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Public Service Broadcasting: A Comparative Legal Survey

- by Toby Mendel
- Second Edition
Revised and Updated



**Communication and
Information Sector**

Public Service Broadcasting: A Comparative Legal Survey

■ by
Toby Mendel

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Mendel has provided peak level expertise on the rights to information and to freedom of expression, including in the area of public service broadcasting, to a wide range of actors including the World Bank, UNESCO, the OSCE and other UN and intergovernmental bodies. He has also worked with numerous governments and NGOs in countries all over the world on these issues. In these various roles, he has, among other things, advised governments and NGOs on drafting broadcasting, public service broadcasting, right to information, defamation and other laws, taken cases to and filed amicus curiae legal briefs before both international and national courts, analysed laws, developed training materials and run training seminars, and made numerous presentations at international conferences, seminars and workshops.

Mendel has published extensively on a range of freedom of expression, right to information, communication rights and refugee issues. For UNESCO, in addition to this publication, he has also published *Freedom of Information: A Comparative Legal Survey*,¹ the second edition of which was published in 2008, as well as *The Right to Information in Latin America: A Comparative Legal Survey*.² He is a co-author of *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation*,³ and the author of two leading ARTICLE 19 publications on public service broadcasting, namely *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*⁴ and *A Model Public Service Broadcasting Law*.⁵

1 (Paris: UNESCO, 2008)

2 (Quito: UNESCO, 2009)

3 (Ann Arbor: University of Michigan Press, 2008)

4 (London: 2002)

5 (London: 2005)

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Foreword

The key rationale for public service broadcasters (PSB) is to serve the informational needs and interests of the public. Although historically, public service broadcasters often operated as monopolies, protected by law, those days are now long past. In democracies, with a vast wealth of options for the viewing and listening public now available, public broadcasters need to justify their existence, and particularly the expenditure on them of public funds, on a nearly continuous basis.

In some countries, State or government controlled public broadcasters are losing market share and becoming less and less relevant to citizens. In other countries, however, true public service broadcasters exist which find strong support among the citizenry and which maintain sometimes remarkably high market shares considering the extent of market fragmentation now present in nearly every country in the world.

This stark contrast immediately gives rise to a number of key questions. Why are these broadcasters popular in some countries but not in others? How can one transition an unsuccessful public broadcaster into a successful one? How can one ensure that these broadcasters serve the public interest and are responsive to the public? What structures are employed to ensure that 'public' ownership does not lead to political control? Is true independence possible or even appropriate in a public body? How can funding mechanisms be truly public in nature and yet not lead to control? How can programming which really fulfils a public need be promoted? How can an appropriate balance be struck between fostering innovation and creativity and accountability?

This book on public service broadcasting by Mr. Toby Mendel explores the legal and regulatory systems governing public service broadcasters in eight different countries around the world, looking at what services they provide, the way in which their mandates are defined, their internal governance systems, mechanisms of oversight or accountability and how they are funded. In selecting the various countries, an attempt has been made to ensure wide geographic representation, while including only countries which have a strong commitment to public service broadcasting.

Special emphasis has been placed on the strategies which have evolved over the years to ensure that public service broadcasters are not undermined by two critical phenomena: external control (political or other), particularly over editorial output, and inadequate public funding. The book outlines tested approaches to resolving these key problems, but it also highlights innovative systems that are being piloted in different countries to address some of the new challenges that face public service broadcasters.

One of the main strategic focus of UNESCO is raising awareness on the importance of freedom of expression through advocacy and monitoring. Actions consist in providing technical assistance to Member States and building capacity for the establishment and application of internationally recognized legal and regulatory standards for freedom of expression, freedom of information and free and independent media including public service broadcasting. UNESCO has a long-standing commitment to supporting public

service broadcasting around the world. A key part of this has been ongoing efforts to try to learn from the experiences of various well-established, successful public service broadcasters from all over the world, in relation to their status, legal framework, sources of funding and administrative structures. Support has been provided to foster editorial independence and quality programming in public service broadcasting, community media and new digital media, for example by assisting Member States to transform state broadcasters into editorially independent public service broadcasters in order to ensure media pluralism and quality journalism.

This publication is the second edition of this book, which was originally published jointly by UNESCO and AIBD in 2000. The original publication was very well received, has been translated into a number of different languages, and has become a point of reference in many countries for advocates, civil society activists, legal professionals and decision-makers. We believe that this second edition will continue to be a useful reference and to serve as an authoritative source of information from countries around the world, as a friend for broadcasters to help them solve some of the issues they are currently facing in their own organizations. Knowing others always means knowing ourselves.

The author, Mr Toby Mendel, is the Executive Director of the Centre for Law and Democracy (www.law-democracy.org), an international human rights NGO based in Canada which promotes respect for rights which are foundational to democracy, including freedom of expression. He has worked closely with UNESCO in a number of countries around the world advising on general broadcasting and also specific public service broadcasting legislation.

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I

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Introduction

National broadcasters, owned by the State and funded out of the public purse, have historically formed a vital component of the broadcasting sector. Indeed, in many countries, a State-owned broadcasting organization supported by public funding was in the past the only national broadcast medium. Although they are far less dominant today than they once were, the rationale for these broadcasters remains strong and they continue to represent an important part of the overall broadcasting ecology in most countries. For the most part, the commitment to public broadcasting remains firm and this is reflected in public support, government funding and viewing statistics.

There are a number of good reasons to support publicly owned and funded broadcasters. They have the potential to provide an effective complement to commercial services, satisfying informational needs and interests to which the market does not respond. Quality has traditionally been a hallmark of public broadcasting, and this arguably provides a floor for the sector as a whole, including private broadcasters. They can ensure that programmes are broadcast which cover a wide range of interests and which respond to the needs of all sectors of the population. At their best, they ensure diversity in programming and make an important contribution to satisfying the public's right to know. They also serve as a focal point for promoting a sense of national identity and fostering a democratic and rights-respecting culture.

At the same time, a number of threats to the success of publicly owned and funded broadcasters exist. The first is on-going attempts in many countries by the governing authorities to exert control over such broadcasters, undermining their independence and the quality of their news and other programming. In some countries, the government is able to exert extensive control over public broadcasters, using them as mouthpieces for government rather than as independent sources of information for the public. In other countries, governments do not have the same levers of control but they still pressure public broadcasters at moments of important public debate. Thus, even the BBC came under sometimes intense pressure during the early years of the Iraq war regarding its coverage of that highly controversial event.

A second threat is the ever-present desire of governments to cut budgets, which has resulted in increasing downward pressure on the level of public funding received by public broadcasters, and a consequent search for alternative sources of funding. The four special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization

of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information – expressed concern, in their Joint Declaration of February 2010, about:

The increasingly frequent challenges to public funding support for public broadcasters.¹

The recent global recession, which in many countries around the world has been described as the worst recession since the Great Depression, has exacerbated this threat.² And it is further exacerbated by the increasing pressure on public funds due to rising costs in certain public sectors, in particular in relation to medical services.

Linked to this are changes in the dominant understanding of the role of government. Moves to downsize government and privatise or commercialise government-run industries have been very popular. These changes have affected even activities once deemed core public functions such as responsibility for roads and monopoly utilities. Few public broadcasters have been truly privatised, but many have been turned into public corporations. This, in itself, is not particularly relevant. However, in many cases, this transformation has been accompanied by an expectation that the public broadcaster will also raise more of its funding on a commercial basis. Thus, the Committee of Ministers of the Council of Europe has expressed concern that,

in certain countries, the distinction between public service and commercial broadcasting has become increasingly blurred, leading to what is called “programme convergence”, to the detriment of the quality of the programmes offered by the former.³

Given this, it is natural that the question of the extent and nature of direct public support for national broadcasters is coming up increasingly frequently and some countries are exploring new ways of satisfying the need for an alternative to commercially driven programming. One possibility is to impose public interest obligations on private broadcasters and this is done in many countries. However, there is a very clear overall trend towards relaxing such obligations, in part driven by technological changes, and it is becoming increasingly difficult for national governments to impose effective regulatory conditions along these lines.

Another approach is to focus on providing public funding for programming which serves various public needs and interests, instead of supporting one central public broadcaster. In some countries, independent programme producers, which are not linked to a specific broadcaster, may receive public funding for individual programmes. It is increasingly common for public broadcasters, or even all broadcasters, to be required to include within their overall broadcasting a certain proportion of programmes from independent producers. Alternately private broadcasters may apply for funding for programmes which serve a public interest role. Community broadcasters are also playing an increasingly important role in satisfying needs which other forms of broadcasting do not.

