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## **The Freedom and Independence of Public Service Media in Europe: International Standards and Their Domestic Implementation**

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This article explores the guidance that international and European organizations, such as the Council of Europe and the European Union, have developed regarding the remit, governance and funding of public service media. It argues that considerable work has now been done to identify concrete measures that can help to protect public service broadcasters from external political or commercial pressures and assist them in fulfilling their public service missions. Although these standards are by now well established they receive very variable recognition in the 14 Mediadem countries studied. The authors suggest that effective implementation of these international guidelines can help to support, even if they cannot guarantee, media independence over time. There is thus room for improvement and mutual learning across all systems, whether those emphasizing political pluralism or the virtues of a more technocratic, professional system of governance.

*Keywords: media independence, public service remit, public value test*

States have been heavily involved in the regulation of radio and television broadcasting from their inception. This stemmed in part from the technical characteristics of the medium, notably limited radio spectrum, but also from government awareness of broadcasting's potential social and political influence, leading many European countries to establish state or government-controlled broadcasting organizations during the early years of the 20th century (Short, 1983, p. 30). Though state ownership is often associated with public service broadcasting, it is neither a necessary nor defining characteristic, and

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may compromise the broadcaster's independence. Rather, a number of specific purposes and distinct characteristics have been identified as essential components of public service broadcasting (PSB) in international documents and academic commentaries.

In recent years most public service broadcasters (PSBs) have started to employ the Internet and other digital platforms to relay their services, so that it is often more accurate to employ the term "public service media" (PSM) rather than PSB. The Council of Europe (CoE) considers the term PSM to indicate a welcome transition on the part of PSBs to organizations that provide a more diverse range of content and services (CoE, 2012; see Note 1). PSM is here used in a broad sense to cover all media services that fulfill public service obligations, whether transmitted over traditional broadcast networks or via digital distribution platforms and networks.

In this article we consider the international standards relating to the provision of PSM, noting, in particular, the importance that these documents ascribe to the independence of PSM from both political and commercial pressures (CoE, 2007a, Section II.c). We then outline the legal, financial and institutional arrangements that determine the governance of PSM in the 14 countries studied in the Mediadem project (Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey, and the UK) and consider how well the international standards are reflected in practice, focusing on three main areas: the management and supervision, financing, and remit of PSM.

## **International and European Guidelines on Public Service Media**

### ***Legal Framework***

The countries considered in this article are all members of the CoE and signatories to the European Convention on Human Rights (ECHR). They are also members of the United Nations and UNESCO, the specialized UN agency concerned with economic, social, and cultural affairs. All the countries except Turkey are members of the European Union (EU) and are thus bound to comply with the Charter of Fundamental Rights of the European Union (CFR) when operating within the scope of EU law. Although many of the international documents relating to PSM, such as CoE resolutions and recommendations, are advisory only, they set standards that member states should strive to realize in the domestic context. Although the decision to pursue public service objectives in the communications field and the scale of any such intervention is largely a political matter for each state, such decisions need to be understood in the context of this framework of international rules and guidelines.

The 2005 UNESCO Convention on the protection and promotion of the diversity of cultural expressions confirms the rights of state parties to "formulate and implement their cultural policies" (UNESCO, 2005, Art. 5.1) and to adopt "measures aimed at enhancing diversity of the media, including through public service broadcasting" (Art. 6.2(h)).<sup>1</sup> At CoE level, the establishment of PSBs has been held by the European Court of Human Rights (ECtHR) to restrict freedom of expression guaranteed by Article 10 ECHR by excluding private operators but also to be capable of justification where designed to promote

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<sup>1</sup> The EU and all countries studied, except Turkey, have acceded to, or ratified, this Convention.

pluralism and when proportionate (ECtHR, 1993). More recently, the ECtHR has emphasized that the state is under a positive duty, particularly regarding the audio-visual media, to guarantee “effective pluralism” (ECtHR, 2012, para. 134), while access to free and independent media from diverse sources is now considered a prerequisite for realizing freedom of expression and information under Article 10 ECHR (ECtHR, 2009, para. 100). PSM are seen as playing an important role in guaranteeing such a plural media environment (CoE, 1982, 1996, Explanatory Memorandum, paras. 1–4; ECtHR, 2009, para. 100).

The EU is committed to respecting “the freedom and pluralism of the media” and cultural diversity (Article 167 of the Treaty on the Functioning of the European Union, TFEU; Articles 11 and 22 CFR). At the same time, competition law and internal market rules enable the EU to review the operation of public service organizations to prevent any unduly restrictive or discriminatory effects on trade (Court of Justice, 2007). The Protocol on the System of Public Broadcasting in the Member States to the Lisbon Treaty of 2009 expressly notes that public service broadcasting is directly related to the democratic, social, and cultural needs of each society and to the need to preserve media pluralism. It also confirms the competence of the member states to provide funding for such services. International and European law thus recognize the legitimacy and indeed desirability of PSM, but require state intervention to be both effective and proportionate.

