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of Public Service Broadcasting

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Bernd Holznagel, Christoph Nüßing

Basic Principles for the Funding of Public Service Broadcasting*

1. Introduction

During the last decade the financial situation of the European public service broadcasters has been relatively stable.¹ With a total average of 60 % of all revenue, the radio and TV licence fee is still its most important source of revenue. Advertising revenue comprises approximately 20 %. Other sources of revenue such as merchandising or the sale of programme rights take third place. 7 % of the total revenue finally are drawn directly from the state budget.²

Recently however pressure on this existing funding system has been mounting. There are several reasons for this: firstly, advertising revenue in broadcasting is on the decline – as a result of the current economic and financial crisis, as well as the growing importance of online opportunities for the advertising industry.³ Commercial broadcasting providers are therefore lobbying for an advertising veto in public broadcasting in order to safeguard their own financial stability. This was a significant factor in France's decision to abolish advertising in the public broadcasting system.⁴ Insofar as the public broadcasters themselves depend on advertising revenue to a significant extent, alternative financial possibilities must be looked into. As a result the government subsidies have been increased in Spain.⁵ Developments in the field of convergence further heighten the pressure towards change. Television sets are no longer the sole receivers of the television programme and can be replaced by a multitude of devices, such as personal computers, mobile telephones, iPads, etc. As a result, the levy of the compulsory radio and TV licence fee, which traditionally is inseparably linked with the ownership of a television set, has become increasingly difficult. It is obvious that for more and more states a reform of the existing funding model has become inevitable.

* This article is based on a presentation given by Prof. Holznagel during an international conference concerning "The Future of the Broadcasting Licence Fee in Times of Media Convergence" in Bonn on May 6, 2010. Prof. Dr. Bernd Holznagel, LL.M. is Director of the Institute for Information, Telecommunication and Media Law (ITM) at the Westfälische Wilhelms-Universität Münster; Christoph Nüßing is a research assistant at the ITM.

¹ EUROPEAN BROADCASTING UNION, December 2009, 6.

² EUROPEAN BROADCASTING UNION, December 2009, 5.

³ EUROPEAN BROADCASTING UNION, December 2009, 17.

⁴ PAPSCH, 2009, 26 (26 ff.)

⁵ BOTELLA, 2009, 46 (46).



Under these circumstances, it is necessary to examine the basic principles which govern the funding of these public service broadcasters. In the first place they are seen as putting into practice the basic right to freedom of broadcasting.⁶ This right is anchored in the constitutions of the member-states of the European Union and in the European Fundamental Rights Convention (Art. 10, Par. 1.). Art. 11, Par. 2 of the Charter of Fundamental Rights, which the Lisbon Treaty (Art. 6, Par. 1 EUV) has made legally binding for all member states, guarantees explicitly that “the freedom and plurality of the media shall be respected”. In the last decades, a Common European Law has evolved from these legal foundations which must be taken into account when new funding models for public broadcasting are being created.⁷ Furthermore the member-states must follow the specifications laid down in the European laws on subsidies and government aid.

At the moment the national constitutional courts, as well as the European Court of Human Rights, are the authoritative interpreters of the freedom of broadcasting. In their jurisdiction they set out the consequences which the freedom of broadcasting implies for the funding of public broadcasters.⁸ In the following, it will be shown that these consequences follow from the remit of public broadcasting. Then the relevant specifications in European law and in particular the laws relating to subsidies and government aid will be dealt with. Finally it will be discussed how even in the age of convergence, the legal requirements made on a funding system can still be met.

⁶ BVerfGE 119, 181; E 90, 60 (90).

⁷ HOLZNAGEL, 1996, 4 f.

⁸ BVerfGE 87, 181; E 90, 60; E 119, 181.