The rapid proliferation of commercial and other forms of broadcasting is increasingly posing a new and dynamic challenge to public broadcasters. Technological developments have completely altered the nature of broadcasting with households in many countries now having access to tens, if not hundreds, of channels through cable or satellite delivery systems. Digital technology allows limited frequency ranges to accommodate far more signals, opening up the airwaves to ever increasing numbers of terrestrially disseminated broadcasters. These developments are complemented by the rapidly falling costs of starting up a broadcasting enterprise.

1 Adopted 3 February 2010.

2 The Committee of Ministers of the Council of Europe has noted that in some countries, cuts to public funding for public service broadcasters have already been made. See Reply of the Committee of Ministers to Parliamentary Assembly Recommendation 1878 (2009), CM/AS(2010)Rec1878 final, 23 April 2010, Appendix, para. 2.

3 Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, adopted 27 September 2006, Appendix, para. 9.

The Internet promises even more exciting and profound changes. Virtually anyone who has access to fairly basic equipment will effectively be in a position to operate as a broadcaster in the near future. And there will be no limits on the number of channels once Internet broadcasting really takes hold.

These developments pose a particular threat to public broadcasters which remain under government control. Many citizens prefer to tune in to independent commercial broadcasters, where they are available, than to a national broadcaster which is effectively a government mouthpiece. This can lead to a significant erosion of support for public broadcasting, to the longer-term detriment of the greater public interest. It is perhaps ironic that the very fact of government control creates a situation in which that control no longer delivers the desired result – influence over a wide spread of the population – and so you have a vicious circle which ultimately erodes support for public broadcasting from all quarters.

Despite these challenges, and the growing importance of alternative models of promoting public interest broadcasting, national public broadcasters still play a very important role in the majority of countries worldwide. Where the independence of these broadcasters is guaranteed – in law and in practice – where they receive adequate funding from the public purse, and where there are appropriate accountability arrangements in place that keep these broadcasters tethered to their mandates, and to the perspectives of their viewers and listeners, they can truly operate as servants of the public interest, providing high quality and diverse information from a variety of sources to the public. Broadcasting organizations which meet these conditions are frequently referred to as “public service broadcasters”.

This book looks at the way in which publicly owned and funded broadcasters are organized and paid for in eight countries around the world, namely Australia, Canada, France, Japan, Poland, South Africa, Thailand and the United Kingdom. These countries have been chosen first on the basis that their public broadcasters are recognised to be public service broadcasters in the proper sense of this term and, in particular, to be independent, accountable and adequately funded. Second, they have been chosen so as to be geographically representative to the extent possible. It may be noted that two major regions of world are not reflected in this sample. First, there is no country from Latin America. This is because, in that region, public broadcasting is relatively underdeveloped compared to the rest of the world. Second, there is no country from the Middle East and North Africa. This is because the public broadcasters in that region are characterised by strong government control, so that they cannot be considered to be public service broadcasters.

The methodology employed in writing this book relied primarily on desk research. The key laws governing public service broadcasters in the different countries were studied, along with academic literature. A range of supplementary sources were used, including the websites of the broadcasters themselves, as well as civil society and official publications and websites. This desk research was supported, in most cases, by having the country chapters reviewed by local experts.

The focus of this book is on the legal and policy frameworks within which public broadcasters operate, including as to their broadcasting obligations, governance structures and funding arrangements. The objective is to provide those interested in public broadcasting – academics, legal practitioners, civil society representatives, officials, elected representatives, journalists or media owners – with access to information about the regulatory arrangements associated with successful public service broadcasting. The book will provide the reader with information about the services democracies have demanded from their public broadcasters, and the various ways in which their independence has been ensured. It outlines the arrangements that the eight countries covered have put in place to ensure accountability, and it describes the different ways in which funding for public service broadcasting has been secured.

The first chapter of the book reviews a number of different standards relating to public service broadcasting. It provides a brief overview of the key features normally associated with public service broadcasting. It reviews international legal standards relevant to public service broadcasting, particularly as derived from the human right to freedom of expression. The chapter also provides an overview of two issues of particular relevance for public service broadcasting, namely funding and their online activities.

The main part of the book consists of the eight country chapters. Each country chapter is organized according to the same five main headings, namely: Introduction, Services Provided, Public Service Mandate, Governing Structure (broken down into Internal Governance and Regulatory Mechanisms) and

Financing. Under Services Provided, the main services offered by public service broadcasters, including programme channels, are described. The section on Public Service Mandate includes an outline of the special legal and administrative obligations, primarily in relation to programming, placed on public service broadcasters. The section on Governing Structure is divided into two sub-sections, describing first the governing structure of the broadcasters themselves (such as their governing boards) and second any external bodies which exercise power over them. Finally, a brief description of the main sources of funding for these public service broadcasters is provided.

The country chapters are followed by a chapter providing a comparative analysis of the different approaches to public service broadcasting in the eight countries. It reviews the main systems used to achieve different objectives, and compares and contrasts them. And it provides some pointers on which may be more appropriate for countries trying to transform State or government controlled entities into public service broadcasters.

Publicly owned and funded broadcasters exist in many countries. However, as noted above, the term 'public service broadcaster' is commonly associated with a set of minimum conditions or attributes. Some of these attributes flow directly from the right to freedom of expression. Some are more closely linked to general principles of democracy and equality, and the fact that public funds are being spent on these entities, which engages certain general principles relating to public spending. Yet others are more associated with the historical role that public service broadcasters have played in society.

This section outlines the key attributes which have historically defined public service broadcasters, and assesses these against modern standards and practices. A good statement of the historical understanding of the key features of public service broadcasters comes from Eric Barendt, who identifies six key attributes:

1. general geographical availability;
2. concern for national identity and culture;
3. independence from both the State and commercial interests;
4. impartiality of programmes;
5. range and variety of programmes; and
6. substantial financing by a general charge on users.⁴

Three of these address programme content – concern for national identity and culture, impartiality of programmes and range and variety of programmes – which is ultimately the key to the definition of public service broadcasting. The others are more structural in nature, although they are also closely linked to the issue of programme content.

The idea that the output from public service broadcasters should be available to everyone – i.e. the idea of general geographical availability – is a direct consequence of the public nature of the service. It would not be appropriate to offer a service which is supported by public funding to only part of the population, geographically defined. General availability is also part of the justification for public service broadcasting, since it serves to ensure that the public's right to know is satisfied in equal measure throughout the whole territory. This is also supported by official statements. For example, in 1994, in Resolution No. 1 of the European Ministerial Conference on Mass Media Policy, participating Ministers from Council of Europe States committed to ensure that at least one public service would be "accessible to all members of the public" in each country.⁵

It may be noted that this principle does not necessarily mean that all regions in a country will receive identical services. Indeed, a key obligation for many public broadcasters is precisely to provide tailored services to different regions, so as to ensure the availability of local news and current affairs programming. And new technologies have greatly facilitated the tailoring of programming output to audience needs and

4 *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 52.

5 See also Principle VI of the Declaration of Principles on Freedom of Expression in Africa, which states: "[Pu]blic broadcasters should strive to ensure that their transmission system covers the whole territory of the country". Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002 (African Declaration).

interests, including geographic tailoring. At the same time, it is clear that universal service remains an important notion even in the digital broadcasting era.⁶

The need to protect public service broadcasters from political and commercial interference is now widely, almost universally, recognised. The need for such independence is now well established as a matter of international and comparative law (see below). It is fairly obvious that it is inappropriate for a particular political party, government or branch of the State apparatus to exercise influence over a public service broadcaster to promote its own interests, given that the latter is funded from the public purse. It is equally obvious that this will impede the ability of public broadcasters to fulfil their programming remits, as their energies and resources are diverted from this to meeting the needs of their political masters.

Despite this, in many countries the greatest threat to public broadcasting comes precisely from attempts by government to control public broadcasters and the subordination of the proper remit of these broadcasters to the interests of the government of the day. State-funded broadcasters are often accused of being mouthpieces of government, to the detriment of the public interest and the right of citizens to receive a diverse range of information. This remains a problem even within Europe, and the Committee of Ministers of the Council of Europe has noted:

In some cases, the applicable regulations are not capable of guaranteeing editorial independence and institutional autonomy of public service broadcasters....⁷

It is not possible to insulate public broadcasters from all commercial pressures, but a key part of the remit of public service broadcasters is to provide quality broadcasting which meets the informational, entertainment and educational needs of the population while respecting and promoting diversity. Satisfaction of this goal is impossible if public broadcasters are expected to compete for funds in the same way as commercial broadcasters. Put differently, excessive reliance on commercial sources of funding would inevitably lead public broadcasters to subject programme production and scheduling decisions to popularity tests, rather than such decisions being made in the public interest. Although many public service broadcasters now operate on a blend of public and commercial funding, relying entirely on private funding would undermine the ability of such broadcasters to fulfil their public service mandates.