#### ***Endorsement of a Broad View of PSM***

The CoE has endorsed a broad view of PSM in relation to both programming and platforms. Concerning programming, the Parliamentary Assembly has called on states to “guarantee at least one comprehensive wide-ranging service comprising information, education, culture and entertainment” (CoE, 2009, para. 7). The Assembly also concluded that PSBs should be able to diversify their services “through thematic channels, on-demand media, recorded media and Internet-based media services in order to offer a comprehensive and competitive range of media services” (CoE, 2009, para. 9). The Committee of Ministers has called for PSM to respond positively to audience expectations of enhanced choice and control stemming from digital developments (CoE, 2012, para. 6).

The EU has similarly accepted a broad view of PSM. Both the Court of First Instance (now, General Court) and European Commission have expressly confirmed that an obligation to provide a balanced and varied broadcasting offer will generally be legitimate (Court of First Instance, 2008a, paras. 201, 204; Court of First Instance, 2008b, paras. 194–201; European Commission, 2009, para. 47). The Commission has stated that PSM may provide services that are not “programs” in the traditional sense, provided they address the same democratic, social, and cultural needs (European Commission, 2001, para. 34) and that “the public service remit may also reflect the. . . diversification of activities in the digital age” (European Commission, 2009, paras. 47, 81). The European Parliament (EP) has endorsed public service operators taking advantage of new distribution platforms (EP, 2010, para. 14; EP, 2013, para. 12).

The broad remit identified above has brought PSM into conflict with commercial operators. In the context of the CoE there is as yet little guidance as to when the scale or reach of new PSM services could conflict with Article 10 ECHR. At EU level, the Commission has stated that it will question the PSB remit

only where the state has made a “manifest error” of judgment (European Commission, 2009, para. 48), with terms falling out with the democratic, social, and cultural objectives identified in the Lisbon Protocol on Public Service Broadcasting. Commercial broadcasters and publishers have nevertheless referred a series of complaints to the Commission on the basis that public funding of PSB/PSM constitutes state aid contrary to article 107 TFEU (Craufurd Smith, 2008, pp. 44–49; Donders, 2012; Donders & Pauwels, 2011; European Commission, 2001, 2009). In response, the Commission has pressed for all new public services to be assessed in terms of their potential commercial impact and public benefit using a “public-value” test (Donders, 2012; Donders & Pauwels, 2011; European Commission, 2009, para. 84). While these requirements encourage a clearer articulation of public service goals, creating greater certainty for industry, they may result in further bureaucracy and a reactive market failure approach to the scope of public provision (EP, 2010, para. 16). The Parliamentary Assembly of the CoE has expressed concern at the potential of EU law to constrain “member states’ powers to adapt the public service broadcasting remit to their own national needs” (CoE, 2009, para. 10).

### ***Independence and Governance***

The CoE considers that the “first priority” for PSM must be to ensure that their “culture, policies, processes and programming reflect and ensure” editorial independence and operational autonomy (CoE, 2006; CoE, 2012, paras. 2, 21 see also EP, 2013, paras. 2, 8). Editorial independence is defined as “the right of public service broadcasting organizations to determine the content of their programmes freely and without interference from any external authority, within the limits prescribed by law or other rules in order to safeguard legitimate rights and interests” (CoE, 1996, Explanatory Memorandum, paras. 9 and 20; see also CoE, 2011, para. 81; CoE, 2012, para. 2). Operational autonomy involves the right of PSM to organize their activities freely, within the limits prescribed by law and appropriate supervisory constraints (CoE, 1996, Explanatory Memorandum, para. 11). Below we consider in more detail what international organizations have held independence to entail in relation to the remit, institutional structure, and funding of PSM.

### ***Remit***

Both the body empowered to set and review the remit of public service operators and the remit itself must be clearly determined (CoE, 2009, paras. 16, 17; CoE, 2012, paras. 15, 25; European Commission, 2009a, paras. 45, 60). The process by which this remit is defined and reviewed should be transparent, providing adequate scope for consultation with relevant interest groups, notably, citizens and Parliament. This can enable public service operators to draw on public support and strengthen their position in key negotiations (Levy, 2012).

