assert political influence on public service media that could jeopardise their independence or the fulfilment of their public tasks.

[10] See *Schwarze*, "Die Medien in der europäischen Verfassungsreform, Archiv für Presserecht" (2003) 209, who interprets Article 11 as an expression of a common value between EU and Member States (211), and cites *Hesse*, according to whom the value judgment in favour of freedom and pluralism of the media may influence the entire European legal system (212).

II. THE PUBLIC SERVICE DIMENSION OF ART. 10 ECHR

In depth analysis of the existing case law of the ECtHR, which has been exhaustively examined in recent reports, is not required here.[11] Rather, this body of law will provide a starting point from which to examine *some basic questions* that arise in the context of Article 10 with respect to public service media. Based on these considerations, we will see that the legal status of public service broadcasting, and other public service media, is not clear-cut under Article 10. However, this does not preclude the further development of Article 10 to extend the range of protection offered to public service media.

1. ARTICLE 10 AS AN INDIVIDUAL RIGHT

Article 10 ECHR reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 10 represents a human rights guarantee, shaped and formulated according to the traditional concept of an *individual right*, granting freedom from State interference to any natural or legal person. It includes freedom to impart and receive information and ideas by using broadcasting and other electronic media. Therefore, journalists working in broadcasting services have been able to rely on Article 10 in numerous cases. They may invoke Article 10 protection in appeals against interference by State authorities or employers and there have been appeals by employees of public service broadcasters.[12] It is also clear that private or commercial media service providers as legal persons can challenge any encroachment of their liberty to broadcast. As a result, a public monopoly for broadcasting has been considered as a far-reaching restriction on the freedom of expression which cannot be justified in the current European media landscape by pressing social or technical needs.[13]

The fact that licensing is mentioned in Article 10§1, sentence 3 does not change this assertion, because the ECtHR has already clarified in an earlier judgment that a refusal to grant a license has to be judged by the conditions of Article 10§2.[14] In some countries, the reservation of licensing had previously been interpreted as a far-reaching empowerment of the State to establish a basic order of the national broadcasting environment. Today, this judgment of the ECtHR rules out any such attempts.[15] German authors especially stress the character of Article 10 as being a purely subjective

[11] C.f. inter alia and most recently *Institut für Europäisches Medienrecht (EMR),* Public Service Media According to Constitutional Jurisprudence: The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence, 2nd edition, 2012, 15-34.

[12] C.f. inter alia ECtHR *Radio France* and *others v France*, judgment of 30 March 2004, no 53.984/00; ECtHR *Wojtas-Kaleta v Poland*, judgment of 16 July 2009, no 20.436/02; ECtHR *Manole* and *others v Moldova*, judgment of 17 September 2009, no 13.936/02; ECtHR *Yleisradio Oy* and *others v Finland*, decision of 8 February 2011, no 30.881/09.

[13] ECtHR *Informationsverein Lentia and others v Austria*, judgment of 24 November 1993, no 13.914/88.

[14] ECtHR *Groppera Radio AG and others v Switzerland,* judgment of 28 March 1990, no 10.890/84.

[15] C.f. *Grote/Wenzel*, in *Grote/Marauhn* (eds), EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz (2006) 916.

freedom right ("Abwehrrecht" – "negative/defensive right"). This is in contrast to the established jurisprudence of the German Constitutional Court, according to which freedom of broadcasting constitutes primarily an "objective function" and a "serving freedom" ("dienende Freiheit"). This understanding of freedom of broadcasting has led to a guarantee of the existence and development of public service media. However, it is difficult, if not impossible, to reach this conclusion under Article 10.[16]

2. THE PUBLIC SERVICE BROADCASTER AS APPELLANT

At a first glance, one could even doubt that a public service broadcaster, which is owned and/or financed by the State, may invoke Article 10, considering that only "non-governmental organisations" can claim to be the *victim of a violation* of the rights set forth in the Convention (Article 34 ECHR). However, given a legal framework that guarantees editorial independence and institutional autonomy, the ECtHR has explicitly acknowledged that public service broadcasters can be considered as "non-governmental organisations" with the right to appeal to the Court.[17] Under such conditions, ownership by the State and State funding do not prevent public service broadcasters from claiming protection under Article 10.

This finding could lead to a somehow *paradoxical situation*. If a State established a public service broadcaster owned by the State and under all-embracing government control, thus denying it independence and institutional autonomy, it would be a "governmental organisation" in the sense of Article 34 ECHR. Even if the State then violated its obligations under Article 10, as stated by the ECtHR in the *Manole* case (discussed below), the broadcaster could not itself claim to be a victim, creating a situation in which a public service media organisation is completely dispossessed of its rights under Article 10 due to complete State control, and is bereft of any means of appeal for precisely the same reason. This paradoxical consequence places public service media in a very tenuous situation. As a pivotal issue, it will be a key point below.

3. THE PUBLIC SERVICE TASK OF BROADCASTING AND THE CONDITIONS OF MASS COMMUNICATION IN DEMOCRATIC SOCIETIES

With respect to freedom of the media, the media's role and function within a democratic society is a well-established argument and guiding principle in the case law of the ECtHR with respect to Article 10. Starting with the notion that freedom of expression is one of the basic conditions for the progress of democratic societies, the Court has consistently highlighted the task the media have to fulfil: impart information and ideas concerning matters of public interest, play the vital role of public watchdog, and serve the need for impartial, independent and balanced news, information and comment. Although the political dimension of Article 10 was primarily attached to the press, the Court has expanded this reasoning to *all types of media*, including broadcasting and other types of audiovisual media.[18]

[16] For further references to German literature, c.f. *Grote/Wenzel* (footnote 15) 916; for a similar interpretation of Article 10 in Austria, where the Convention holds the rank of constitutional law c.f. e.g. *Holoubek,* Rundfunkfreiheit und Rundfunkmonopol (1990) 164 et seq.

[17] ECtHR *Radio France* and *others v France*, judgment of 30 March 2004, no 53.984/00; ECtHR *Österreichischer Rundfunk v Austria*, judgment of 7 December 2006, no 35.841/02, §46 et seq. In agreement e.g. *Jarass,* EU-Grundrechte (2005) 203; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th edition (2012) 311.

[18] C.f. inter alia ECtHR *Jersild v Denmark*, judgment of 23 September 1994, no 15.890/89, §31.

With these considerations in mind, one can argue that Article 10 implies a certain "*public service task*" for mass media, which is derived from the role they play in a democratic society in the sense of the Convention. Under Article 10, this task has to be taken into account when assessing an interference with freedom of expression. In this context, the public service task does not establish an autonomous, self-contained obligation for media, but rather an argument for balancing interests under the justification clause of Article 10§2. This can lead to media privileges, e.g. the protection of journalistic sources, and can give the media a preferential position as long as they fulfil this task, e.g. when contributing to a debate of public interest.