7

It may be noted that there is somehow a tension between these two types of independence. Funding must come from somewhere and, to the extent that it does not come from commercial sources, it must come from public sources, with the attendant risk of State interference.

This leads to the next key attribute of public service broadcasters, which is public support for their work, albeit provided in a manner which does not undermine the previous attribute, namely independence. As with independence, this flows, among other things, from the guarantee of freedom of expression. Barendt posits a general fund on users, usually in the form of a television license fee, as being at the heart of this attribute. However, as is clear from the comparative practice of the States surveyed herein, the manner of funding public service broadcasting varies considerably from State to State. In many countries, for example, the national legislative body, or parliament, directly votes funds for these broadcasters, instead of them being funded from a fee imposed on users. The issue of funding public service broadcasting is discussed in more detail below.

Finally, we come to the three direct content attributes identified by Barendt, namely concern for national identity and culture, impartiality of programmes, and range and variety of programmes. The latter two – impartiality and diversity of programming – are core public service values that find strong reflection in international standards, including the right to freedom of expression, as well as in the very rationale

6 See, for example, Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting, adopted 28 May 2003, Appendix, Principle 20.

7 Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, adopted 27 September 2006. Declarations and other statements by the Council of Europe relating to the media and the information society can be found at: http://www.coe.int/t/dghl/standardsetting/media/Doc/CM_en.asp.

underlying public service broadcasting. On the other hand, it is probably fair to say that a concern with national identity and culture, while somehow part of the programming obligations of most public service broadcasters, are at the same time just examples of some of the many different programme obligations placed on these types of broadcasters.

The idea of pluralism and diversity as core freedom of expression values is elaborated on below. This essentially derives from the right to receive information and ideas, which underpins the right to know, and upon which the right of the public to have access to information about a wide variety of issues and concerns, and from different perspectives, is founded. Their ability to contribute to pluralism is one of the key rationales for public service broadcasters, another concept which is elaborated further on below.

The need for public service broadcasters to respect standards of balance and impartiality in their programming is closely related to the idea of independence. If it is inappropriate for governments to use public broadcasters to promote their own interests, it is equally inappropriate, given its public mandate, for a public service broadcaster to promote a certain position or support a particular political party. This idea is also elaborated on in greater detail below, under the heading of Independence.

The promotion of national identity and culture have been, and remain, closely associated with public service broadcasting, being an explicit obligation in many countries. Indeed, there is a tendency to add cultural programming to the traditional trio of goals of public service broadcasting, namely to educate, inform and entertain.⁸ National identity, on the other hand, has gradually developed more into the idea of promoting social cohesion and integration, and combating discrimination.⁹

But the larger point is that these are just two from among many programming obligations that States routinely place on public service broadcasters. Others that find expression in Resolution No. 1 include providing: a reference point for all members of the public; a forum for public debate; a comprehensive news service; programming which is ethical, pluralistic, innovative and of high quality; programming of both wide appeal and directed to specialised audiences; access to different philosophical and religious beliefs; and programming that contributes to a greater appreciation of the diversity of national and European cultural heritage.¹⁰ At the same time, it is recognised that States should be free to define the specific remit of their public broadcasters, as long as this is clearly defined and reflects the public interest.¹¹

8 See, for example, Recommendation Rec(2003)9, para. 19.

9 See, for example, Resolution No. 1 of the European Ministerial Conference on Mass Media Policy and Recommendation 1878(2009) of the Parliamentary Assembly of the Council of Europe on Funding of public service broadcasting, para. 5. See also Goodwin, P., "Public Service Broadcasting and new Media Technology: What the BBC has Done and What it Should Have Done" (1997) 4 *the public* 59, p. 72.

10 Principle II.

11 See Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, para. 8.

Key Standards for Public Service Broadcasting

This chapter defines the key standards that have been recognised in the context of public service broadcasting, and which help define it. In some cases, these flow directly from international law. In other cases, they find support in what may be termed authoritative statements, for example, as adopted by the Council of Europe or the official special international mandates for freedom of expression at the UN, OAS, OSCE and African Commission.

I. Freedom of Expression: An Overview

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR),¹² as follows:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.¹³

This right is also guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR),¹⁴ a treaty ratified by 167 States,¹⁵ also in Article 19, as follows:

12 United Nations General Assembly Resolution 217A (III), 10 December 1948.

13 See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice) and *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).

14 UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

15 As of December 2010.

- (1) Everyone shall have the right to freedom of opinion.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in all three regional human rights treaties, specifically at Article 13 of the *American Convention on Human Rights*,¹⁶ at Article 10 of the *European Convention on Human Rights* (ECHR)¹⁷ and at Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR).¹⁸

It is difficult to overestimate the importance of freedom of expression. Where information and ideas are not permitted to flow freely, other human rights, as well as democracy itself, are under threat. Participatory mechanisms depend on the free flow of information and ideas, since citizen engagement can only be effective if people are informed and have the means to express themselves. Other social values – including good governance, public accountability, individual fulfilment and combating corruption – also depend on respect for freedom of expression.

International bodies and courts have made it very clear that the right to freedom of expression is a fundamental human right. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),¹⁹ which refers to freedom of information in its widest sense and states:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is fundamentally important both as an individual right and as indispensable to the exercise of all other rights. This view has been upheld by international human rights bodies. For example, the UN Human Rights Committee, the body established to monitor implementation of the ICCPR, has held:

The right to freedom of expression is of paramount importance in any democratic society.²⁰

Statements of this nature abound in the case law of human rights courts and tribunals around the world. The Inter-American Court of Human Rights has stated: “Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.”²¹ And the European Court of Human Rights has noted: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”²²

The scope of protection of international guarantees of freedom of expression is wide, covering not only speech that may be deemed to be in the public interest, but also speech that is considered by many, or even most, people as offensive or unpalatable. Indeed, this notion somehow lies at the very heart of the importance of freedom of expression. As the European Court has made clear:

[F]reedom of expression ... is applicable not only to “information” or “ideas” that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”²³

16 Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.

17 Adopted 4 November 1950, in force 3 September 1953.

18 Adopted at Nairobi, Kenya, 26 June 1981, in force 21 October 1986.

19 14 December 1946.

20 *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

21 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

22 *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

23 *Ibid.*

Freedom of expression has a dual nature, inasmuch as it protects not only the right to impart information and ideas (the right of the speaker) but also the rights to seek and receive information and ideas (the rights of the listener). This duality has been elaborated upon clearly by the Inter-American Court of Human Rights:

[W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.... In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.²⁴

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The reason for this is simple: in most countries, the mass media is the main conduit for public discussion on any and all matters. The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."²⁵ The European Court of Human Rights has referred to "the pre-eminent role of the press in a State governed by the rule of law."²⁶ The media as a whole merit special protection in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."²⁷

Similarly, in its Declaration of Principles on Freedom of Expression, adopted in 2003, the African Commission stressed "the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy."²⁸

The media play a very important role in underpinning democracy, including during elections. The UN Human Rights Committee has stressed the importance of free media to the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.²⁹

In a similar vein, the European Court has emphasised:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.³⁰

24 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, paras. 30-2.

25 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34.

26 *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

27 *Ibid.*

28 Adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.

29 UN Human Rights Committee General Comment 25, issued 12 July 1996.

30 *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, these obligations do apply to public broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, public broadcasters are in a special position to satisfy the public's right to know and to guarantee pluralism and access, and it is therefore particularly important that they promote these rights.

II. Pluralism and Diversity

Pluralism and diversity in the media are fundamental principles of international law. The need for plurality flows from the right to seek and receive information and ideas. Central to this aspect of the right to freedom of expression is the idea that citizens should have access to a wide range of different perspectives and analyses through the media, in other words, access to a diverse media. It is through the availability of a range of viewpoints that individuals can exercise full citizenship, choosing between competing perspectives as they engage in public decision-making. As regards broadcasting, the airwaves are a public resource and they should be used for the benefit of the whole public, including people with minority views or interests.

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights, but that they must take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.

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This is backed up by a wealth of authoritative international standards. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism."³¹ The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."³² And the African Declaration states:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.³³

Council of Europe Recommendation 2007(2) on Media Pluralism and Diversity of Media Content is devoted to elaborating on the question of the importance of pluralism in the media and measures to promote it. It states:

Member states should encourage the development of other media capable of making a contribution to pluralism and diversity and providing a space for dialogue. These media could, for example, take the form of community, local, minority or social media.³⁴

One of the key rationales for public service broadcasting is that it makes an important contribution to pluralism. The German Federal Constitutional Court has even held that ensuring variety and promoting diversity is a constitutional obligation for public service broadcasting organizations.³⁵

31 *Informationsverein Lentia and Others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.