The principles of editorial independence and institutional autonomy should be explicitly embodied in the legal framework governing PSM (CoE, 1996, Explanatory Memorandum, para. 9; EP, 2013, para. 2). This should clarify that independence extends to the definition of program schedules; conception and production of programs; editing and presentation of news and current affairs programs; organization of activities; and recruitment of staff (CoE, 2006, Appendix I). In particular, PSM should be able to express the widest spectrum of views and opinions, governed by the principles of balance and impartiality (CoE,

1996, Explanatory Memorandum, para. 68; EP, 2013, para. 8). All political parties should have sufficient airtime to present their views, and PSM should not be required to transmit official public messages, declarations, or communications except in "exceptional circumstances" (CoE, 1996, Explanatory Memorandum VI).

### ***Structure, Supervision, and Regulatory Framework***

The 1996 CoE Recommendation on the guarantee of the independence of PSB states that PSBs should be organized so as to limit the possibility of outside influence. The Recommendation suggests a two-tier structure, consisting of a board of management and a supervisory body (CoE, 1996, Appendices II and III). The legal framework governing the status of both the board of management and the supervisory body should be structured to avoid any risk of political or other interference (CoE, 2000). The board of management should be solely responsible for the day-to-day operation of the organization and, editorially, for program schedules and output. The independent supervisory body, to which the board should be solely answerable, except where appropriate to the courts, should have no prior control over programming or involvement in the day-to-day management of the organization (CoE, 2000, para. 19; IFJ, 1999, p. 2; Mendel, 2011, p. 15). The EP has also called on member states to guarantee the independence of media councils and regulatory bodies "from the political influence of the government, the parliamentary majority or any other group in society" (EP, 2013, para. 2). This is also reflected in the proposed revision of the EU Audiovisual Media Services Directive to include a new Article 30 requiring member States to designate "one or more independent national regulatory authorities" in the audiovisual field (European Commission, 2016, Article 1(21))

The responsibilities of the management and supervisory bodies need to be clearly set out in advance so as to avoid both perceived and actual conflicts of interest. Members of either body should not have interests in related fields, such as shareholdings or directorates in media outlets, which could influence their judgment (CoE, 1996, Appendices II.2 and III.2; CoE, 2000, para. 4). The CoE considers that representatives appointed by the government or parliament may sit on the board of management (CoE, 2000, p. 26; CoE, 2012, p. 25), but such individuals must be able to exercise their functions independently and should not be able to exert a dominant influence over the board (CoE, 1996, Explanatory Memorandum, para. 24). The supervisory body should be independent from the state in its decision-making capacity and should represent collectively the interests of society in general. Although state involvement in appointments to the highest supervisory or decision-making levels may be acceptable as long as dominance of one interest group is avoided, the CoE concludes that this "should not normally extend to appointments at executive or editorial management level" (CoE, 2012, para. 27). The risk of outside influence will be reduced by recourse to an open public tender; with appointments made in a transparent manner on the basis of specified, relevant, criteria published in advance.

The EP has similarly emphasized the importance of transparent mechanisms for the selection and appointment of "public media heads, management boards, media councils and regulatory bodies" that are based on merit and "ensure professionalism, integrity and independence, as well as maximum consensus in terms of representing the entire political and social spectrum" (EP, 2013, para. 2). The recruitment, promotion and transfer of staff "should not depend on origin, sex, opinions or political, philosophical or

religious beliefs or trade union membership” (CoE, 1996, Appendix IV), though international organizations have indicated the desirability of staff being generally representative of the diversity of political trends or society’s constituent groups (IFJ, 1999, 2; CoE, 2011, para.83; CoE, 2012, para. 34). While staff should not be subject to instruction from entities out with the public service operator, they should be free to join a trade union (CoE, 1996, Explanatory Memorandum Guidelines 15-16). To avoid the risk of actual or perceived bias the International Federation of Journalists (IFJ) considers it advisable that editors and journalists working for PSM do not hold office in a political party or, at least, declare any affiliations (IFJ, 1999, section 4).

Equally important are the terms of appointment and scope for dismissal. Top management positions should be allocated for a fixed term independent of the term of office of the elected government and there should be no scope for dismissal on the basis of editorial disagreement (CoE, 2012: para.27; IFJ, 1999, Part 3). Members of supervisory bodies should be immune from dismissal or suspension during their term of office by any authority other than the authority which appointed them, outside exceptional circumstances, such as becoming incapable of carrying out their functions. Subject to any independent liability before the courts, members of the board of management should only be accountable for the exercise of their functions to the supervisory body (CoE, 1996: Explanatory Memorandum, II.3).