2. Requirements resulting from the Freedom of Broadcasting

2.1. Obligation for Sufficient Funding

Broadcasting is of central importance to the intellectual climate and to free and open discussion in any democratic state. Radio and television supplement the role of the traditional printing media. The broadcasters' function as formers and interpreters of public opinion can scarcely be overestimated. Their widespread impact, their topicality and their suggestive force make them so effective.¹ The European constitutional courts recognised these correlations very early. They recognised a pluralistic media landscape to be one of the fundamental values on which their constitutions were based. In this context I would like to quote the European Court for Human Rights. On its famous *Lentia* judgement from the year 1993² the court expatiates:

“The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, (...) it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audiovisual media, whose programmes are often broadcast very widely.”

The European constitutional courts therefore see broadcasting not just as a “medium” in the forming of public opinion. It is much more than this: it is an eminent “factor” in forming and interpreting public opinion.³ Its function is to guarantee the freedom of individual and public expression. This function can only be fulfilled when neither state nor private bodies dominate the broadcasting sector.⁴ Therefore the legal system must arrange for that in broadcasting the variety of opinions expressed is as broad and complete as possible.⁵ In this way comprehensive information shall be offered to the audience.

Putting this mandate into practice, governments throughout Europe decided on a dual structure of commercial and public broadcasting.⁶ The ground task of public broadcasting is to ensure the basic services. This entails the provision of broadcasting to the whole population, the organisation of comprehensive programme and safeguarding of a diversity of opinion within this programme.⁷ In order to fulfil these duties in a functional way the public broadcasters are enti-

¹ BVerfGE 90, 60 (87).

² EGMR, judgment from November 24, 1993, AfP 1994, 281 (283).

³ BVerfGE 12, 205 (260).

⁴ BVerfGE 13, 314 (325); E 12, 205 (263 ff.).

⁵ BVerfGE 57, 295 (320).

⁶ EUROPEAN BROADCASTING UNION, November 2000, 2.

⁷ BVerfGE 73, 118 (157 f.).



tled to gain proper financing from the state.⁸ That means that they have a constitutional right to receive all the funding necessary for the fulfilment of their task.⁹

Necessity is the criterion which allows balancing the public broadcasters' programming freedom against the financial interests of the licence fee payers. In this way public broadcasting is not limited to a minimal programme which is determined externally.¹⁰ It must rather have the freedom to fulfil its guaranteed tasks in its own way. On the other hand the public broadcasters must be restrained from expanding their programmes as they see fit. This would result in automatic increases of the subsidies to which they would be entitled. Therefore the criterion of necessity is of a dynamic nature. In this way it is justified to adapt and adjust the amount of funding in regular intervals. What is necessary for public broadcasting to fulfil its task cannot be defined once and for all; rather it is dependent on the particular circumstances. These essentially entail technical development, changing consumer behaviour and the changing business models of the commercial providers, with whom the public broadcasters must be able to compete.¹¹

2.2. Independence from Government

The freedom of designing the broadcasting programme is the essential factor in guaranteeing broadcasting freedom in general. It entails resisting any attempt to manipulate broadcasting for outside purposes. The broadcasters alone must be entitled to decide on what is necessary to fulfil their mandate.¹² Therefore, all attempts at political instrumentalisation must be forbidden, government bodies must be kept from indirect or direct interference. Attempts at influencing the programme or to pressurise staff of the broadcasters must be made impossible.¹³

It is therefore obvious that parliament, government or even the governing party (alone) must not decide on the amount of financial support public broadcasters receive. The question of programming freedom is closely linked to the question of financial support.¹⁴ If parliament, for example, enjoyed unrestricted freedom in their decision on financial support, there would be a permanent danger that this power could be misused to manipulate programme-content for reasons of media politics.¹⁵

⁸ BVerfGE 74, 297; 83, 238 (310); E 87, 181 (198).

⁹ BVerfGE 74, 297 (243); E 90, 60 (90).

¹⁰ BVerfGE 74, 297 (325 f.).

¹¹ BVerfGE 87, 181 (203).

¹² BVerfGE 87, 181 (201).

¹³ BVerfGE 12, 205 (263); E 73, 118 (183).

¹⁴ BVerfGE 90, 60 (102).