32 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34.

33 Principle III.

34 Principle 4.

35 *See Fourth Television case*, 87 BverfGE 181 (1992). In Barendt, *op cit.*, p. 58. See also the *Fifth Broadcasting case* (Baden-Württemberg Private Broadcasting Case), 1 BvR 147, 478/86, 1 BvR 147, 478/865 (1987).

A number of international instruments stress the important contribution public service broadcasters make to promoting diversity and pluralism. Every year, the four special international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information – adopt a Joint Declaration elaborating on key freedom of expression themes. In their 2007 Joint Declaration, the special mandates highlighted the role of public service broadcasters in contributing to diversity, including by “giving voice to, and serving the information needs and interests of, all sectors of society.”³⁶ The special mandates reiterated this in their 2010 Joint Declaration, expressing concern that this role was coming under threat.³⁷

Similarly, Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy (Resolution No. 1) underlines the “vital function of public service broadcasting as an essential factor of pluralistic communication accessible to everyone.”³⁸ It goes on to list a number of specific ways in which public broadcasters contribute to diversity, including by providing “pluralistic, innovative and varied programming” and “services of interest to a wide public while being attentive to the needs of minority groups”. The idea of contributing to diversity is echoed in one form or another in practically all Council of Europe statements on the mandate of public service broadcasters.

Within Europe, funding by States to public service broadcasters is exempted from the general provisions of the Treaty of Amsterdam, in part because of the contribution they make to diversity. A Resolution of the Council and of the Representatives of the Governments of the Member States Concerning Public Service Broadcasting, passed by the European Union, recognises the important role played by public service broadcasting organizations in ensuring a flow of information from a variety of sources to the public. In exempting such broadcasters from the provisions of the Treaty of Amsterdam, the Protocol notes that they are of direct relevance to democracy, social and cultural needs, as well as the need to preserve media pluralism.³⁹

III. Independence

There are a number of areas where State regulation and/or oversight is appropriate in relation to broadcasting. Licensing of broadcasters is necessary to ensure the orderly use of the airwaves and of course there must be oversight of public broadcasters, among other things to ensure appropriate use of public funding. However, both licensing procedures and oversight of public broadcasters are governed by the guarantee of freedom of expression. A key freedom of expression principle is that licensing and oversight powers must be protected against both government control and undue commercial influence. This requires the putting in place of specific protections, of both a legal and practical nature, against political, commercial and other forms of interference, in part due to the universally observed tendency of governments and businesses to want to minimise access of their critics and competitors to the broadcast media.

This general principle finds strong support in international decisions and statements. The African Declaration states, very clearly, at Principle VII(1):

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

The need for protection against political or commercial interference was also stressed in the 2003 Joint Declaration of the specialised mandates, which states:

36 12 December 2007.

37 3 February 2010.

38 Preamble.

39 Official Journal 1999/C 30/01, 5 February 1999.

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁴⁰

The same special mandates reiterated this point in their 2007 Joint Declaration.⁴¹

Within Europe, an entire recommendation of the Committee of Ministers of the Council of Europe is devoted to this matter, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector. The very first substantive clause of this Recommendation states:

Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.⁴²

This core principle is also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”⁴³

The same principle has been established clearly in the specific context of public broadcasters as well. The most comprehensive such statement is probably Recommendation [1996]10 on the Guarantee of the Independence of Public Service Broadcasting, passed by the Committee of Ministers of the Council of Europe.⁴⁴ The very name of this Recommendation clearly illustrates the importance to be attached to the independence of public service broadcasting organizations, and the recommendation provides detailed guidance on how this is to be achieved in practice.

Several Declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasters. The 1996 Declaration of Sana’a calls on the international community to provide assistance to public broadcasters only where they are independent and calls on individual States to guarantee such independence.⁴⁵ The 1997 Declaration of Sofia notes the need for state-owned broadcasters to be transformed into proper public service broadcasting organizations with guaranteed editorial independence and independent supervisory bodies.⁴⁶

The African Declaration also highlights the importance of independence for public broadcasters, calling for State and government controlled broadcasters to be transformed into public service broadcasters.⁴⁷ Similarly, in their Joint Declaration of 2010, the special international mandates expressed concern about political “influence or control” over public broadcasters, which results in them serving “as government mouthpieces instead of as independent bodies operating in the public interest.”⁴⁸

40 Adopted 18 December 2003.

41 12 December 2007.

42 Adopted 20 December 2000.

43 *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

44 Adopted 11 September 1996.

45 Resolution 34 adopted by the General Conference at its twenty-ninth session (1997). Available at: http://portal.unesco.org/ci/en/ev.php-URL_ID=5351&URL_DO=DO_TOPIC&URL_SECTION=201.html.

46 Resolution 35 adopted by the General Conference at its twenty-ninth session (1997), Clause 7. Available at: http://portal.unesco.org/ci/en/ev.php-URL_ID=5352&URL_DO=DO_TOPIC&URL_SECTION=201.html.

47 Principle VI.

48 3 February 2010.

The same ideas are reflected in a number of constitutional decisions by national courts. For example, the Supreme Court of Ghana noted: “[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham.”⁴⁹ As regards the governing body, the National Media Commission, the Ghanaian Supreme Court stated that it was their role, “to breathe the air of independence into the state media to ensure that they are insulated from Governmental control.”⁵⁰

The German Constitutional Court ruled that the establishment of a federal broadcaster was unconstitutional, thereby preventing the body from being established. Among other things, the Court noted: “The corporation was completely in the hands of the State. It was an instrument of the Federation and was dominated by the Federal Government and the Federal Chancellor”.⁵¹

At a practical level, there are a number of ways of guaranteeing the independence of public service broadcasters, including through structural guarantees and rules relating to programming. Independence is also safeguarded through the establishment of appropriate systems of accountability to the public, including systems of direct public input and general requirements of transparency, which helps enable a direct public watchdog role. The manner in which public funding is allocated to public broadcasters is also key to their independence (see below).

In terms of structural guarantees, a key focus of the standards is on the need to establish independent governing bodies, and on how to achieve this in practice. The standards also reflect the complementary idea that the editorial independence of public service broadcasters should be guaranteed. This approach erects a two-tier structure to protect independence, composed of a governing body, which oversees the work and reports to parliament, (i.e. acts as an interface between the organization and top-level accountability bodies) and the management of the organization itself.

In practice, editorial independence is often promoted by ensuring a clear separation between the governing body, with overall responsibility for the organization, and managers and editors, who have responsibility for day-to-day and editorial decision-making. The governing body may set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

A number of international statements reflect these ideas of structural independence. Thus, the African Declaration calls for public broadcasters to be accountable to the public through the legislature, and also states:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed.⁵²

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, noted above, reiterates these principles, stating:

Participating states undertake to guarantee the independence of public service broadcasters against political and economic interference. In particular, day to day management and editorial responsibility for programme schedules and the content of programmes must be a matter entirely for the broadcasters themselves.

The independence of public service broadcasters must be guaranteed by appropriate structures such as pluralistic internal boards or other independent bodies.

49 *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

50 *Ibid.*, p. 13. See also *National Media Commission v. Attorney General*, 20 January 2000, Writ No. 2/96 (Supreme Court of Ghana).

51 *First Broadcasting Case*, BVerfGE 12, 26 February 1961.

52 Principle VI.

Securing independence in practice is something that must be rooted in the institutional structures of each country, taking into account the political and cultural setting. However, some general principles may be established. Recommendation (1996)10 of the Council of Europe is the most detailed international statement of such principles. It stipulates that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy, especially as regards programme schedules, programmes, news and a number of other matters, including internal finances and organization.⁵³

The Recommendation calls for 'supervisory bodies' (governing bodies) to be appointed in a manner that avoids placing them "at risk of political or other interference", that is "open and pluralistic" and so that they "represent collectively the interests of society in general". It also calls for protection of their tenure (i.e. protection against unwarranted dismissal), for rules on conflicts of interests, for clearly defined rules on remuneration and for a prohibition on members receiving any instructions or mandate from any person or body other than the one which appointed them, outside of exceptional cases determined by law.⁵⁴

Members of management should also be appointed in a manner that is protected against political or other interference, and be subject to public interest rules, including against conflicts of interest. Importantly, management should be solely responsible for day-to-day operations, and they should only be accountable to the supervisory body, subject to overall accountability before the courts. Decisions of the supervisory body against members of management should be duly reasoned and subject to court appeal.⁵⁵

As noted above, this system envisages two layers of protection. First, general oversight is undertaken not by political elements, such as parliament and government, but by an independent the supervisory body. Second, this body is responsible only for general oversight, while editorial decision-making is undertaken by members of management.