### ***Funding***

The ability to provide or withhold finance can be used both by corporations and the state to influence PSM content. To protect public service operators from such external pressures, the CoE has emphasized the importance of access to adequate long-term funding determined at the national level, as well as independence in the management of financial resources (CoE, 2006, Appendix I; CoE, 2009, paras. 10, 12, 16.1, 17.1). The EP has similarly called for “appropriate, proportionate and stable funding for public service media in order to guarantee their political and economic independence” (EP, 2013, para. 12). The variety of public service models in place means funding can be obtained from different sources, both state and commercial (CoE, 2009, para. 15; European Commission, 2009, para. 59). To reduce the risk of inappropriate influence in relation to both commercial and public funding, a clear statement in the founding documents of the obligation of independence, supported by transparent accounting and effective monitoring processes, should be put in place (CoE, 1996, Explanatory Memorandum, para. 63; Levy, 2012). Special attention needs to be paid to the potential for state advertising and sponsorship to be used to influence editorial decisions (EP, 2013, para. 16).

## **A Comparative Overview of PSBs**

### ***The Public Service Remit***

The legal frameworks for PSM in the 14 countries reviewed establish more or less comprehensive provisions identifying the character, type, and breadth of the public service offer. Mandates, which usually take the form of qualitative, but may also include quantitative, requirements, vary considerably on account of domestic sociopolitical and cultural conditions. Even so, there are some core features that are generally evident. Public service operators are typically required to provide citizens with a wide variety of

programs and services that disseminate information and news; foster debate on issues of public interest; provide education and entertainment; support the national identity, culture, and language; and promote social cohesion, tolerance, and mutual understanding. Requirements to satisfy the interests of different audiences and social groups are commonly imposed, coupled with obligations for high professional standards.

The public service mission is usually laid down in legislation, but also in public service contracts (or charters), concluded on a regular basis with the government, as in Belgium, Croatia, Denmark, Italy, Slovakia, and the UK. In the UK, the Charter and accompanying Agreement with the BBC are negotiated by the executive with the BBC, though by convention Parliament is consulted (UK Parliament, 2015).<sup>2</sup> In some countries, such as Denmark, regarding DR, there has been a move toward more detailed regulation concerning the types of services to be offered (Helles et al., 2011, p. 38). Arguably, the more detailed the public service agreement, the more restricted the scope left to operators to make autonomous decisions, which could thwart responsiveness to citizens' evolving needs. On the other hand, detailed content requirements could support the independence of PSM, reducing the scope for external intervention.

Although in the pre-Internet era there seemed to be general agreement that a broad public service remit was also a sufficiently *precise* remit, in the post-Internet, multiplatform media environment such a consensus has largely faded. From the early 2000s onward, private media have argued for an accurately defined public service mission, largely aimed at curbing public operators' expansion into new areas of activity online. The *public value* frenzy that accompanied such debates crystallized in claims for an *ex ante* assessment of the activities of public operators, aimed at evaluating the societal and market impact of envisaged new services online. Adoption of *public value tests*, already in operation in the UK, was, as noted above, actively supported by the Commission (European Commission, 2007, 2008, 2009). Besides the UK, public value tests have been legally instituted in the following countries under study: Denmark, Finland, Germany, and Belgium (regarding the public service operator in Flanders, VRT).<sup>3</sup>

The public value tests in these countries vary significantly, including with respect to the bodies assigned to conduct them. In Denmark, it is the independent regulator, the Radio and Television Council, which is responsible for carrying out both a public value and market impact assessment before the launch of any new service or major service changes that are not explicitly covered by DR's public service contract (Helles et al., 2011, pp. 43–44). In Belgium, any new service or activity that is not covered by the management contract of VRT requires the explicit permission of the Flemish government (Van Besien, 2011, pp. 26–27). This must turn for advice to the Flemish Media Council, consisting of experts and representatives of the Flemish media community. In the UK, the BBC Board is required to consider the impact on competition of any material change to the BBC public services, and under the new Agreement with the government any such material change must be approved by the independent regulator Ofcom, which may carry out an independent review (Department for Culture, Media and Sport, 2016b, clauses 8–

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<sup>2</sup> Public service contracts may also build on broader media policy agreements reached by the political parties in Parliament (Helles, Søndergaard & Toft, 2011, pp. 19–20, concerning Danish DR).

<sup>3</sup> For discussion of public value tests elsewhere in Europe, see Donders (2012).



12).<sup>4</sup> In Germany, responsibility for the test rests with the broadcasting councils, the governing bodies of the public service operators (Müller & Gusy, 2011, p. 23). As to the Finnish public service operator YLE, when a test is due, an external expert, selected in accordance with public procurement legislation, is mandated to launch two consultations on market impact and public value respectively. The ultimate decision lies with YLE's administrative council.