¹⁵ BVerfGE 87, 181 (202).

2.3. Independence from Influence of the Advertising Economy

On the other hand, public broadcasting cannot solely rely on advertising revenue. This would mean a serious threat to the realisation of a programme which fulfils the public broadcasting mandate.¹⁶ From the advertising economy's point of view, the effectiveness of advertising in broadcasting depends on how attractive the programme is. This factor again is measured according to audience rating. If a broadcaster depends on advertising income, it must strongly consider audience rating. This constraint would mean that public broadcasting could no longer cope with its mandate to provide a high level of diversity of programme and opinion.

The necessity to limit economic constraints does not inevitably mean that other sources of funding, in particular advertising, must be excluded generally. On the contrary, mixed funding mutually limits potential dependence on the state or the economy. Thus the programming freedom is strengthened.¹⁷ Therefore advertising may be a valuable contribution in guaranteeing public broadcasting mandate. The sale of even relatively short advertising spots may supply a large share of funding needs.¹⁸ In spite of this advantage advertising should – considering its effects on content and diversity – never be the dominant source of income.¹⁹

However, the legislator is not obliged to allow public broadcasters to air advertising at all. The only decisive factor is that an adequate funding is guaranteed.²⁰

2.4. Providing for an Independent Procedure of Funding-Fixation

Being independent from the state and from the advertising economy is a condition that must be guaranteed by a suitable procedure for the fixation of funding.²¹ It must be kept in mind that neither broadcasters nor the legislative body should be allowed into a position where they could unilaterally determine the funding needs of public service broadcasters:

The broadcaster cannot adequately guarantee that the funding they request, which after all must be provided by the fee-payer, is the minimum they need to fulfil their mandate. Broadcasters have, like all institutions, a tendency to expansion and self-assertion, which can develop away from the mandate that they have received.²² This would especially be true under the circumstances of com-

¹⁶ BVerfGE 83, 238 (311).

¹⁷ BVerfGE 87, 181 (200).

¹⁸ EUROPEAN BROADCASTING UNION, November 2000, 17.

¹⁹ BVerfGE 83, 238 (311).

²⁰ BVerfGE 87, 181 (200).

²¹ BVerfGE 90, 60 (96 ff.).

²² BVerfGE 87, 181 (202).



petition with private broadcasters. Those enjoy more freedom in their procurement of revenue and in the structuring of their programmes.²³

If however, the legislator or the government were allowed to decide on the adequate amount of funding without restriction, they would be in possession of a powerful instrument. In this way they would be in a position to indirectly influence the programme structure by withdrawing or curtailing moneys.²⁴ Therefore there is a strong need for an independent procedure for the fixation of the funding amount. One possible method could be the indexing of the funding revenue.²⁵ Another possibility would be to delegate the procedure to a committee of experts. An example here would be the fixation of the licence fee in the Federal Republic of Germany.

In a first step, the German procedure starts with the broadcasters determining themselves how much they need for the financing of their programmes (§1 Par. 1 RFinStV). This is necessary in order to ensure that the final fee is determined by the public broadcasters constitutionally approved autonomous programming decisions (principles of programme neutrality and programme accessoriness).²⁶

The public broadcasters must announce their financial requirements to an independent committee of experts, the Committee to Calculate the Financial Needs of the Broadcasting Corporations (in German: Kommission zur Ermittlung der Finanzbedarfs der Rundfunkanstalten – KEF).

On the second stage, the funding need is then being checked by KEF (§ 2 RFinStV). Such independent revision is necessary to protect the licence-payers' interests, since market mechanisms fail in a fee based system.²⁷ The revision is limited to whether the programme is in accordance with the basic service mandate and if the principles of cost effectiveness and thriftiness are met.²⁸

The last stage is the parliamentary ratification of the licence fee. Deviations of the amount fixed by the committee are extremely rare. Reasons for such a decision must expressively be given.²⁹ The only reasons acceptable are that the fee is unreasonably high or that access to information is being blocked. The parliament's role therefore is to take the licence-payers' economic interests into account. Finally it may consider factors outside the public broadcasters' control – such as the citizens' economic situation, changes in income or other public

²³ BVerfGE 87, 181 (202).