Another way of ensuring independence it to place direct programme obligations on public service broadcasters to be balanced and impartial, particularly in relation to their news and current affairs programming. Thus, the African Declaration calls for public service broadcasters to be under an "obligation to ensure that the public receive adequate, politically balanced information",⁵⁶ Resolution No. 1 states that the missions of public service broadcasters should include providing "impartial and independent news, information and comment",⁵⁷ and Council of Europe Recommendation (1996)10 calls for the legal frameworks to stipulate that these broadcasters should "ensure that news programmes fairly present the facts and events and encourage the free formation of opinions." Furthermore, they should be compelled to broadcast official messages only in exceptional circumstances.⁵⁸

Courts have also held that balance and impartiality was a constitutional obligation for public service broadcasters. Thus, the High Court of Malawi upheld a complaint by citizens about biased coverage of parliamentary and presidential elections on the part of the Malawi Broadcasting Corporation.⁵⁹ The Constitutional Court of Austria has also upheld the obligations of the Austrian Broadcasting Corporation to be balanced in the context of programming about matters of public interest that were not political in nature, specifically regarding a programme about animal husbandry.⁶⁰

Finally, a number of international statements call on public broadcasters to be directly accountable to the public, and to be open in their operations. Thus, Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe calls for "public accountability mechanisms for public control" to be established.⁶¹ Resolution No. 1 calls on public broadcasters to be directly accountable to the public, including by publishing information on their activities and by developing procedures allowing viewers and

53 Principle I.

54 Principle III.

55 Principle II.

56 Principle VI.

57 Principle II.

58 Principle VI.

59 *Kafumba and others v. the Electoral Commission and Malawi Broadcasting Corporation*, Miscellaneous Case Number 35 of 1999.

60 *Austrian Broadcasting Corporation, "ORF" v. Count H*, VfGH B 54/01, 4 March 2002.

61 Para. 15. See also, generally, the resolution of 25 November 2010 by the Parliament of the European Union on public service broadcasting in the digital era: the future of the dual system.

listeners to comment on the way they are carrying out their missions. The 2007 Joint Declaration by the special international mandates calls for transparency to be “a hallmark of public policy efforts in the area of broadcasting.”⁶²

IV. Funding

International standards, as well as national practice, establish clearly that providing public financial support for public service broadcasters is essential to the successful delivery of their mandates. These broadcasters are given special programme mandates, the fulfilment of which requires public support. Indeed, if this were not the case, there would be little need for public service broadcasters, since a combination of market forces and regulation could deliver the desired benefits without them. Thus, the Italian Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to provide sufficient resources to the public broadcaster to enable it to discharge its functions.⁶³

There are two main aspects to this. First, in many cases, the programming obligations imposed on public service broadcasters are costly. Thus, news, dramas and educational programmes are relatively expensive to produce, and yet public broadcasters are expected to include significant proportions of these genres in their output. Second, advertising, the main source of income for commercial broadcasters, is linked to audience share and sometimes to targeting certain market segments (often those which are more wealthy). Public broadcasters, on the other hand, are supposed to include programming directed at all members of society, including programming directed at minorities and other groups which may not be particularly commercially viable, and on a non-discriminatory basis. A related idea in many countries is that viewers and listeners should be able to enjoy the programming of public broadcasters with no or a minimum of advertising.

At the same time, true independence for public service broadcasters is possible only if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. In particular, protecting the structural independence of the governing structures of public broadcasters is unlikely to be effective if the government can exert pressure through its control over the funding which is available.

In response to this threat, Resolution No. 1 calls for an “appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions.” The African Declaration states: “public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.”⁶⁴

Recommendation (1996)10 of the Council of Europe essentially reiterates the general statement on funding in Resolution No. 1. It further notes that funding arrangements should not be used “to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy” of public service broadcasters. The level of funding should be set after consultation with the public broadcaster, and take into account trends in the costs of its activities. Furthermore, payment should be effected in a manner which “guarantees the continuity of the activities” of the broadcaster and allows it to “engage in long-term planning”.⁶⁵

These ideas reflect the idea that public service broadcasters should be able to count on a degree of reliability in the allocation of their funding, without which it is difficult to plan their activities, maintain a stable workforce and adapt to new technologies. This suggests that they need longer-term, multi-year funding allocations.

62 12 December 2007.

63 Decision 826/1998 [1998] Guir. cost. 3893.

64 Principle VI.

65 Principle V.

In most cases, public service broadcasters work on a mixed funding model, whereby some of their funding comes from public sources and some from commercial activities, including advertising. Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe refers to the following possible sources of funding:

The funding of public service media may be ensured, through a flat broadcasting licence fee, taxation, state subsidies, subscription fees, advertising and sponsoring revenue, specialised pay-per-view or on-demand services, the sale of related products such as books, videos or films, and the exploitation of their audiovisual archives.⁶⁶

There are pros and cons to each of the various sources of funding. A license fee has the advantage of being more stable and also less susceptible of government interference, although public bodies ultimately set the rate of the license fee and, where relevant, apportion it among public broadcasters. At the same time, license fees may be difficult and/or costly to collect and, where they are not already in place, may be difficult to introduce because they are not likely to be very popular. In addition, the high visibility of a general charge may lead to the public broadcaster being forced to compete for ratings, in order to justify the general charge, rather than concentrate on quality and diversity. Direct government grants are less associated with these pressures, but it is far more difficult to insulate them from political influence.

Where public broadcasters operate on mixed funding models, it is very important to ensure that they do not use this to compete unfairly with commercial broadcasters, particularly in relation to advertising revenues. In other words, they should not be allowed to use their public funding or other public benefits to subsidise their advertising operations.

V. Public Broadcasters and New Technologies

New technologies are fundamentally altering the way that broadcasters of all sorts, including public broadcasters, operate. This goes far beyond just the issue of changing the manner of distribution of broadcasting. It is effecting profound changes at the level of broadcasting content. For example, technological changes have facilitated a massive proliferation in the number of channels that are now available to many people, both fracturing the audience and allowing for much more interest-tailored channels and programming. And the Internet allows broadcasters to engage in a much wider range of informational activities, some of which may not fall within traditional definitions of broadcasting (including Internet hosting of user generated content which was not even produced by the broadcaster in question). These changes raise a number of interesting questions about the role and direction of public broadcasting.

A number of authoritative statements, confirmed by the almost universal practice of States, make it clear that public broadcasters should be able to operate on all available digital dissemination platforms, and this is hardly controversial. Thus, both Resolution No. 1 and Recommendation (1996)10 of the Council of Europe both state simply that public broadcasters should be able to “exploit new communications technologies”, while Recommendation (2007)3 of the Council of Europe calls for this to be clearly established in the legal framework governing these broadcasters.⁶⁷ Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe lists some of the possible new services as being “thematic channels, on-demand media, recorded media and Internet-based media services”.⁶⁸

66 Para. 14.

67 On the remit of public service media in the information society, 31 January 2007, Principle 26. This Recommendation, as the title suggests, prefers to use the term public service media, while excluding the print media, to reflect the idea of these media operating on multiple platforms, some of which cannot be described as broadcasting.

68 Principle 9.

Resolution No. 1, Recommendation (2003)9⁶⁹ and Recommendation (2007)3⁷⁰ all also reflect the idea that an obligation to develop new communications technologies should be included within the mandates of public service broadcasters, an idea that has gained considerable currency in practice, particularly in relation to digital television.

Several statements – including Recommendation 1878 (2009), the special international mandates Joint Declaration of 2007, Recommendation (2003)9 and Recommendation (2007)3 – make it clear that public broadcasters should be given adequate digital frequencies to enable them to fulfil their mandates and to provide universal services on the same or a similar basis as before.

Similarly, Resolution No. 1 proclaims that private control over distribution system for broadcasting should not operate so as to exclude public service broadcasters. The means for ensuring this may include must-carry rules, but it should also extend to more subtle issues, such as fair, reasonable and non-discriminatory access to electronic programme guides, on which “public service channels should be prominently displayed and easy to access.”⁷¹

Universality of service is generally considered to be a key characteristic of public service broadcasting. However, as the nature of distribution systems continues to develop and change, the general availability of certain public service offerings – such as those provided over the Internet – may be dependent on factors beyond the control of the public service broadcaster – such as Internet connectivity.