There are other conditions and requirements of media and communication in a democratic society that can be derived from Article 10. Notably the case law of the ECtHR related to freedom of broadcasting and licensing of media services allows the identification of certain policy aims that a national legislator or national authorities can legitimately pursue. First and foremost, one must mention the *principle of plurality*, which is an indispensable condition for communication in open democratic societies.[19]

Although pluralism is commonly accepted as a guiding principle in media policy, it is not a fixed concept but rather an *ambiguous*, *multi-faceted notion*. Without going into depth, one can distinguish between external media pluralism (structural pluralism), i.e. the existence of a diversity of independent media outlets, and pluralism of opinions (content pluralism), i.e. a variety of information and opinions diverse enough to foster an informed, uninhibited and inclusive discussion on matters of public interest. With respect to public service broadcasting, the notion of "internal pluralism" is commonly used to describe the requirements of securing freedom of communication and independence from the State within a single medium by giving room for a diversity of ideas and/or social forces.[20] The interplay between pluralism of media and pluralism of opinions, i.e. between "external" and "internal" pluralism, is a heavily disputed area of media policy. For this study, it is sufficient to state (with reference to the Council of Europe) that pluralism is designed to foster "as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions".[21] It is therefore a question of the relationship between means and aims that links structural and content pluralism (or external and internal pluralism).

In the context of human rights and human rights jurisprudence, media pluralism was and is mainly associated with its *external aspects*. In this sense, securing a free market place of ideas through a variety of independent media outlets is the immediate goal. That entails attempts to break down media monopolies, be it the monopoly of a commercial media enterprise or a State monopoly, and securing free access to the market. Nevertheless, the true goal of pluralistic communication has never been obscured: to secure pluralism of information and society's right to access a diverse flow of accurate and reliable information – as is essential for the building of a democratic society.

As we have just seen, mass media have a public service task, which serves as the objective justification of their individual right under Article 10. It "is the key that unlocks the door of freedom of information and freedom of speech".[22] That task comprises the provision of services indispensable for a democratic society in the sense of the Convention: to provide citizens with reliable information on public affairs, to give room to the expression of the diversity of ideas and opinions of an open society, to control the power of the State and of social and economic forces by acting as a "public watchdog". There is no doubt that the case law of the ECtHR recognises this public service task of mass media. This finding can be corroborated by referring to common European standards as expressed in numerous documents of the CoE and the EU.

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[19] Since ECtHR *Informationsverein Lentia* and *others v Austria*, judgment of 24 November 1993, no 13.914/88; recently ECtHR *Nenkova-Lalova v Bulgaria*, judgment of 11 December 2012, no 35.745/05, §57.

[20] The literature on media pluralism is boundless and beyond the scope of this study; c.f. the recent critical analysis by *Karppinen*, "Rethinking Media Pluralism" (2013) or the quantitative approach by *Valcke*, "A European Risk Barometer for Media Pluralism: Why Assess Damage When You Can Map Risk?" Journal of Information Policy 1 (2011) 185; with reference to media pluralism trends in the CoE Member States c.f. the Issue Discussion Paper "Media Pluralism and Human Rights", published by the Commissioner for Human Rights and prepared by *Miklós Haraszti*, available under https://wcd.coe.int/ViewDoc.jsp?id=1881589 (2 September 2013).

[21] C.f. *mutatis mutandis* the Declaration on the freedom of expression and information, adopted by the Committee of Ministers on 29 April 1982.

[22] Analogously to *Haraszti i*n the Issue Discussion Paper mentioned in footnote 20.

III. EUROPEAN STANDARDS AND VALUES REGARDING PUBLIC SERVICE MEDIA

1. DOCUMENTS OF THE COUNCIL OF EUROPE AND THE EUROPEAN UNION AS SOURCES FOR THE IDENTIFICATION OF EUROPEAN MEDIA STANDARDS

In the previously cited judgment *Manole and others v Moldova* of 17 December 2009 the ECtHR referred in §102 to "standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe" providing "guidance as to the approach which should be taken to interpreting Article 10 [ECHR] in this field". This implies that the ECtHR acknowledges legal sources other than the ECHR, which express a common understanding of the Member States, when it interprets the rights and freedoms, as well as legitimate restrictions, of the Convention.

The Court notes in §102 of the judgement:

> "in '*Resolution No. 1 on The Future of Public Service Broadcasting*' (1994),[23] the participating States undertook 'to guarantee the independence of public service broadcasters against political and economic interference'. Furthermore, in the *Appendix to Recommendation No. R(96)10 on 'The Guarantee of the Independence of Public Service Broadcasting' (1996)*,[24] the Committee of Ministers adopted a number of detailed guidelines aimed at ensuring the independence of public service broadcasters. These included the recommendation that 'the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy' (...). The Guidelines also emphasised that the rules governing the status and appointment of the members of the boards of management and the supervisory bodies of public service broadcasters should be defined in a way which avoids any risk of political or other interference".

Finally, the Court referred to the Appendix to *Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector*,[25] in which the Committee of Ministers again stressed the importance for States to adopt detailed rules covering the membership and functioning of such regulatory authorities so as to protect against political interference and influence.

Although in the *Manole* judgment the ECtHR did not refer to other Committee of Ministers' documents already published at the date of the judgement, it should be admissible to take into account other documents from which conclusions on European standards can be drawn, including recommendations of the CoE Parliamentary Assembly. This is highlighted in *Resolution 1636(2008) of the Parliamentary Assembly of the CoE on "Indicators for media in a democracy"* in which the Assembly states that the CoE "has set standards for Europe on media freedom through Article 10 ECHR and a number of related recommendations by the Committee of Ministers as well as resolutions and recommendations by the Parliamentary Assembly."

[23] Authors' italics.

[24] Authors' italics.

[25] See also the subsequent *Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector* of 26 March 2008.

The EU bodies are also working towards the development of European standards and all EU Member States also being Member States of the ECHR, when the ECtHR and CJEU refer to case law, related documents of EU bodies should not go unheeded. Therefore, in outlining the following notions, important documents of the CoE as well as of the EU will be taken into account.

REMIT OF PUBLIC SERVICE BROADCASTING

In various documents the CoE emphasises the interrelation between the concepts of democracy, human rights, the free circulation of information and free expression of opinions, a pluralist and diverse media order, and the concept for, and existence of, public service broadcasting.[26] The CoE also allocates a special remit to public service broadcasting to ensure pluralism[27] and to contribute to culture,[28] and underlines the importance of participation by public service broadcasters in new media services.[29] The European Parliament refers to broadcast media as one of the most important sources of information available to citizens, and as such, being an important factor in shaping people's values and opinions.[30]

In its *Recommendation (2007)3 on the remit of public service media in the information society* the CoE encourages Member States to entrust public service media with a remit adapted to technological and socio-cultural changes and to elaborate strategies enabling it to preserve its role as a factor for social cohesion and integration of all individuals, as well as a contributor to cultural identities and diversity and to a wider democratic debate, including a growing participation of the public.[31]

The *Prague Resolution No. 1 on the future of public service broadcasting*,[32] though dating back to 1994, set very specific and still valid requirements for, in particular, public service broadcasting aimed at providing for and safeguarding certain standards and quality.[33]

DUAL BROADCASTING SYSTEM

Based on the fact that all EU Member States and most of the other European States run a dual broadcasting system, characterised by the coexistence of public service and commercial broadcasters, the question arises whether this system can be qualified as a European standard which might flow into the interpretation of Article 10 ECHR and Article 11 Charter. It is interesting to note that the European Parliament, in its *Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI))*, attributes to the dual broadcasting system an important role in ensuring pluralism and spreading information, which is in the public interest.