Evidently, the bodies involved in the tests include, besides independent regulators and supervisory bodies, government bodies and entities that may have a stake in the outcome of the test. This can prove problematic from the perspective of independent assessment (Katsirea, 2011, p. 63). More importantly, *ex ante* evaluation poses a clear challenge to the editorial autonomy and freedom of expression of the public operators: proposed services are put to test *before* they are actually launched and, crucially, can be prohibited not on account of public interest concerns that can legitimately restrict free speech but on the basis of competition constraints. In some countries, such as Germany, competition concerns have led to the outright banning of specific types of service from the public service remit through "negative" lists of impermissible online content (Moe, 2010, pp. 211–212; Müller & Gusy, 2011, p. 18). Although the exclusion of certain types of service may be legitimate from the perspective of ensuring that public operators remain focused on their democratic, social, and cultural remit, the German law prohibits the provision of so-called non-program-related press-like services.<sup>5</sup> Although this vague concept leaves public broadcasters room for interpretation, public service operators are broadly confined to online services associated with "traditional" public service radio and television programs. This consequently undermines their ability to pursue in a technologically neutral manner their democratic, social, and cultural objectives. Similarly, German PSBs are prohibited from transmitting on demand acquired feature films and series, which have not been commissioned, or a nationwide service exclusively focused on local news and reporting.<sup>6</sup>

### ***Funding Arrangements***

A key indicator of the independence of PSM is their ability to resist interference by those who provide funding. Most of the countries studied have introduced a model of *mixed funding* for their PSM that combines public resources with commercial revenue. In some countries, such as Denmark and the UK, different PSBs have different funding arrangements. In the UK, Channels 3 and 4 are funded solely through advertising, the BBC by license fee. Whereas commercial revenue may derive from a variety of sources (i.e., advertising, sponsorship, program sales, merchandising, provision of production services to third parties, etc.), the most common public funding instrument is the *license fee*. However, public revenue may also originate directly in the state budget, from taxation or derive from specific public funds in the form of subsidies, grants, or concessions.

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<sup>4</sup> Implementing the proposals in Department for Culture, Media and Sport [DCMS], 2016a, p. 65.

<sup>5</sup> Art. 11.d (2), Point 3, Interstate Treaty on Broadcasting and Telemedia.

<sup>6</sup> Art. 11.d (5) Point 3, Interstate Treaty on Broadcasting and Telemedia.

With the exception of Belgium,<sup>7</sup> Bulgaria, Estonia, and Spain, which follow a system of state contributions, and Finland, which, since January 2013, funds YLE through taxation (Kuutti, Lauk, & Lindgren, 2011, p. 24), all countries reviewed have opted for the license fee method of funding. The obligation to pay the fee and its level are commonly laid down in law or, as noted above, multiannual public service contracts signed with the government, which can facilitate political influence (regarding the UK, see Martinson & Plunkett, 2015). Whereas most countries have traditionally linked payment of the license fee to possession of a radio and/or television set, technological evolution, enabling reception by means other than a radio or television, has triggered the application of platform-neutral fees tied to ownership of any receiving device (see, on the UK, Martinson & Plunkett, 2015). In certain countries, such as Greece, the license fee has been based on lump-sum contributions, unrelated to possession of a receiving device. Recent changes in Germany also point in this direction (Müller, 2012) in that since January 2013 a flat monthly fee has been imposed on households. The fee for businesses is calculated on the basis of, *inter alia*, the number of employees. To avoid evasion, Italy is to collect the license fee through electricity bills (Pekic, 2016).

In the majority of countries studied, besides public income, PSM are allowed to draw on advertising and/or sponsorship revenue. This can result in advertisers and sponsors gaining undue editorial influence and may encourage PSM to maximize ratings among those segments of the population of principal interest to advertisers. Such commercial influence runs counter to the international guidelines considered above. To counter this influence, Estonia and Finland have excluded their public operators from the advertising market. Whereas the Finnish YLE has been prevented from relying on advertising since its establishment, as with the BBC in the UK, changes in the legal framework governing the Estonian ERR have resulted in the operator's exit from the advertising market (Harro-Loit & Loit, 2011, p. 16). In Spain, in contrast to regional PSBs, the nationwide RTVE has been required to abandon advertising (De la Sierra, Guichot, Mantini, Medina, & Sobrino, 2010, p. 400). In other countries, to mitigate commercial influence, public service operators have been subjected to stricter advertising regulation in comparison to commercial broadcasters.<sup>8</sup> Though such measures can enhance the independence of PSM, they also benefit the commercial sector. It is important, therefore, that they are not deployed simply to weaken the public sector and that any loss in required revenue is compensated for by public funds.