²⁴ BVerfGE 74, 297 (342); BVerfGE 87, 181 (202).

²⁵ BVerfGE 90, 60 (104).

²⁶ BVerfGE 87, 181 (201).

²⁷ BVerfGE 90, 60 (102).

²⁸ BVerfGE 90, 60 (103).

²⁹ BVerfGE 90, 60 (103 f.).

charges.³⁰ Programme related or even political criteria may in contrast not justify derogation.³¹

2.5. Current Developments

At present a trend in Europe can be observed, where the share of advertising funding is being reduced in favour of direct state subventions.³² In addition, just like in France³³ or Spain³⁴, fees are levied from commercial broadcasting, telecommunications and internet providers and used to support the public broadcasters. The amount levied is mostly decided by government or parliament. In fact these measures do ensure adequate funding of public broadcasting. Reducing the dependencies on advertising revenue, which is becoming increasingly incalculable, also is an advantage and a welcome step away from dependence and economic manipulation. On the other hand, these measures have the disadvantage that the governmental or parliament influence increases considerably. This is a development that gives serious cause for concern. Whether these measures violate the principle of independence from state influence can only be decided by a detailed analysis of the respective funding regulations.

³⁰ BVerfG NVwZ 2007, 1287 (1292).

³¹ BVerfGE 90, 60 (103 f.).

³² BRON, IRIS plus 4/2010, 6 ff.

³³ BLOCMAN, IRIS plus 6/2009, 38 (38).

³⁴ BOTELLA, IRIS plus 6/2009, 46 (46).



3. The Requirements of the EU Legislation on State Aid

In recent years, the public discussion about the adequate funding of public broadcasting has taken on another dimension – that of European law.¹ In the Treaty of Lisbon in Art. 2 pluralism now is explicitly named as a central value of the European Union. In Europe, public broadcasting is the institution that must guarantee and safeguard this fundamental value. The “Amsterdam protocol”² outlines the legislative framework for the funding of public institutions within Europe. It states:

“The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.”

It is therefore the task of the member states and not of the European Commission to define and form the mandate of the broadcasters.

These principles must also be respected by the Commission in its task of supervising and controlling state aid. Due to numerous complaints by commercial providers, the Commission repeatedly had to check whether the TV and radio licence fees funding the public broadcasters have not perhaps taken on the character of an unacceptable subsidy (see Art. 107 Par. 1 AEUV). It is the Commission's aim to prevent license fees from having overcompensating and disproportional effects.³ It found that at least in Germany the levied license fees could be defined as subsidies but considered these to be justified under certain conditions. Among other things, the Commission required that the mandate for the broadcasters be defined as exactly as possible. This definition must make it perfectly clear whether the member-state wishes to include a particular activity of the provider into the public mandate or not.⁴ In order to ensure compliance with the public mandate and adequate funding, the Commission stipulates a supervision that must be regular and effective. Basically the member-states are free to choose a method of supervision they find suitable. However the Commission makes it obvious that the only method of supervision it considers suit-

¹ BARTOSCH, 2009, 684 (684ff.).

² Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States, OJ C 340, 10.11.1997, 109.

³ Communication from the Commission on the application of State aid rules to public service broadcasting, 2009/C 257/01, Par. 40.

⁴ EU Communication 2009, Par. 45.



able would be one carried out by an independent and external body.⁵ This is contrary to the tradition of many member-states which until now have entrusted the control and supervision of their institutions to internal bodies.