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[26] See *EMR* (footnote 11) 34 and 45.

[27] E.g. *Committee of Ministers' Recommendation No. R (99) 1 on measures to promote media pluralism, the Parliamentary Assembly's Recommendation 1407 (1999) on media and democratic culture, Committee of Ministers' Recommendation Rec (2011) 7 on a new notion of media,* and *Parliamentary Assembly's Recommendation 1878 (2009) on the funding of public service broadcasting;* for more information see EMR (footnote 11) 45.

[28] See, in particular, the *Prague Resolution* and the *Committee of Ministers' Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance,* as well as the *Parliamentary Assembly' s Recommendation 1407 (1999) on media and democratic culture*, its *Recommendation 1878 (2009) on the funding of public service broadcasting*, and its *Recommendation CM/Rec(2012)1 on public service media governance*, § 35 et seq; for more information see EMR (footnote 11) 45.

[29] See various recommendations of the *Committee of Ministers* and the *Parliamentary Assembly* of the CoE. In *Recommendation Rec (2011) 7 on a new notion of media* the Committee of Ministers defines a new media ecosystem which should encompass all actors and factors whose interaction allows the media to function and to fulfil their role in society; for more information see EMR (footnote 10) 46. See also recital C of the *European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI))*, in which the Parliament considers that "both public service and private-sector broadcasting have a crucial role to play with regard to European audiovisual production, cultural diversity and identity, information, pluralism, social cohesion, the promotion of fundamental freedoms and the functioning of democracy".

[30] *European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI)),* recital B.

[31] See also CoE, *Directorate General of Human Rights and Legal Affairs, Media and Information Society Division*, Background Text "Public service media governance: looking to the future" to the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, *A new notion of media?*, 28-29 May 2009, Reykjavik, Iceland.

[32] Adopted at the 4th European Ministerial Conference on Mass Media Policy in Prague on 7 and 8 December 1994.

[33] See the informative summary by *Susanne Nikoltchev* in "European Backing for Public Service Broadcasting, Council of Europe Rules and Standards", IRIS Special, The Public Service Broadcasting Culture, 7-15 (12), cited in *EMR* (footnote 11) 35.

The Resolution states in its recitals that "the EU audiovisual landscape is unique, and is characterised by what has been described as the 'dual system', based on a true balance between public service and commercial broadcasters" (recital E) in order to secure an effective dual system which is in the general interest (recital F). According to the Resolution, the dual system "has ensured a diverse range of freely accessible programming, which benefits all EU citizens and contributes to media pluralism, cultural and linguistic diversity, editorial competition (in terms of content quality and diversity) and freedom of expression" (recital G). Therefore, the European Parliament, in point 2 of the Resolution, "underlines, in particular, the fundamental role of a genuinely balanced European dual system in promoting democracy, social cohesion and integration and freedom of expression, with an emphasis on preserving and promoting media pluralism, media literacy, cultural and linguistic diversity and compliance with European standards relating to press freedom", and finally, in point 23, "calls on the Commission to give higher priority to the dual system as a part of the EU *acquis* in the context of accession negotiations, and urges that the progress made by candidate countries in this respect be monitored".

This last proposition in particular merits attention when it comes to the question of whether the dual broadcasting system ranks among European media standards. Considering the clear prevalence of national dual broadcasting systems within the sphere of the CoE and the EU, there is little doubt that this system can be qualified as a European standard serving for the interpretation of freedom of media as set out in Article 10 ECHR and Article 11 Charter, should the existence of public broadcasters be at stake or the question of their establishment arise.

INDEPENDENCE AND FUNDING OF PUBLIC SERVICE BROADCASTERS

Concerning public service broadcasters' independence and funding, the CoE Committee of Ministers demands that the principle of public service broadcasting be preserved in the changing media environment,[34] in particular when the independence of national regulators for the audiovisual media sector, from illegal or undue political, governmental or commercial influences, are at stake.[35] In the *Political Declaration and Resolution "Towards a new notion of media"*, the participating Ministers in the *CoE Conference of Ministers responsible for Media* and *New Communication Services* also underscore the importance of public service media's editorial independence and institutional autonomy.[36] In the *European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI))*, the Parliament urges Member States, in point 10, "to define the remits of public service broadcasters so that they can retain their distinctiveness through a commitment to original audiovisual production and high-quality programming and journalism regardless of commercial considerations or political influence, which is precisely what marks them out as distinctive; notes that these remits should be defined as precisely as possible, but with due regard for the broadcasters' programming autonomy".

Public service broadcasters' editorial and managerial independence from governmental and political interference, as an important condition for the entrustment of public service broadcasting with a certain remit that is within public interest, depends in a large measure on proper, adequate funding. This is expressly emphasised in the *CoE Parliamentary Assembly's Recommendation 1878(2009) on the funding of public service broadcasting.* In the *European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI))* referred to above, the Parliament stresses in recitals O and P the fact that in certain Member States, public service broadcasting is not yet sufficiently socially embedded and

[34] The Committee of Ministers also stresses the importance to ensure independence of public service media in respect of a new media and technical environment by *Declaration on public service media governance* and the respective *Recommendation Rec(2012)1*, §21 et seq.

[35] *Committee of Minister' s Recommendation No. R(96)10 on the independence of public service broadcasting; Recommendation 1641(2004) on public service broadcasting; reiterated* in *Recommendation 1855(2009) on the regulation of audiovisual media.*

[36] See additionally, the *Comparative Report of the European Commission, Media freedom and independence in 14 European countries: A comparative perspective*, July 2012.

does not have adequate resources at its disposal, and that public broadcasters in some Member States are confronted with major problems that jeopardise their political independence, their viability and even their financial basis, posing a direct threat to the very existence of the dual system. Consequently, the Parliament – reminding the Member States of their commitment to European standards – recommends, in point 18 of the Resolution, that they provide appropriate, proportionate and stable funding for public service media so as to enable them to fulfil their remit, guarantee political and economic independence and contribute to an inclusive information and knowledge society with representative, high quality media available to all.[37]

Similarly, but going even further, the *Committee of Ministers' Recommendation CM/Rec(2012)1 to Member States on public service media governance*[38] demands, in its point 15, that a properly functioning governance system define, within the public service remit, the vision and overall purpose of the public service broadcaster and to ensure that it is best equipped to fulfil its remit. In order to achieve this goal the Recommendation stresses, in its point 26, the State's responsibility to set both the method and the level of funding, and the imperative need for the system to be so designed that, *inter alia*,

- "the public service media is consulted over the level of funding required to meet their mission and purposes, and their views are taken into account when setting the level of funding;
- the funding provided is adequate to meet the agreed role and remit of the public service media, including offering sufficient security for the future as to allow reasonable future planning."