In many countries reviewed, commercial operators, press outlets, and private broadcasters have, as noted, criticized PSBs for expanding their online activities using "guaranteed" public income. In the UK, the scale of the BBC's online activities have been particularly controversial, even though domestic services do not carry advertising (UK Parliament, 2015). Allegations of unfair competition have also been a factor in the move towards increased reliance on public funds in some of the countries reviewed. In Germany, the Interstate Treaty on Broadcasting and Telemedia precludes PSBs from offering advertising portals and engaging in online advertising. In Croatia, the legislator has limited the amount of advertising that the public HRT may carry and thus advertising revenues (Švob-Đokić, Bilić, & Peruško, 2011, p. 22). In some

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<sup>7</sup> Financial aid granted by the French Community Government in Belgium to RTBF.be comes partly from license fees paid by local households.

<sup>8</sup> In Belgium, VRT in Flanders has no right to income received from television advertising, but radio and Internet advertising can generate resources, alongside other commercial revenues, up to a certain ceiling.

countries, a different trend is discernible, with public funding offered more widely. Thus, license-fee revenue supports the Danish Public Service Fund, which subsidizes drama and documentary programs broadcast by commercial media (Helles et al., 2011, p. 43). Similarly, the Croatian Fund for the Promotion of Diversity and Pluralism of Electronic Media supports the production and broadcasting of public interest programs by local and regional radio and television operators (Švob-Đokić et al., 2011, p. 30). In the UK, the government proposes the introduction of a contestable public service fund (DCMS, 2016, p. 71).

### ***Management and Supervision***

A central feature of the independence of PSM is the ability to operate at arm's length from government and power elites, while being subject to effective supervision by bodies that are shielded from political interference. The executive bodies of the public operators in the countries studied consist of corporate bodies (management or administrative boards), persons acting in an individual capacity (i.e., director general, president), or both. The executive is responsible for the operational management of the public operators, which commonly involves developing and implementing a program and budgetary strategy, taking organizational decisions and program scheduling. Although the responsibilities assigned to the management bodies display considerable similarities, the procedures followed for the nomination and appointment of their members vary substantially in the countries reviewed, mainly due to differences in political culture and national styles of government.

The risk of political interference is particularly acute in countries with *centralized* procedural arrangements involving the executive and/or legislative branch.<sup>9</sup> A pure centralized model, implicating only the executive, was until recently in place in Greece: The president, managing director, and other members of the management board of ERT used to be appointed by joint decision of the Ministries of Finance and State.<sup>10</sup> Procedures involving both the executive and the legislative power, as with the Italian RAI, the Romanian TVR and the Danish DR, decrease the potential for one-sided political influence. This is especially so when the legislative branch is mandated to elect more members than the executive, provided that influence is dispersed among the political parties represented in Parliament. The latter is of key importance also when appointments are under the sole responsibility of Parliament.<sup>11</sup> Increased majority voting requirements, in particular, may undermine the centralization of power by the political party (or parties) in government.

In some of the countries examined, a *mixed* procedural model is followed, combining centralized with decentralized features. In Turkey, all members of the administrative board of TRT are appointed by the cabinet but four are selected on the basis of nominations made by RTÜK, the independent media regulator. In the UK, the government has introduced a new unitary board for the BBC, consisting of 14

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<sup>9</sup> Opportunities for the public operators' employees to elect representatives may also exist.

<sup>10</sup> They are currently appointed by the Minister of State following a public appointments process and an opinion issued by the parliamentary Committee on Institutions and Transparency.

<sup>11</sup> Note that in Belgium the members of the boards of directors of RTBF.be and VRT in the French and Flemish Communities are selected by the respective community parliaments in proportion to the strength of the political parties therein.

members: five of the ten non-executive members are appointed by the government, including the Chair, following the public appointment principles (Her Majesty Elizabeth II, 2016, arts. 21–23). The Chair also chairs the Board Nomination Committee, which proposes the other five non-executive members to the Board for appointment. The Director General is automatically a member of the Board, but the other three executive members must similarly be put forward by the Nomination Committee for approval by the Board (Her Majesty Elizabeth II, 2016, arts. 24–26). In other countries, insulation from political influence is sought via entirely *decentralized* procedures without the involvement of political elites. In Estonia, it is ERR's own supervisory organ, the broadcasting council, which appoints the broadcaster's management board. In Bulgaria, the management boards of BNR and BNT consist of members appointed by the independent media regulator, the Council for Electronic Media (CEM), upon nomination by the operators' director general, who is also elected by CEM. In Denmark, on the other hand, wider societal representation is sought: The members of the board of directors of the regional TV2 stations are appointed by the board councils, which consist of representatives of each region's cultural and social life.

Turning to the supervisory organs of the PSBs in the countries under review, these are typically responsible for monitoring compliance with public service goals, program standards, ensuring financial discipline, and holding the management to account. Occasionally, they are also under an explicit duty to safeguard the independence of the public operator. The BBC Board is required to secure the independence of the BBC, and prohibited from taking instructions from 'Government Ministers or any other person' by Article 20(2) of the new 2016 Charter (Her Majesty Elizabeth II, 2016).