Closely linked to this is the idea that public service broadcasters need adequate financial and other resources (such as technical expertise) to be able to be present and to deliver their mandates on new communications platforms. In this regard, Recommendation (2003)9 refers to increases in the costs of acquiring, producing and storing programmes,⁷² while Recommendation (2007)3 refers to the need to develop the “necessary technical resources” to make use of new communications technologies. The same Recommendation notes that while traditional funding sources remain “valid”, complementary funding sources might be considered, such as charging for the more personalised services which these new technologies make possible.⁷³

In terms of remit, Recommendation (2003)9 of the Council of Europe calls for the “special social remit” of public service broadcasters to be preserved in the new digital environment while, at the same time, the mandate should be allowed to adapt to the new environment.⁷⁴ Recommendation (2007)3 suggests that there is a need to reconcile the idea of a clear mandate for public broadcasters with the need to allow them the flexibility to take advantage of changing technological developments.⁷⁵ The same Recommendation suggests that public service media can, among the ever-growing number of different operators that provide broadcasting services to listeners and viewers, “constitute a space of credibility and reliability” and play a “role in bridging fragmentation”.⁷⁶

An interesting idea is the possibility that new technologies have made it easier to provide truly universal services, both in the sense of universal access but also in the more profound sense of programming that responds to the needs of all. Thus, Recommendation 1878 (2009) refers to the idea that public service broadcasters should “utilise new technologies to increase the accessibility of their services and offer new services including interactive and on-demand media services on all available platforms so as to reach all audiences, and in particular young people”.⁷⁷

69 On measures to promote the democratic and social contribution of digital broadcasting, 28 May 2003. Principle 19.

70 Principle 9.

71 Recommendation (2003)9, Principles 21 and 13.

72 Principle 22.

73 Principles 28-30. Recommendation 1878 (2009) also refers to the idea of providing on-demand services, although it is not clear whether it envisages these being used to generate funds.

74 Principle 19.

75 Principle 27.

76 Principles 12 and 13. Recommendation (2003)9 also refers to the idea of public service broadcasters “united society” in light of fragmenting markets.

77 Para. 17.2

The same idea is developed in a significant manner in Recommendation (2007)3. It refers, for example, to the idea that public broadcasters “should be able to offer both generalist and specialised contents and services, as well as personalised interactive and on-demand services. They should address all generations, but especially involve the younger generation in active forms of communication, encouraging the provision of user-generated content and establishing other participatory schemes.”⁷⁸ This suggests that new technologies are actually enhancing these broadcasters’ ability to reach out to the youth. The Recommendation reiterates these same ideas in relation to minorities and older people. Similarly, several of the standards suggest that new technologies should also be used to promote greater access to broadcasting on the part of the disabled. Thus, Recommendation (2007)3 calls for specific measures to improve access by people with hearing and visual disabilities.⁷⁹

Another way in which public broadcasters are being asked to use new technologies to enhance their ability to deliver their mandates is by facilitating “broader democratic debate and participation”. This should not only encourage participation in elections, but also in “decision-making processes and public life in general”.⁸⁰ In short, public broadcasters are being asked to make wide-ranging use of new technologies to facilitate and extend the delivery of their public service remits.

78 Principle 5.

79 Principle 10. See also Principle 8 of Recommendation (2007)3.

80 *Ibid.*, Principles 14-15.

Introduction

Australia has two separate public service broadcasting organizations, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS).⁸¹ The ABC provides information and entertainment services of general interest on both radio and television, while the smaller SBS provides specialised services focused on fulfilling the media needs of Australia's culturally diverse population. Both broadcasters are public corporations operating under Charters enacted by Australia's federal Parliament. While ultimately accountable to the government for the way in which they spend public funds, both the ABC and the SBS are independent of governmental control and enjoy substantial creative and editorial freedom. This section examines the specific services, mandate, governance and financing of both broadcasters separately in turn.

The Australian Broadcasting Corporation

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I. Services Provided

ABC operates a national television network (ABC-TV), available through terrestrial transmission. The system has production facilities and transmission centres in all State capitals, as well as the national capital, Canberra, and the City of Darwin, and reception is available to virtually all Australians. ABC's primary television channel is ABC1, available in both analogue and digital formats. ABC2 is a free-to-air digital channel, while ABC3 is a dedicated digital children's channel and ABC24 is, as the name suggests, a 24 hour news channel, broadcast only in high definition digital format. iView operates over the Internet and allows viewers to catch up on shows they have missed. Local television services are also provided in each State and territory of Australia. All of these television channels are also available through pay TV networks. ABC also operates Australian Network Television, an international service which is available in some 44 countries.

According to the 2009-2010 Annual Report, ABC broadcast a total of nearly 15,000 hours of television on ABC1 and 2, with ABC1 alone broadcasting over 1,000 hours of first-release Australian content. Together, the three television services had a weekly viewership of about 60% of the population, with ABC1 alone reaching about 55% of the public.

ABC Radio runs four national radio networks, Radio National, Classic FM, Triple J and News Network. Radio National is a general service, featuring programmes on the arts, religion, politics, the law, news and current affairs, science and technology, history, health, adult education and social change, economics and international affairs. Classic FM is, as the name suggests, dedicated to classical music. Triple J is a youth network featuring predominantly popular music, but also carrying news and current affairs, comedy

81 There is a third broadcaster which might be considered to be a public service broadcaster, the National Indigenous Television Network (NITV), available via subscription and satellite. Technically, NITV is non-profit company to which the government has made a funding commitment.

and special features. Finally, News Network is a continuous news and current affairs service, with live broadcasts of both Houses of Parliament when they are sitting.

ABC also runs Metropolitan Radio, a network of nine stations, one in each State capital, as well as one in each of Darwin, Canberra and Newcastle, which provide a core service of news, current affairs, talk, information, sport and entertainment programmes. Regional Radio consists of a system of 51 regional radio stations around the country.

ABC's ten digital channels simulcast the four national networks and also carry a number of digital only services such as ABC Dig Music, Jazz, Country, Grandstand Digital and Extra. All but one of the digital services are also streamed online. Radio Australia is an international channel, available in Asia and the Pacific via local rebroadcasts, shortwave, satellite and a network of FM relays.⁸²

II. Public Service Mandate

The Charter of the ABC, set out in section 6 of the 1983 Australian Broadcasting Corporation Act (ABC Act),⁸³ establishes the functions of the Corporation, which are "to provide within Australia innovative and comprehensive broadcasting and television services of a high standard as part of the Australian broadcasting and television system consisting of national, commercial and public sectors." More specifically, the Charter calls upon the ABC to provide broadcasting programmes that "contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of the Australian community," in part by promoting Australian music, drama, and other performing arts. It also requires the ABC to provide educational broadcasts as a substantial component of its programming.

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The ABC has a subsidiary international mandate, (i) to promote and encourage international awareness of Australia, and Australian outlooks on world affairs, by transmitting information and entertainment programmes to foreign viewers; and (ii) to enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs while abroad. In this way, the public service broadcasting organization acts both as a mirror to the nation and as a window for the world into Australian life and culture.

The ABC's Charter defines its role in the context of a broader competitive media environment. To this end, it instructs the Corporation to take account of the broadcasting services provided by the commercial and public sectors of the Australian broadcasting system in formulating its own programming complement. ABC is specifically required to take into account the programming developed by the Special Broadcasting Service Corporation (section 26 of the ABC Act). The Charter also imposes responsibility on the ABC, as the provider of an independent national broadcasting service, "to provide a balance between broadcasting programmes and television programmes of wide appeal and specialised broadcasting programmes and television programmes." Consistent with its public role, the ABC is required to have regard for the multicultural character of the Australian community throughout its operations.⁸⁴

Several more specific requirements in relation to programming are imposed on the ABC. Its enabling statute requires the ABC to develop and maintain an independent service for the broadcasting of news and information, and the ABC is required to broadcast daily, from all of its national radio and television stations, regular sessions of news and information relating to current events within and outside Australia.⁸⁵

82 A comprehensive summary of the ABC's services, mandate, and funding situation may be found at the Corporation's website, <http://www.abc.net.au>. See, in particular, its 2009-2010 Annual Report, available at: http://www.abc.net.au/corp/annual_reports/ar10/.

83 Act No. 6 of 1983. Available at: [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/89AC98A56682BA43CA25718D00237CF6/\\$file/AusBroadCastCorp1983WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/89AC98A56682BA43CA25718D00237CF6/$file/AusBroadCastCorp1983WD02.pdf).

84 Section 6(2).

85 Section 27.

Pursuant to sections 28-29 of the ABC Act, ABC is empowered to maintain orchestras and bands, and to hold public concerts or other forms of entertainment. However, it no longer manages orchestras, of which it had one in each of the main state capitals, as these were divested to a stand-alone operation in 2006. It is also allowed to compile and distribute literary material, films and the like. Sections 25-25B give it wide general powers to conduct its business.

Section 4 of the Parliament Proceedings Broadcasting Act (1946),⁸⁶ requires the ABC to broadcast the proceedings of the Senate, the House of Representatives or a joint sitting of both Houses of the Commonwealth Parliament on such days and during such periods as the Joint Committee on the Broadcasting of Parliamentary Proceedings determines. The proceedings are to be broadcast from medium wave radio stations in each State capital city and Newcastle, and from such other radio stations as may be prescribed. Sections 79A and 79B of the ABC Act also set out a basic framework of rules for broadcasting election materials.