The *Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector* of 26 March 2008 stipulates that the funding arrangements of public service broadcasters should be specified in law, in accordance with a clearly defined plan and with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.[39] The manner in which Member States ensure the legal, financial, technical and other appropriate conditions required to enable public service media to discharge their remit, is explained in the identically named report on good practices by the *Group of Specialists on Public Service Media in the Information Society (MC-S-PSM)* of November 2008.

Most recently, Ministers responsible for media and information society participating in the Council of Europe Ministerial Conference in Belgrade (7-8 November 2013) held that the preservation of the essential role of media in the digital age justifies further support for "well-funded, sustainable, independent, high quality and ethical public service media".[40]

CONCLUSIONS ON THE RELEVANCE OF EUROPEAN STANDARDS

In summary, it is safe to say that the CoE and the EU documents clearly show the close connection between the concepts of democracy, human rights, the free circulation of information and the free expression of opinions, as well as the need for a pluralist and diverse media order. Freedom of expression and the right to seek and receive information are fundamental for the functioning of a genuine democracy.[41] Media are the most important tool for freedom of expression in the public sphere, enabling people to exercise the right to seek and receive information.[42] This goal can be achieved best, according to the documents, within the dual broadcasting system which prevails in

[37] In point 6 the Parliament also calls on Member States "to ensure that there are sufficient resources to enable public service broadcasters to take advantage of the new digital technologies and to secure the benefits of modern audiovisual services for the general public".

[38] Adopted by the Committee of Ministers on 15 February 2012.

[39] See Appendix to the Recommendation, Section III, §9-11.

[40] See *Resolution No 2 "Preserving the essential role of media in the digital age"*, available under: http://www.coe.int/t/dghl/standardsetting/media/belgrade2013/default_EN.asp

[41] *Recommendation CM/Rec(2012)1 of the Committee of Ministers to Member States on public service media governance*, adopted on 15 February 2012.

[42] *Declaration of the Committee of Ministers on Public Service Media Governance*, adopted by the Committee of Ministers on 15 February 2012.

European States. This system requires the existence in each State of public service broadcasting to preserve pluralism and diversity in the media,[43] to provide information on all matters of public interest and to fulfil an educational mandate. Consequently, European standards allocate a special remit to public service broadcasting to ensure pluralism and to contribute to culture, they stress the importance of public service broadcasters' independence and demand their proper funding by public financial means.

Therefore, it can be reasonably argued that the above-mentioned principles and recommendations set out in CoE and EU documents express European standards relating to the indispensability of independent, adequately funded public service broadcasting that is entrusted with a broad pluralistic and diverse mandate.

2. FREEDOM OF THE MEDIA ACCORDING TO ARTICLE 11 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Article 11 of the Charter states that:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected."

Academic commentaries on Article 52§3 Charter state that its Article 11 corresponds in its entirety to Article 10 ECHR.[44] However, it is disputed whether Article 52§3 Charter,[45] – and, consequently, the conditions for restrictions to the freedom of expression set out in Article 10§2 ECHR – apply to Article 11§2 Charter, since the freedom of media according to that provision has assumed a separate existence, independent from the ECHR.[46] In the opinion of the authors of this study, the provision is applicable to Article 11§2 Charter because freedom of media is recognised by the ECHR expressly (by use of the terms "broadcasting" and "television" in the third sentence of Article 10§1 ECHR), and implicitly in the ECtHR's case law. Nevertheless, according to Article 52§3 Charter, the Union's law may provide more extensive protection than the ECHR.[47] Moreover, there is definitely no room to apply Article 52§2 Charter[48] to Article 11 because freedom of the media is not found in the EU Treaties.[49]

[43] Ibidem: The Committee of Ministers "alerts Member States to the risks to pluralism and diversity in the media and, in consequence, to democratic debate and engagement, should the current model which includes public service, commercial and community media not be preserved and if the transitions from State to public service and from broadcasting to public service media are not successfully completed".

[44] See the explanations in *Bernsdorff/Borowsky*, Die Charta der Grundrechte der Europäischen Union – Handreichungen und Sitzungsprotokolle (2002) 159, 287 et seq; see also the further considerations below.

[45] Article 52§3 states that, "In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]" (taking into account the case law of the ECtHR as well as of the CFEU, see the Preamble to the Charter), but does "not prevent Union law providing more extensive protection".

[46] See quotations in *Bernsdorff in Meyer* (ed), Charta der Grundrechte der Europäischen Union, 3rd edition (2011) 253/20.

[47] See footnote 45.

[48] This provision reads: "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties."

[49] See also *Bernsdorff* (footnote 46) 253/20.

The freedom of the media according to Article 11§2 Charter must not be understood merely as an economic freedom in the sense of the relevant provisions of the TFEU,[50] but rather as a comprehensive right to communication that also covers public service media.[51] The origin of this Article reveals that it is based on the freedom of expression of Article 10 ECHR,[52] though it goes further by explicitly covering freedom of the media, whose legitimacy arises from CJEU case law on television, from the Protocol to the Treaty of Amsterdam on the system of public broadcasting in the Member States, and from the "Television without Frontiers" Directive (now the Audiovisual Media Services Directive).[53] Although not planned initially,[54] the opinion prevailed that – in light of the increasing importance of mass media for the formation of public opinion – freedom of the media could no longer be understood as part of freedom of expression and should be guaranteed separately. Such a step could counter possible threats to pluralism and objectivity of coverage due to State interferences and media concentration. Some members of the Convention responsible for drafting the Charter of Fundamental Rights even urged that the safeguarding of the dual broadcasting system be added.[55]

It is apparent that in the course of the negotiations of the Convention for the Charter of Fundamental Rights, the original proposal to "guarantee" freedom of the media was rephrased to "respect" it. Although there were and are various attempts in literature to perceive – due to that reformulation – a weakening of the obligations of the States to secure the given freedom, the course of the debates during the Convention suggests that the amendment was only to limit the competences of the EU with regard to media law, but not to restrict the level of protection of the freedom.[56] In all ways a systematic interpretation of Article 11§2 Charter, taking into due account the binding impact of Article 10 ECHR based on Articles 52§3[57] and 53 Charter, reveals that Article 11§2 Charter guarantees, at least in substance, a freedom of the media as outlined in Article 10 ECHR and as interpreted by the ECtHR. This implies in particular that Article 11§2 Charter confirms and strengthens the importance and role of pluralist and culturally diverse media within a democratic society, as it is generally recognised and demanded by the CoE, as well as by the EU. It also emphasises the case law of the CJEU on the admissibility of restricting the fundamental economic freedoms of the Union in favour of plurality of the media.[58]

From these reflections it follows that Article 11 Charter covers the scope of freedom of expression as guaranteed in Article 10 ECHR, whilst going explicitly beyond Article 10 with respect to freedom and pluralism of the media. Furthermore, Article 11 Charter can be interpreted along the lines of the European standards on public service media developed by the EU and the CoE. It can be expected that the CFEU will recognise and apply these standards in its forthcoming case law on this Article.