Supervision takes place through bodies internal to the public service broadcasters, external, or both. A characteristic example of internal supervision can be found in Germany: The supervisory organs of the German public operators are the broadcasting councils<sup>12</sup> and the administrative councils. The broadcasting councils consist of representatives through delegation by various societal groups (i.e., trade unions, industry groups, churches, sports, science and cultural associations, universities, etc.) and sometimes, pursuant to the relevant state broadcasting act, by representatives of political parties or the state government. The members of the administrative councils are elected by the broadcasting councils and thus also tend to represent a variety of social groups. Participatory arrangements of this kind favor the representation of a wider array of interests and therefore might mitigate the risk of political interference, in line with international guidelines. The German Federal Constitutional Court has, however, emphasized that such bodies should be as diverse as possible, including representatives from nonmainstream bodies; that the independent members should not be subject to direction from political parties; and that the proportion of members part of, or close to, the state should be kept to no more than a third (German Federal Constitutional Court, 2014).

In other countries, public broadcasters' activities are monitored externally by independent regulators, sometimes with concurrent supervision by Parliament, government, or other bodies (such as courts of auditors with regard to financial oversight). Whereas in the UK (for the commercial PSBs), Bulgaria, and Turkey, oversight is exercised by independent regulators; in Italy and Romania, the

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<sup>12</sup> In the case of ZDF, the television council.

supervisory duties of the independent regulators go hand in hand with parliamentary control;<sup>13</sup> and, in the case of Italy, with control by the executive as well.<sup>14</sup> Supervisory functions may also be allocated to bodies both internal and external to the public operators. In the UK, oversight of the BBC is currently divided between the BBC Board and Ofcom. A similar supervisory model can be found in Finland.<sup>15</sup>

Supervision by the executive and/or the legislative branch creates fertile ground for political interference. In Romania, for example, the Parliament may decide not to approve reports submitted by TVR and, on this basis, dismiss the TVR board (Ghinea & Avădani, 2011, p. 21). Interference might also arise when the independent regulator does not enjoy genuine safeguards (in law or practice) to guarantee its own autonomy. Internal bodies, in turn, face the risk of “captured” oversight. This is particularly so when the supervisory body enjoys mixed competences, engaging partly in management and partly in supervision.

### **Factors Influencing the Political Independence of Public Service Broadcasting**

Given that PSM have often evolved from state broadcasting organizations, it is not surprising that their political independence often remains problematic (ECtHR, 2009). Borrowing from Hanretty, political independence refers to “the degree to which public service broadcaster employees take day to-day decisions about their output or the output of their subordinates, without receiving and acting on the basis of instructions, threats or other inducement from politicians, or the anticipation thereof; or considering whether the interests of those politicians would be harmed by particular choices about output” (Hanretty, 2009, p. 76). Institutional, financial and legal arrangements may constrain the attempts by political and government elites to influence PSM for their own advantage (Hanretty, 2009, p. 79).

The independence of PSM is likely to be more effectively defended in those countries where the operators’ governance structures and appointment procedures are explicitly intended to neutralize government control. This is the case where the governance structures reflect the existing balance of power among political parties and secure representation for the main social partners and interests. For example, in Denmark (regarding the regional TV2 stations), Finland and Germany,<sup>16</sup> internal and external structures of PSM regulation and governance reflect in roughly proportionate ways the strength of the political parties represented in Parliament and/or dominant social groups. At the same time, though, there should be scope for representation of wider interests in society (see German Federal Constitutional Court, 2014).

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<sup>13</sup> In Italy, the Parliamentary Committee for General Guidance and Monitoring of Radio and Broadcasting Services monitors RAI’s compliance with PSB principles. In Romania, supervision of is exercised through an annual report submitted by TVR to the Parliament’s media committees.

<sup>14</sup> RAI reports each semester to the Department of Communications within the Ministry of Economic Development on fulfilment of quantitative content requirements in its management contract. It also submits an annual report on all program activities to the same department.

<sup>15</sup> The administrative council of the Finnish YLE is also subject to reporting requirements to Parliament.

<sup>16</sup> On Germany, see Khabyuk (2010).