Especially far-reaching are the rulings aimed at all online products offered by public producers. In its communication on broadcasting in July 2009⁶, the Commission committed the member-states to investigate the impact of new online services on the market as a whole by means of the findings of public consultation. The anticipated state of the market with the planned new services in operation is to be compared to the state of the market without them. The impact of these services must be weighed against the additional benefits which the services in question provide for the society. If the impact on the market is predominantly negative, a state funding of the audiovisual services could only be approved if justified by these additional benefits. Taking the existing public services as a whole into account, it has to be questioned whether these audiovisual services are necessary to satisfy social, democratic and cultural needs in society. Hence in Germany, public broadcasters are obligated to conduct a so called "three-steps-test" on all new or altered digital services. In three stages the broadcasting corporations investigate (1) how far the new service would satisfy democratic, social and cultural needs in society, (2) to what extent the quality of the service would encourage and contribute to media competition and (3) what expenditure would be necessary to put this service into operation (§11 f RStV).

Insofar as the commission stipulates extensive controls and checks regarding state aid, it must be kept in mind that this should not lead to rulings which would stand in contradiction to the principle of freedom from the state. In the funding fixation method, for example by the independent committee of experts in Germany, the only criteria taken into consideration are functional ones: cost effectiveness and thriftiness.⁷ An intensive state control procedure could very quickly open the door for political manipulation. It would therefore be an advantage if the Commission stipulated that the control body be independent not only from the broadcasters but also from governmental institutions.⁸ In addition there is a risk that a too rigid definition of its role and its mandate could unduly restrict the programming freedom of the broadcasters. When new online services are to be funded, using the "three-steps-test" means that a bureaucratic monster may be created, which effectively prevents innovative and rapid reactions in the programme planning of the broadcasters. As well as this, it is hardly compatible with economical budget management to spend huge sums on financial reports which often bring only minimal additional insight and which seldom produce anything more than another point of view in the deliberations.

⁵ EU Communication 2009, Par. 54.

⁶ EU Communication 2009, Par. 40.

⁷ LIBERTUS, § 14 Par. 1.

⁸ EU Communication 2009, Par. 54, 78.



It should be closely observed in the years to come whether the two freedoms – freedom of competition and freedom of broadcasting – can be brought into an appropriate and workable balance. If this is not the case, the EGMR, the European Court of Justice or the member-states' national Constitutional Courts will have to work on correction. The German Constitutional Court recently confirmed in its verdict on the Treaty of Lisbon that the nation's media landscape belongs to the central core of the authority of the German state.⁹ Within the framework of a so called “identity check” the court will take care to safeguard its leeway in this field, especially in the face of measures introduced by Brussels.¹⁰

⁹ BVerfGE 123, 267 (363).

¹⁰ BVerfGE 123, 267 (353 f.).



4. The Problem of Compulsory Radio and TV Licence Fees in the Current Times of Convergence

Traditionally, the main source of income for public broadcasting is licence fees. Usually the possession of a broadcasting receiver means that the fee must be paid (§ 13 Par. 2 RStV). The obligation to pay this licence fee is in no way connected to the viewing habits of the individual user. Even if a technical arrangement means that only programmes by private broadcasters can be received, the licence fee still has to be paid.

At the moment, this funding model is in great difficulties. In the times of convergence, the possession of a broadcasting receiver loses its distinguishing power. Since multifunctional terminals, such as PC's or mobile telephones, become more and more common, it is no longer possible to distinguish whether the appliance in question can be viewed as a broadcasting receiver or not. Such "new-type" appliances can be used as broadcasting receivers, but usually, they are purchased to serve different purposes. In most cases, the appliance has many features. In fact, the feature of receiving broadcast is used seldomly or even never at all. In a law firm for example, PCs are used for typewriting, emailing or internet search but not for viewing broadcasting programmes. At the same time though, more and more young people are exclusively using these new receivers to receive television and radio.