[50] See point III/3.

[51] See *Bernsdorff* (footnote 46) 251/16 for further arguments.

[52] See *Bernsdorff* (footnote 46) 244/1, 246 et seq, and 250 /15.

[53] Ibidem, 244/1.

[54] See *Schwarze (*footnote 10) 209 et seq (210).

[55] See *Bernsdorff* (footnote 46) 247/8.

[56] See, *Schwarze* (footnote 10) 211.

[57] See above.

[58] C.f. *Schwarze* (footnote 10) 211.

3. OTHER LEGAL PROVISIONS OF THE EU WITH RELEVANCE FOR PUBLIC SERVICE BROADCASTING

The EU does not have any explicit competence in the media sector, neither public nor private. Nevertheless, since the CJEU classifies not only private but also public service broadcasters as "enterprises",[59] both are subject to the EU competition and freedom of movement laws. The most relevant provisions of the TFEU for public service broadcasting are, therefore, Article 56 which guarantees the free movement of services (with further deliberations in Articles 57-62 and exceptions in Articles 51-54) and Articles 106 and 107-109 (on aids granted by States) aimed at preventing distortions of competition. Broadcasting is qualified as a service which is protected by Article 56 TFEU, but can be restricted according to Article 62 in conjunction with Article 52 TFEU on justified grounds of public policy, public security or public health or with compelling reasons of public interest.[60]

The European Courts and the Commission have always regarded public service broadcasting as a service of general economic interest, and have assessed its compatibility with the provisions of the TFEU on aids granted by States, if the public service broadcasters in question have been explicitly entrusted by the Member State with the provision of a service of general economic interest, and the prohibition on State aid would obstruct the performance of the tasks assigned to the broadcaster.

Alongside the former *"Television without Frontiers" Directive*,[61] which has become the *Audiovisual Media Services Directive*,[62] the *Protocol on the system of public broadcasting in the Member States*,[63] which is now part of the Lisbon Treaty (TFEU), had and has a strong impact on the development of public service broadcasting in Europe. This interpretative Protocol states "that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", and confirms the Member States competence to define the remit of public service organisations and provide for their funding in order to enable them to fulfil their remit.[64]

From these deliberations we may draw the conclusion that the applicable provisions of the TFEU are not inconsistent with the standards and values which could be identified as supporting the establishment of public service media in Europe. EU media policies and legal practice are partly backing those standards and values.[65]

[59] See with references *Michel/Neukamm*, Öffentlich-rechtlicher Rundfunk im Lichte des Europäischen Rechts, in *Becker/Weber* (eds), Liber Amicorum für Carl-Eugen Eberle (2012) 221.

[60] *EMR* (footnote 11) 59; for relevant case law of the CJEU see *Bernsdorff* (footnote 46) 251/16.

[61] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, as amended by Directives 97/36/EC and 2007/65/EC of the European Parliament and of the Council.

[62] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[63] Introduced by the Treaty of Amsterdam, amending the Treaty of the European Union, the Treaties establishing the European Communities and related Acts, Official Journal C 340, 10 November 1997.

[64] See also *EMR* (footnote 11) 60.

[65] See, *EMR* (footnote 11) 60.

IV. THE LEGAL STATUS OF PUBLIC SERVICE MEDIA UNDER ARTICLE 10

1. THE PUBLIC SERVICE TASK OF MASS MEDIA AND THE REMIT OF PUBLIC SERVICE MEDIA

The task and values attributed to mass media stemming from Article 10 and common European standards are associated with *all* media that can and do fulfil this task, although in general they are not *obliged* to fulfil it. In some respects, this task and these values correspond to those commonly associated with the *public remit* of public service broadcasting in the European tradition.

This has been demonstrated above through a comparison with the "*key elements*" of public service media, as expressed in several documents of the Council of Europe.[66] If public service media is "a source of impartial and independent information and comment" and a "forum for pluralistic public discussion", as is expressed in these documents, its remit is indeed associated with the very same task and values already mentioned above. Of course, there are other attributes and expectations going beyond the provision of reliable information and the fostering of a pluralistic public discussion. Public service media, by offering a broad range of programmes and content, are a decisive factor for the integration of society and social cohesion. They have a cultural remit, insofar as they support the creation and production of works of culture and art, thus promoting cultural diversity and identity. And under the principle of universality, their services should be accessible to all groups of a given society.

Whether the values underpinning freedom of the media in Article 10 extend to such "additional public values" of public service broadcasting is a question open to debate. In its case law, the ECtHR has only incidentally addressed conditions and prerequisites of social communication other than those that focus on the political dimensions of mass media. One example is a judgment in which the court considered "quality and balance" of television programmes as legitimate aims for a broadcast licensing system.[67] Nevertheless, there are good reasons to assume that the "value dimension" of Article 10 is not restricted to the political debate and information or comment of a political nature.

Firstly, Article 10 should be placed in the context of the human rights system established by the Convention. Human rights aim to guarantee each individual the self-fulfilment of his or her personality in private and social relations. Communication is a necessary precondition of *personal self-fulfilment* – a prerequisite of the "democratic society" which the Convention seeks to create and protect. Therefore, the individual, and society as a whole, depend on communication processes that facilitate the self-fulfilment of the individual and the development of an open society. The conditions of communication related to societal goals such as integration, social cohesion or cultural identity must thus be also considered as values that are enshrined in Article 10.

[66] C.f. section III.

[67] ECtHR *Demuth v Switzerland*, judgment of 5 November 2002, no 38.743/97, §34.

Secondly, this interpretation can be confirmed by references to a common European standard of freedom of expression and the media. Reference to European standards is a well established means for interpreting the Convention.[68] Notwithstanding the differences among media systems in European countries and the different media policies, a critical analysis of various legal sources (Council of Europe documents, EU law, national constitutional law and jurisprudence) has provided a robust set of standards related to the social function of media. The principle of pluralism, with its different dimensions, is the most prominent factor. But as section III of this study has shown in detail, there is a whole set of other values related to the "democratic, social and cultural needs of each society"[69] that are associated with freedom of expression and the media as a right, guaranteed by human rights documents as well as European and national constitutional law.

According to this approach, the whole public service remit of public broadcasting and other public service media is covered by the values underlying Article 10. The emphasis that is given to the principle of pluralism and other conditions of the democratic process in the case law of the ECtHR should be interpreted as an exemplary accentuation. It does not exclude other democratic, social and cultural needs of society that are served by broadcasting. In a broad sense, one could conclude *that Article 10 aims to ensure the same conditions and requirements of communication that are embraced by the public service remit of public broadcasting.*

2. FREEDOM OF MEDIA AND POSITIVE OBLIGATIONS UNDER ARTICLE 10

Having concluded that the public service remit of public service media can be considered a value underlying Article 10, the legal consequences of such a finding must be considered very carefully. As shown above in section II.1, Article 10 grants the individual freedom right which provides protection from State interference. Other dimensions of this guarantee are recognised by the ECtHR too, notably its so-called "positive obligations", but their legal consequences are not as manifest. Therefore, it is appropriate to start the analysis of the legal protection of public service media with the freedom right, i.e. the clearest content of the guarantee in question. In this respect, we can make two solid assertions.