This is a relatively broad mandate, although its references to key public service broadcasting obligations, such as educational programming and nation building, are rather cursory in nature. It is interesting to note the specific reference to ABC within the wider broadcasting ecology, and the requirement for it to tailor its broadcasting based on what other sectors, in particular the commercial sector, is providing.

III. Governing Structure

A. Internal Governance

The ABC Act empowers it to carry out all the functions necessary to the operation of a national broadcaster. Internally, the ABC is governed by a Board of Directors, established by the Act,⁸⁷ which comprises the Managing Director and between five and seven other Directors who are appointed by the Governor-General (in practice the Cabinet). Prior to appointment, the qualifications of potential Directors must be assessed for experience relating to the provision of broadcasting services or in communications or management, expertise in financial or technical matters, and cultural or other interests relevant to the oversight of a public service broadcasting organization.⁸⁸ The Governor-General also identifies one of the non-executive Directors to be Chairperson and another to be Deputy Chairperson.

Directors may resign by notice in writing (section 16). They may be removed for cause, which is defined to include misbehaviour, or physical or mental incapacity. Where a Director becomes bankrupt, fails to comply with his or her obligations, or is absent from three consecutive Board meetings without leave of the Chairman (or the Minister, in the case of the Chairperson), he or she shall be removed by the Governor-General.⁸⁹

Structurally, this system provides few guarantees for the independence of the Board. It is appointment by the government, there are no prohibitions on membership and the grounds for dismissal are broad. At the same time, history, political culture and a strong civil society mean that Boards have proven to be very independent in practice. There is, however, currently legislation before the Federal Parliament to change the selection process for the Board so that appointments will be made by the Minister upon recommendation of an independent board. The proposals bar politicians and advisors from being appointed for five years. One director would also be elected by staff, a situation which was in place prior to 2006.

86 Act No. 20 of 1946. Available at: [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/4B5A1DD14FE49E64CA25712900130E25/\\$file/ParliamentaryProcBroad1946.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/4B5A1DD14FE49E64CA25712900130E25/$file/ParliamentaryProcBroad1946.pdf).

87 Section 7.

88 Section 12.

89 Section 18.

Meetings of the Board are convened by the Chairperson or by the written request of at least four of the Directors (or five, if the total number of non-executive members is greater than six). Quorum is four (or five, if the number of non-executive members is greater than six) and decisions are by majority vote, with the Chairperson having a casting vote (section 22).

According to section 8(1) of the Act, the Board is required “(a) to ensure that the functions of the Corporation are performed efficiently and with the maximum benefit to the people of Australia; (b) to maintain the independence and integrity of the Corporation; (c) to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism,” as well as to ensure that the Corporation complies with the regulatory framework for broadcasting. The Board is also tasked with developing codes of practice for programming and with taking into account any policies provided to it by the Minister which impact on the functions of the ABC.

The Managing Director is appointed by the Board for five years, is eligible for reappointment, and holds office on such terms and conditions as may be set by the Board (section 13). The duties of the Managing Director are to manage the affairs of the ABC, in accordance with any policies determined by or instructions given by the Board (section 10).

Although the formal rules on division of power between the Board and the Managing Director are not very clear or detailed, in practice, the Board restricts itself to an oversight function, leaving more day-to-day and editorial matters to the Managing Director.

B. Regulatory Mechanisms

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The federal government of Australia has jurisdiction over broadcasting, and therefore ultimate legislative control over the ABC. However, the terms of the ABC’s Charter, mandating it to provide comprehensive and independent news and information broadcasting for all Australians, combined with the terms under which Directors of the Corporation are appointed, ensure the ABC a large measure of editorial independence from the government. These provisions are largely respected in practice, and government manipulation of the public service broadcasting organization would violate longstanding customary political norms, even though Australia does not have a constitutionally entrenched bill of rights guaranteeing freedom of expression.

Recently, the High Court of Australia has ruled that the basic democratic institutions of Australia, as established by its constitution, create an implied freedom of political communication, which the elected government cannot abrogate.⁹⁰ Although this judicially created freedom has not been applied in the context of government control over public service broadcasting, it nonetheless introduces a further safeguard for the independence of Australia’s public service broadcasting organizations. As the Board has noted:

Although political control is not presently an issue in Australian broadcasting, fears have been raised that the quality and integrity of the service may be compromised by inadequate funding. The most important lever of power presently, discussed below, is the government’s control over the public grants on which the ABC is dependent.⁹¹

Under section 78 of the ABC Act, the Minister for Communications is empowered to direct the ABC to broadcast certain matters over its national services free of charge if he is of the opinion that this is in the national interest. However, if he does so, the Minister must cause a statement containing particulars of and reasons for the direction to be laid before the Commonwealth Parliament. This is an unfortunate allocation of political power over broadcasting content. In practice, however, it has rarely been used.

90 *Australian Capital Television Pty Ltd. v. Commonwealth of Australia*, (1992) 108 ALR 577, *Nationwide News Pty Lt. v. Wills*, (1992) 108 ALR 681.

91 ABC Board Call for Adequate Base Funding, Media Release, 21 April 1997.

As the national broadcast regulator, the Australian Broadcasting Authority (ABA) also has a limited measure of control over the ABC. Under the Broadcasting Services Act (1992),⁹² the Broadcasting Authority can hear complaints concerning both the ABC and the SBS. This is a procedure of last resort, however, coming into play only if a complaint has first been made directly to the ABC or SBS to the effect that it has contravened an established code of practice and the complainant either has not received an answer within 60 days or has, in his or her opinion, received an inadequate response. Only then may an aggrieved party lodge a complaint with the ABA, which must in turn investigate unless it is satisfied that the complaint is frivolous or vexatious, was not made in good faith, or pertains to a matter that is not covered by a code of practice.

The ABA has limited powers of enforcement when dealing with complaints concerning ABC and SBS. The 1992 Act provides that if, after investigating a complaint, the ABA is satisfied that the complaint was justified and that action should be taken to encourage compliance with the relevant code of practice, the ABA may recommend to the national broadcaster that it comply with the code or take such other action as is suggested, including broadcasting or otherwise publishing an apology or retraction. The ABA has no direct power to enforce compliance with its recommendations. If, however, appropriate remedial action is not taken by the national broadcaster within 30 days, the ABA can report the matter to the Minister, who must ensure that a copy of the report is laid before both Houses of Parliament within seven sitting days.⁹³

In order to have the benefit of additional expert opinion, section 11 requires the Board to establish an Advisory Council to advise it on matters concerning broadcasting and television programmes. Members are appointed at the discretion of the Board, which shall designate a Chairperson and a deputy Chairperson. The Board may also set rules of procedure for the Council. The Council's recommendations are purely for the information and guidance of the Directors, and have no binding authority. The Board can also establish Advisory Councils in relation to any State, Territory or region of Australia.

Pursuant to section 17, where members of an Advisory Council have a direct or indirect pecuniary interest in a matter being considered, they must declare that interest, which shall be recorded in the minutes. In this case, the member shall not be present during any deliberation on, or take part in any decision with respect to, that matter. Rules regarding conflicts of interest for the Board are contained in the Commonwealth Authorities and Companies Act 1997.⁹⁴

Pursuant to section 9 of the Commonwealth Authorities and Companies Act, all companies are required to prepare an annual report. Section 80 of the ABA Act lists a number of specific issues that must be included in the ABC annual report, such as particulars of each broadcast made as a result of a Ministerial direction pursuant to section 78 or otherwise, codes of practice, particulars of any policy presented by the Minister to the Board for consideration, any gift, devise or bequest accepted by the ABC during the year, any advice received from the Advisory Council, an assessment of the extent to which the objectives have been met for that year, a summary of the activities undertaken that year, and particulars regarding any significant changes during the year in respect of transmissions.

IV. Financing

Part IV of the ABC Act deals with financial matters. The ABC is prohibited from broadcasting commercial advertising and, as a result, is largely dependent on parliamentary appropriations.⁹⁵ The Board submits estimates annually of the receipts and expenditure of the ABC for the following fiscal year to Parliament, which then votes an annual allocation to the ABC (section 67). Although the allocation is approved on an annual basis in the budget, it is set for three-year periods in advance through what is called triennial funding. The ABC is not subject to taxation (section 71 of the ABA Act).

92 Act No. 110 of 1992. Available at: <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/3A4FCB890D2293BDCA25776700059F65?OpenDocument>.