This means that in Germany, for example, the younger generation in particular is against compulsory radio and TV licence fees. Although only a very small percentage of the population was affected, the decision to link the possession of these new appliances to the compulsory licence fee led to a storm of protest. Even the courts have not yet finally decided on whether these new forms of receiving appliances can be described as "being held ready" to receive broadcasting. The numerous verdicts which come to different conclusions point out just how important it is to change the law.¹

The following reform options are being discussed:

- *The minimal Reform²* (Model 1): This model would pertain the existing model as far as possible and introduce only minimal modifications in known problem areas. The licence fee would, for example in Germany, still be fixed by the independent committee of experts (the KEF) and be ratified by the parlia-

¹ Confirmed by: VG Regensburg, Urt. v. 24. 3. 2009 – RO 3K 08.1829; VG Augsburg, Urt. v. 16. 3. 2009 – Au 7 K 08.1306; VG Würzburg, ZUM 2009, 339; VG Hamburg, Urt. v. 24. 7. 2008 – 10 K 1261/08; VG Ansbach, ZUM 2008, 1000; VG Greifswald, Urt. v. 8. 7. 2008 – 2 A 2028/07; Denied by: VG Arnberg, Urt. v. 7. 4. 2009 – 11 K 1273/08; VG Berlin, Urt. v. 17. 12. 2008 – 27 A 245/08; VG Wiesbaden, ZUM 2009, 262; VG München, Urt. v. 21. 11. 2008 – M 6a K 08.191; VG Münster, MMR 2009, 64 /w annotations by NOLDEN/SCHRAMM; VG Koblenz, K&R 2008, 559; VG Braunschweig, Urt. v. 15. 7. 2008 – 4 A 149/07.

² HOLZER, 2010, 6 f.



ments of the federal states. The structure of the licence fee would however be flattened: There would be no differentiation between radio or television reception and the use of an internet pc any more. This reduction of complexity in the licensing-system would involve a slight increase of the fee, as it then covers all possible devices.

- *The fee for households and places of business*³ (Model 2): In another model the licence fee is decoupled from the possession of a broadcasting receiver. Instead of this, a fee would be paid by each household, regardless of how many people live in the household. The levy of this fee is justified by the argument that in fact there is no household that does not use services of public broadcasting. Places of business would also be subject to this fee, and the amount of the fee would be determined by their size and how intensively the media is used.
- *Capitation fee* (Model 3): Another suggestion could be the introduction of a capitation fee. This would be levied, for instance by the tax authorities. The fee would have to be paid by every adult citizen, regardless of their actual media habits.

In Germany the decision as to the future of broadcasting funding will be made by the middle of this year.⁴ Meanwhile, the ongoing reform-debate is accompanied by worries that the new funding system could trigger off a new EC State aid investigation.⁵ In the worst case scenario, the Commission could decide that the new system does not meet the requirements of Article 106, Par. 2 of the Treaty on the Functioning of the European Union. Yet, this is unlikely to happen: A new State aid procedure will only be initiated, if the reform represents a "new" State aid, differing in legal terms from the one that the EC has decided on previously. However, the old State aid decision was rather a fundamental one, and it is probable that its principles will also apply to the new funding system.

Similar discussions and decisions though are present in other European states. In this year France started compensating for broadcasting-compatible PC's by increasing the general broadcasting fee (Model 1).⁶ This "little reform" however still does not obligate broadcasting consumers who only use internet-enabled PC's to pay licence fees. Finland has planned to introduce a broadcasting fee on all Finnish households and on those places of business with a yearly turnover of more than € 400.000.⁷ The tax should no longer be linked to the possession of a receiving appliance. Instead, it will be based on the idea, that practically all Finnish companies make use of broadcasting via different media and

³ KIRCHHOF, 2010, 78 ff.

⁴ epd medien 87/2009, 8.

⁵ KLEIST/SCHEUER, 2010, 3 ff.

⁶ BLOCMAN, 2009, 38 (38).

⁷ BRON, 2010, 10.



different types of receivers.⁸ However, the plan has been postponed in the last moment.

The question as to which of these funding models is best suited to fulfil the service remit of public broadcasting in the media landscape of today, can only be answered in practice. Furthermore, it must be empirically determined for each state individually. However, all three reform options have the advantage of a funding model that does not depend on the state or on commerce. In principle, they are capable of balancing the constitutional freedom of broadcasting and the EU rules on competition properly.

⁸ BRON, 2010, 11.



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