Firstly, the above-mentioned principles and aims of communication in democratic societies may serve as legitimate aims and justify restrictions on freedom of broadcasting or other freedoms, for example the right to respect for private and family life or the right of property. The principles do not alter the nature of an interference, but may justify it, although additional requirements, mainly the principle of proportionality (Article 10§2), must be respected.[70] Most cases decided by the ECtHR that refer to the public task of media in general or the remit of public service media fall into this category.

Secondly, as a freedom right, and because there is no hint in the wording, Article 10 does not guarantee a media system which would include public service broadcasters. On the contrary, a State-founded broadcaster, to whom a government monopoly is granted, could not even find justification under Article 10. For the same reason, there is no evidence that Article 10 guarantees a "dual broadcasting system" based on the coexistence of publicly-funded public service broadcasting and commercial, privately owned broadcasting. However, taking into account the European standards described in section III.1 and the fact that in all EU Member States, and in almost all of the other CoE Member States, public service broadcasting exists alongside private providers, one might argue that Article 10 ECHR could be interpreted in the sense that the dual broadcasting system is within the scope of freedom of media protected by the Convention.

[68] C.f. section III.1.

[69] As addressed in the Amsterdam Protocol on the system of public broadcasting; for its relevance c.f. above section III.3.

[70] Similar *Grote/Wenzel* (footnote 15) 917 f; *EMR* (footnote 11) 31 f.

When the ECtHR has to deal with public service broadcasters, the Court always emphasises the mere *possibility* for a State to establish a public service broadcasting system, and the Court outlines the duties and obligations of the State should it *choose* to create such a system.[71] In line with this position, the most recent study on the legal status of public service media under Article 10 carefully formulates that the State (only) has the "possibility" to establish a media system achieving certain values, which can be derived from the so-called "objective character of the freedom".[72] However, this conclusion need not be the end of our legal reasoning.

Rather, these findings need to be contrasted with the well-established jurisprudence of the Court placing States under *positive obligations* derived from the rights of the Convention, even if those rights do not *expressly* create a positive obligation.[73] Positive obligations that require government bodies to take action are also recognised under Article 10, for example in *Ozgur Gundem v Turkey* with respect to the State obligation to protect a journalist against unlawful violent attacks, as well as in other cases.[74] In the context of the present study, the often quoted statement of the Court in *Informationsverein Lentia* appears to point towards a positive State obligation. When deciding on the former Austrian broadcasting monopoly under the justification clause of Article 10§2, the Court stressed the fundamental role of freedom of expression in a democratic society, which is "grounded in the principle of pluralism, of which the State is the ultimate guarantor."[75] Later decisions were more precise: "The State, as the ultimate guarantor of pluralism, must ensure, through its law and practice, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment."[76]

In the legal context of the *Informationsverein Lentia* case, it was obvious that the reference to the principle of pluralism served to clarify that securing pluralism is a legitimate aim for State intervention with regard to freedom of the media. It is less obvious that the qualification of being the ultimate guarantor of pluralism that is attributed to the State actually stipulates a positive obligation, i.e. an obligation for the State to carry out a certain action, as in other cases of recognised positive obligations. Certainly in the *Manole* case the Court itself linked the notion of the State as "ultimate guarantor of pluralism" with positive obligations, namely the duty of the Moldavian State to provide legal safeguards for the protection of a pluralistic, independent public broadcasting organisation. On the other hand, one cannot ignore that the Court came to this finding "in the light in particular of the virtual monopoly enjoyed by TRM" in Moldova.[77]

We would expect that positive obligations are also arguable in less exceptional situations, which do not present the same gravity as in this particular case. The deduction of positive obligations that are not expressly imposed by the language of the Convention is admittedly a complex approach, whose methodological foundation is not that clear. However, according to the case law of the ECtHR, these obligations can be derived whenever one of the Convention's rights is at stake and cannot be exercised to its full intent and extent. Under certain circumstances, rights can only become practical and effective if a positive obligation is put on the States. States must always follow the general idea of the Convention to secure for everybody rights and freedoms which are "practical and effective".[78] Sometimes, the duty to protect is triggered by a previous action of the State, as in

[71] C.f. ECtHR *Wojtas-Kaleta v Poland,* judgement of 16 July 2009, no 20.436/02, §47; ECtHR *Manole and others v Moldova*, judgement of 17 September 2009, no 13.936/02.

[72] *EMR* (footnote 11) 31 f.

[73] Regarding the concept of positive obligation in general, and with respect to certain rights see *Mowbray,* The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights (2004); *Xenos*, The Positive Obligations of the State under the European Convention of Human Rights (2012).

[74] ECtHR *Ozgur Gundem v Turkey*, judgment of 16 March 2000, no 23.144/03; ECtHR *Fuentes Bobo v Spain*, judgment of 29 February 2000, no 39.293/98, §38; ECtHR *Appleby and others v the United Kingdom*, judgment of 6 May 2003, no 44.306/98, §§39-40.

[75] ECtHR *Informationsverein Lentia and others v Austria*, judgment of 24 November 1993, no 13.914/88, §38.

[76] ECtHR *Manole and others v Moldova*, judgment of 17 September 2009, no 13.936/02, §107.

[77] ECtHR *Manole and others v Moldova*, judgment of 17 September 2009, no 13.936/02, §111.

[78] See ECtHR *Sporrong and Lönnroth v Sweden*, judgment of 23 September 1982, no 7151/75, §63; ECtHR *Airey v Ireland*, judgment of 9 October 1979, no 6289/73, §24.

the *Di Stefano* case. In this case, the Italian authorities had granted the applicant company a licence for television broadcasting but failed for nearly 10 years to allocate frequencies, depriving therefore its licence of all practical purpose, thus violating a positive obligation to act.[79]

Although a comprehensive treatment of this topic would go into too great detail and would be beyond the scope of this study, we can reach the conclusion that Article 10 entails a legally binding positive obligation to take all necessary measures and provide for a pluralistic media system, which takes into account European developments and standards as manifested by recommendations and reports of the Council of Europe as well as studies comparing the respective laws of Member States of the EU and the CoE.[80] Nevertheless, it remains unclear what this would entail for the *status of public service media.*

We have concluded in this study that certain conditions and requirements of mass communication in an open democratic society, among which the principle of pluralism is the most prominent, are consistent with the remit of public service media.[81] What would follow if we assume a corresponding positive obligation of the State? It is generally recognised that in the case of positive human rights obligations, States have a broad margin of appreciation on how to comply with these obligations.[82] It should be further noted that the protection offered by the Convention is subsidiary to the State's own legal system.[83] Both interrelated aspects need to be considered when we analyse possible positive obligations with respect to the media systems in the European States.