Insofar as the appointment of the management and supervisory bodies of PSM remains in the hands of the executive and/or the legislature (i.e., Denmark, for DR and TV2/Denmark, and Finland),<sup>17</sup> there is considerable scope for the government to exert influence through its appointees. Attempts by the government and political parties to appoint individuals on the basis of political favoritism are counterbalanced by the requirement for expertise and professionalism. For example, appointees to certain management and regulatory bodies, such as the Danish Radio and Television Council, must demonstrate their expertise in a field relevant to the media, and partly represent social and linguistic groups (as in Finland; Benson & Powers, 2011, pp. 26, 28). In Italy, on the other hand, appointment of members to the management of RAI by the President of the Republic (upon proposals by the head of government) and Minister of the Economy are politically determined, despite being approved by parliamentary commissions. Reforms since 2005 to reduce such governmental influence have been watered down (Padovani, 2010).

Spain has also pursued reforms to introduce a regulatory framework that can act as a check on government interference in appointments to the management body. In 2006 and 2012, the Parliament approved a new regulatory framework that transformed the status of the RTVE into a state-owned corporation with "special autonomy." Yet, while the first reform in 2006 required a degree of cross-party consensus for appointment of the Board of Directors (Leon, 2010), the 2012 reform subsequently watered this down by allowing a simple parliamentary majority to reach a final decision should parties be unable to agree. Despite these reforms, government attempts to interfere with public service broadcasting have continued (De la Sierra & Mantini, 2011, pp. 20–21).

In the post-communist countries of CESE, the establishment of PSB took place against the background of intense politicization of the state with political parties, business corporations, organized interest groups and other actors trying to control various state institutions and resources. In this context, particularly strong connections were forged between political parties and the media, which the parties then sought to control for partisan ends (Zielonka & Mancini, 2011, pp. 2–3). In Bulgaria, Croatia, Romania, and Slovakia, reforms since the 1990s have augmented the ability of PSM to defend their independence from the government and dominant political elites only in limited ways. The regulatory and governance structures in these countries have not radically distanced public service operators from government and political control. In Bulgaria, for example, reforms in 1998 sought to ensure the political independence of the public broadcaster BNT, yet the specialized agency NCRT (renamed CEM in 2001) established to oversee BNT and to select its general directors is not politically independent as its members are appointed by the president and the parliamentary majority (Smilova, Smilov, & Ganev, 2011). In Romania, the procedures for appointing members of the nominally independent regulator, the National Broadcasting Council (CNA), completely lack transparency. Appointed by the president, the government, and the two chambers of Parliament, its members have a clear political affiliation and, on a number of occasions, they have been former politicians.

The extent to which state financing undermines the political independence of PSM is determined by a number of other financial and administrative factors (O'Hagan & Jennings, 2003, p. 46). Direct state

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<sup>17</sup> In Denmark, two members are appointed by DR's employees and three members by TV2/Denmark's employees.

subsidies can undoubtedly be used to exert leverage and the plan in Slovakia (2011–2012) to shift from license fees, determined by Parliament, to state subsidies was controversial because of concerns about the Slovak public operator's ability to resist political control (Školkaý, Hong, & Kutaš, 2011). Even in countries such as the UK, where PSBs enjoy a significant independence, the power of the executive to set the license fee can facilitate political pressure (Martinson & Plunkett, 2015). This can be contained by incorporating the license fee in multiannual public service contracts that link financing to clear public service goals. Such a contract was adopted in Belgium in 1997, and while it has not prevented government intervention, it has rendered it less frequent and discretionary. Still, critics argue that removing the process of drawing up the public service contract from parliamentary debate renders it less transparent (Coppens & Saeys, 2006, p. 271).

Finally, the autonomy of PSM from government interference can be supported through the involvement of independent regulatory/advisory and judicial actors. When in 2004 a number of Länder governments in Germany refused, for the first time, the license fee increase proposed by the independent advisory body, the German Commission for the Determination of the Financial Needs of Broadcasters, the issue was referred to the German Federal Constitutional Court. The Court ruled in favor of the public broadcasters, holding that the "politically motivated handling of the license fee issue by the Länder had been a violation of the principle of broadcasting freedom" (Woldt, 2010, p. 178).

### Conclusion

PSM are profoundly shaped by the political, social, and economic systems in which they operate (Hallin & Mancini, 2004). We need, therefore, to be alert to how rules and regulatory structures take effect in practice and how both shape and are shaped by the broader media ecology in a given member state. At the same time, we argue that the adoption of legal provisions and institutional safeguards *can* make a positive difference to the independence of PSM, circumscribing the ever present attempts by political elites and governments to tamper with the production of news. International guidelines already identify key areas that require attention, notably the process of making appointments to, and operation of, the supervisory and management bodies of PSM; funding; and the accountability and transparency not only of PSM but of all bodies that make strategic decisions affecting their operation. These guidelines receive only patchy recognition in Europe but they remain relevant even as the technology and expectations of the mass media undergo profound change. If PSM are to realize their full potential in the future, then renewed attention needs to be given to these foundational principles established in the past.

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