It is clear that there are certain common European standards covering aims and values such as media pluralism. Yet this does not mean that the implementation of these aims and values must be identical in all Council of Europe Member States even though all of them have public service broadcasting as part of a dual system. There is no common European model for broadcasting, and Article 10 does not provide a blueprint for it.[84] Even if we could establish a legally binding positive obligation of the State to establish a pluralistic broadcasting system, it is unquestionably for the State to decide *how* to realise this obligation. It is a political decision for national legislation, and in most cases influenced by national constitutional law.[85]

Even assuming positive obligations to protect the values and aims enshrined in Article 10, the findings presented above cannot be overridden: Article 10 does not guarantee a media system with a public service broadcaster or a "dual broadcasting system". In this sense, each State has discretion over the manner in which it realises the "positive" values and aims underlying Article 10. Claims that "every nation of Europe [has] to set up at least one strong, easily accessible audiovisual infrastructure for objective news and reliably inclusive public journalism" and "these broadcasters have to function as a "public service" to secure pluralism[86] seem to have a weak legal basis, if we treat them as *legal* arguments.

Therefore, we conclude that a binding obligation on the State, derived from Article 10, to *establish* a media system with a strong and independent public service broadcaster is only plausible under quite exceptional circumstances. One such situation could be where television is under strict control by a government (or political party) and the printed press cannot effectively balance this shortcoming in terms of pluralism. A *de facto* private media monopoly in a Member State could lead to a similar result. In such situations, substantial deficiencies in providing the citizens with at least a minimum of independent, reliable and pluralistic information on public affairs are evident. We would assume that such scenarios are unacceptable under the Convention.

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79 ECtHR *Centro Europa 7 S.R.L. and Di Stefano v Italy,* judgment of 7 June 2012, no 38.433/09 [GC].

80 C.f. section III.

81 C.f. above section IV.1.

82 C.f. inter alia ECtHR *Manole and others v Moldova*, judgment of 17 September 2009, no 13.936/02, §100; *Van Dijk* et al (eds), Theory and Practice of the European Convention on Human Rights, 4th edition (2006) 785.

83 C.f. e.g. ECtHR *Burden v the United Kingdom,* judgment of 29 April 2008, no 13.378/05, §42 [GC].

84 In this sense e.g. *Grote/Wenzel* (footnote 15) 917.

85 According to the Amsterdam Protocol on the system of public broadcasting it is up to Member States to establish public service broadcaster and define their public service remit; c.f. above section III.3; *Stern, in Tettinger/Stern* (eds), Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta (2006) Art 11 § 33; *Schwarze* (footnote 9) 209 et seq (211).

86 *Haraszti* (footnote 20) section V.

3. THE STATUS OF EXISTING PUBLIC SERVICE MEDIA UNDER ARTICLE 10

However, such situations are not the primary focus of this analysis. In all EU Member States, public service broadcasters *exist*, though their significance and degree of independence vary widely. In this section the analysis will concentrate on this particular setting, which is different from the scenario discussed in the previous section.

We have stated that Article 10 does not in effect guarantee a media system with a public service broadcaster or a "dual broadcasting system". The Convention does not – even assuming certain positive obligations – *force* the State *to establish* public service broadcasting, or to introduce a dual broadcasting system. Now we must qualify this statement and consider a situation where public service broadcasters are acting in a competitive environment with private and commercial broadcasters.

Such a national media system, usually referred to as a "dual system", is the result of the State's *media policy decisions*. It is founded on parliamentary acts, governmental decisions and decisions by regulatory authorities, acting together in a manner which may differ from country to country. The respective political decisions include issues around competition, content production, technical factors, innovation policy, and others. As a result, they are also a manifestation of the State's responsibility of *how to realise* the values and aims envisaged by Article 10. As we have stated, it is at the State's discretion to establish a certain media system. It is through deliberate State action, that media pluralism, and other conditions that allow the media to perform their tasks, are formed and organised.

These policy decisions, once made, necessarily have *consequences*. If a State opts for a dual broadcasting system, the subsequent destruction of one of its components adversely affects the manner in which pluralism is realised in the given national situation. If a public service broadcaster was deemed necessary to provide citizens access to impartial and accurate information and a diverse range of opinion, its closure will inevitably create deficiencies. To put it in the words of the ECtHR: in those cases "where a State does decide to create a public broadcasting system", the State is under the obligations of Article 10.[87]

In situations like this, it is the *individual right of freedom of expression* that is at stake. Several arguments support this finding. Firstly, there is no doubt that a public service broadcaster can claim to be the victim of a violation of this freedom, provided it can be considered a "non-governmental organisation" in the sense of Article 34 ECHR.[88] Secondly, it is necessary to avoid the paradoxical situation mentioned above (II.2) where a State, by entirely depriving a public service broadcaster of its editorial independence and institutional autonomy could also deprive it of any protection under Article 10. Accordingly, considering that the rights of the Convention must be effective rights, such a State action must be assessed as an *infringement of a given freedom*. If a government can at any moment decide to close down a public service broadcaster, without an appropriate procedure and a convincing overriding justification, the broadcasters' staff and journalists would be under permanent threat, which would completely undermine editorial independence. Thirdly, the closure of an existing public service broadcaster would be an interference with its right to freedom in the sense of Article 10§2, because it would take the form of a *State action* and not the omission to fulfil a positive obligation. Therefore, Article 10§2 is, in a strict sense, applicable to a shutdown of a public service media organisation. This argument is backed by the *Manole* judgment, although the facts and legal reasoning in this case are different in some respects.

[87] C.f. ECtHR *Manole and others v Moldova*, judgment of 17 September 2009, no 13.936/02, §101.

[88] C.f. above II.2.

What follows quite clearly from *Manole* is that "where a State does decide to create a public broadcasting system" it has to respect its rights under Article 10. That includes its independence from economic or political pressures, and its ability to transmit impartial, independent and balanced news.[89] In *Manole*, the alleged undue political influence by the ruling political party over the Moldavian public service broadcaster TRM was exercised by different means, mainly through the replacement of a number of senior managers of TRM with persons loyal to the government, and the strict control over editorial work exerted by these persons. Therefore, it was not so much a direct interference by State authorities but the actions of the broadcaster itself, represented by its management acting as partisans of the government that impinged upon media freedom and pluralism. It seems that this was the reason why, in *Manole*, the Court based its judgment on the violation of a positive obligation, namely the failure of the State to set up a legal framework to guarantee the independence of TRM. The case where a State directly abolished an existing public service broadcaster, be it by an act of parliament or through government action, would present a different situation.

The question of whether a violation of Article 10 ensues from the neglect of a positive obligation, or from an interference in the sense of Article 10§2 is significant. In the case of positive obligations, the Convention gives States a broader margin of appreciation. However State actions against existing public service broadcasters are interferences with their freedom of expression. Therefore, such actions must be *justified* under the stricter conditions of the second paragraph of Article 10.[90] This triggers full protection by Article 10 as an individual right. Consequently, existing public service broadcasters are protected against State interferences which are *arbitrary* or *disproportionate* relative to legitimate aims.

In the case of the closure of a PSM/PSB the State's positive obligations according to Article 10 ECHR might demand of the given government – taking the ECtHR's reasoning in the *Manole* judgment even further – to consider whether the remaining media landscape meets the requirements of Article 10§1, namely to provide and to facilitate a media system based on the principles of pluralism and diversity, tolerance and broadmindedness, as well as independence and impartiality. Accordingly, in advance of, or immediately after, the closure of a PSM/PSB, States would have to take proper legal and affirmative measures in order to continuously guarantee freedom of the media as needed in a democratic society.

This conclusion can be affirmed by another aspect: if the remaining media landscape lacks independent and impartial informational and educational media programmes and no substitutes are in the pipeline, any person, non-governmental organisation or group of individuals[91] could rightly claim that their freedom to information – or more specifically, the freedom to access to information – according to Article 10 ECHR and their right to education under Article 2 Additional Protocol to ECHR are withheld.[92] This reasoning could provide additional legal protection for a public service broadcasting organisation threatened by closure, as it could argue that such a measure – in view of its significant negative impact on media pluralism and freedom of information of the audience (listeners and viewers) – would be disproportionate.

[89] *Manole and others v Moldova,* judgment of 17 September 2009, no 13.936/02, §98 and §101.

[90] C.f. *mutatis mutandis* the findings in ECtHR *Saliyev v Russia*, judgment of 21 October 2010, no 35.016/03: although there is no right of access to private media in order to put forward opinions, the withdrawal of an article that was already in the "public domain" ordered by an agent of a public authority amounted to an interference in the sense of Article 10§2.

[91] See the right to apply to the ECtHR according to Article 34 ECHR.

[92] Besides, of course, the right to file an application to the ECtHR of any dissolved public service broadcaster because of a violation of its freedom of media according to Article 10.

V. CONCLUSIONS: THE SCOPE OF PROTECTION AFFORDED TO PUBLIC SERVICE BROADCASTING BY ARTICLE 10

PROTECTION OF PSB BY ARTICLE 10 ECHR

We can state that an *existing public service broadcaster* is protected by Article 10. Its protection under the Convention is a consequence of the deliberate decision by the State to establish a public broadcasting system that provides pluralistic audiovisual media services or that makes major contributions to it, and it is influenced by the development of standards by the CoE and the EU with regard to the essential role and contribution of public broadcasting within a democratic society. This contribution comprises all tasks through which a public broadcaster serves the democratic, social and cultural needs of a democratic society, as defined in the public service remit of the broadcaster. It is most important in the field of information and current affairs, but not restricted to it.[93]

STATE INTERFERENCES AND POSITIVE OBLIGATIONS UNDER ARTICLE 10 ECHR

Whether the protection of public service media is the result of protection against interferences by the State with freedom of expression, or whether it follows from positive obligations of the State derived from Article 10, depends on the situation. Whereas positive obligations give States a broad margin of appreciation, any interference must meet much stricter criteria. Direct State action harming the status of a public service broadcaster can amount to an interference which has to be justified according to the test provided for in the second paragraph of Article 10. If it does not meet the criteria of Article 10§2, especially if the interference is not necessary to fulfil a legitimate public aim, it amounts to a violation of freedom of expression.

STATE INTERFERENCES WITH THE EXISTENCE, ADEQUATE FUNDING OR SERVICE CAPABILITY OF EXISTING PUBLIC SERVICE BROADCASTERS

The closure of an existing public service broadcaster is a definite interference with freedom of expression. However, public service broadcasters can also face difficulties when their finances are restricted, either by a cut in State subsidies, a reduction or freezing of broadcasting fees, or when other sources of financing are restricted (e.g. advertising). Their standing can be reduced if the number of channels is restricted. Public authorities can influence their position when they regulate transmission platforms, e.g. the distribution of frequencies and satellite resources or the licensing of multiplex platforms, and so on.

It would be impossible to address all of these measures in detail. However, some concluding remarks may serve as a tentative guideline.

According to the arguments developed above, *State interferences* with the existence, adequate

[93] See above section II.4.

funding or service capability of existing public service broadcasters have to be justified under Article 10§2. This means that existing public service broadcasters are protected against measures which are *arbitrary* or *disproportionate*, relative to legitimate aims that a State may pursue. This does not mean however that a certain market share, or a certain number of channels, etc, are guaranteed or protected by Article 10. What actually interferes with the broadcaster's freedom, i.e. what is interference in the sense used above, depends on the actual situation of media in a given State. One has to take the media landscape as a whole, including print media as well as other broadcasters, and assess the contribution to plurality provided by the public broadcaster on this basis. If this contribution is substantially reduced by measures of the State with respect to finances, programming offers, diversity of opinions, etc, the level of pluralism may fall below the acceptable level in a democratic society. This would constitute a violation of Article 10.

MARGIN OF APPRECIATION OF THE STATES

Notwithstanding the above, national media policy still has sufficient room for manoeuvre. The State can adapt its media policy according to changing social situations and market developments, and reduce or alter the position of an existing public service broadcaster. However, the margin of appreciation is broader in cases of positive obligations of the State than in cases of State interferences. If a measure interferes with Article 10, the State (parliament, government, regulatory authorities) has to *justify* it in the sense of Article 10§2. Thus, the Convention prevents a State from carrying out *arbitrary* or *disproportionate* measures, relative to legitimate aims, that interfere with the rights of a given public service broadcaster.

Finally, we need to recognise that it is not easy to assess whether the degree of pluralism falls below the level required in a democracy or not. Therefore, a certain amount of evidence will be necessary. A reorganisation and/or reduction of the standing of a public service broadcaster by the State might be justified under the aims of Article 10§2 in many cases. Additionally, the positive obligations arising from Article 10§1 compel States to guarantee at all times a media landscape that is shaped according to the principles of pluralism and diversity, tolerance and broadmindedness, as well as of widely independent and impartial information and reporting.

THE SUBSIDIARY NATURE OF THE HUMAN RIGHTS PROTECTION SYSTEM OF THE ECHR

One could question whether a legal protection that is limited to cases of arbitrary or disproportionate State action or that depends on more or less vague positive obligations of the States is sufficient. But one must definitely not overlook the fact that the human rights protection through the ECHR is intended to be subsidiary to the national systems safeguarding human rights. In the field of media policy, the principle of subsidiarity is especially distinct, despite the broadly shared understanding of the values and aims that underlay the right to freedom of expression. National constitutional law can, and sometimes does, give public service broadcasters a stronger legal position. This could be, for example, through the constitutional principle of continuity of public service, as recognised by the Greek Council of State. The ECHR is *not intended* to prescribe a certain model of how broadcasting should be organised in a given country. Nevertheless, what has been concluded in this study is important. According to our interpretation, Article 10 says more about the status of public service media than merely that a State "can decide" to establish a public service broadcasting system, or not. It gives existing public service media legal protection against State actions which are arbitrary or disproportionate, relative to legitimate aims that a State may pursue, and obliges the State to (re)establish a media system which meets the general requirements of Article 10. The practical ramifications depend heavily on the actual situation in a Member State, and would require an extensive treatise that discusses the respective media landscape in detail.

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