93 Broadcast Services Act 1992, sections 150-152.

94 No. 153 of 1997. Available at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/D01E012B7D5A01A3CA256FC3007EE1EF/\\$file/CwIthAuthCompanies1997_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/D01E012B7D5A01A3CA256FC3007EE1EF/$file/CwIthAuthCompanies1997_WD02.pdf).

95 Section 31.

For the fiscal year 2009-2010, the total allocation of funds from government was Aus\$ 915 million (approximately US\$ 895 million), representing some 83% of total revenues. This was specifically allocated for programming (\$731 million) and different forms of transmission (\$184 million). Although the programming funding is largely spent at ABC's discretion, there has been a trend in recent years for Parliament to allocate some of these funds for dedicated projects, such as Australian drama in the 2009 allocation. ABC's own income, mostly from the sale of good and services, was \$185 million, represents the other 17% of its income.

The Special Broadcasting Service Corporation

The SBS is Australia's unique multicultural and multilingual public service broadcasting organization, founded in 1975 to serve Australians of diverse ethnic backgrounds and to promote cultural awareness. The Special Broadcasting Service Act (SBS Act)⁹⁶ establishes SBS as a corporation with a Charter, at section 6, setting out what the Australian people through the Parliament require from their national speciality broadcaster.

I. Services Provided

The SBS operates three television channels, SBS One, SBS Two and SBS HD, which broadcast a combination of purchased and specially produced programming. Half of the SBS's scheduled programming is in languages other than English, and its weekly viewership extends to some eight million Australians.

The SBS also operates one national radio network, two radio stations in the major cities and nine digital channels. It claims to be the most linguistically diverse radio operation in the world, broadcasting in 68 different languages, and broadcasting in a different language each hour. Programmes include news and current affairs, sports coverage, interviews, talkback, documentaries, drama and music as well as information about settlement, employment, health and education services. Programming is also streamed live and on-demand.⁹⁷

II. Public Service Mandate

The SBS's Charter (section 6 of the SBS Act) states that its principal function is to provide multilingual and multicultural radio and television services that inform, educate, and entertain all Australians and, in doing so, reflect Australia's multicultural society. The Charter clearly specifies SBS's public service obligations in the performance of its functions. According to the Charter, the SBS must:

96 Act No. 180 of 1991. Available at: [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/2F8013F942CC76E5CA2571FD0020CC29/\\$file/SpecBroadService91WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/2F8013F942CC76E5CA2571FD0020CC29/$file/SpecBroadService91WD02.pdf).

97 This information is largely drawn from SBS's Annual Report 2009-2010. Available at: http://media.sbs.com.au/home/upload_media/site_20_rand_662398772_sbs_annual_report_2009_10_.pdf.

- (a) contribute to meeting the communications needs of Australia’s multicultural society, including ethnic, Aboriginal and Torres Straight Islander communities; and
- (b) increase awareness of the contribution of a diversity of cultures to the continuing development of Australian society; and
- (c) promote understanding and acceptance of the cultural, linguistic and ethnic diversity of the Australian people; and
- (d) contribute to the retention and continuing development of language and other cultural skills; and
- (e) as far as practicable, inform, educate and entertain Australians in their preferred languages; and
- (f) make use of Australia’s diverse creative resources; and contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the ABC and the public broadcasting sector; and
- (g) contribute to extending the range of Australian television and radio services, and reflect the changing nature of Australian society, by presenting many points of view and using innovative forms of expression.”

As both this mandate and SBS’s actual channels make clear, the broadcaster’s particular niche is to provide programming for and about a wide variety of ethnic and indigenous communities in Australia. While this is somehow inherent or explicit in the mandates of many public service broadcasters, what is unique about SBS is that this is the very core of its mandate, as opposed to just one among many of its obligations.

III. Governing Structure

A. Internal Governance

Internally, the SBS is governed by a Board of Directors, which consists of the Managing Director and between four and eight non-executive Directors.⁹⁸ The latter are appointed on a part time basis, by the Governor-General, for not more than two five-year terms. In appointing non-executive Directors, the Governor-General shall have regard to the need to ensure that the Directors collectively possess an appropriate balance of expertise in the areas required to govern the SBS effectively, including an understanding of Australia’s multicultural society and the needs and interests of the SBS’s culturally diverse audience. The Directors themselves, collectively, are expected to represent a diversity of cultural perspectives. One Director is also expected to have an understanding of the interests of employees. The Governor-General appoints one of the non-executive Directors to be Chairperson and one to be Deputy Chairperson (sections 17-19 and 21, SBS Act).

Directors hold office on terms determined by the Governor-General. As with the ABC Board, Directors may be removed by the Governor-General for misbehaviour or physical or mental incapacity, for missing three consecutive meetings without leave (of the Chairperson for Directors, and of the Minister or the Board for the Chairperson) or for becoming bankrupt. Importantly, where the Minister is of the view that the performance of the Board or the SBS, or of an individual Director, has been “unsatisfactory for a significant period of time”, he or she may order the Governor-General to terminate all or some or one of the non-executive Directors (sections 20 and 27).

As with the ABC, there are limited formal protections against political interference in the appointment of the Board. In the case of SBS, however, the powers of the Minister even extend to the removal of the Board, on the rather vague grounds of unsatisfactory performance, a power which could be subject to serious abuse.

The Chairperson of the Board calls meetings, but must do so at the request of at least five Directors, or four Directors (if there are six or less non-executive Directors). Quorum is similarly five Directors, or four Directors (if there are six or less non-executive Directors). Matters are decided by majority vote, and the Chairperson has a casting vote (sections 38 and 40).

The overall role of the Board is to decide the objectives, strategies and policies of SBS and to ensure it operates efficiently (section 9). More specific powers include to maintain the independence and integrity of SBS, to develop programming policies, to ensure that news is accurate and balanced “over time and across the schedule of programs”, to ensure value for money in SBS activities, to ensure close cooperation with ABC to maximise efficiency, to be aware of and responsive to community needs, to develop policies on the handling of complaints, and to develop codes of practice relating to programming (section 10).

Pursuant to section 46, the Board must develop guidelines on the kinds of community information that SBS will broadcast. According to sections 47 and 48, the Board is required to establish a corporate plan that sets out the objectives of the SBS and outlines its strategies and policies. The corporate plan must also set out revenue, expenditure and borrowing forecasts, performance indicators and targets, and the measures that the Board proposes to adopt to ensure that it is aware of and responsive to community needs and opinions on matters relevant to the Charter. A copy of the corporate plan must be given to the Minister (section 49). Section 51 states that if the Board is of the opinion that matters have arisen which may prevent or significantly affect the achievement of the objectives, strategies, policies, or revenue or expenditure forecast set out in the corporate plan, the Board must notify the Minister immediately, and give reasons for their opinion. Once again we see an larger role for the Minister in an area of governance of a public service broadcaster than would normally be expected.

The Board appoints the Managing Director on a full-time basis for a period of not more than five years, subject to re-appointment, subject to such terms as the Board may determine (sections 28-32). He or she may be removed by the Board if he or she engages in paid employment without the approval of the Board, is absent from duty without leave for 14 consecutive days or for 28 days in any twelve months, or becomes bankrupt (section 37). The role of the Managing Director is to manage the affairs of SBS, subject to any directions given to him or her by the Board (section 15).

As with the ABC, formally, the law provides only an outline of the respective roles of the Board and Managing Director. In practice, however, the Board does allow the Managing Director to run matters on a day-to-day basis.

B. Regulatory Mechanisms

Section 13 of the SBS Act guarantees that the broadcaster is not subject to direction from the government other than as provided for by law. However, the law does give the Minister certain powers over SBS. Pursuant to section 11, the Minister may give written directions to the SBS Board in relation to the performance by SBS of its functions, where this is necessary in the public interest. This power is, however, circumscribed by certain restrictions, in particular that it must not relate to the content or scheduling of programmes to be broadcast. Furthermore, any such directions must be laid before parliament within 15 days.

Section 12 enables the Minister, when he is of the opinion that the broadcasting of a particular matter by the SBS would be in the national interest, to direct the SBS to broadcast that matter from all, or specified, SBS broadcasting stations. In this case, the SBS must broadcast the matter free of charge, and in accordance with the direction issued by the Minister. In this case, the Minister must cause a statement of his or her direction to be laid before parliament within seven days. This is an unfortunate power to be vested in a minister over a public service broadcaster.

Pursuant to section 9 of the Commonwealth Authorities and Companies Act 1997, the Board is required to prepare an annual report to Parliament. Section 73 of the SBS Act lists a number of particulars that must be included in the report, including ministerial directions and any broadcasts made as a result of ministerial directions, gifts, devises and bequests accepted by the SBS during the year, how the programming activities during the year have related to the Charter obligations of the SBS, advice received from the Advisory Committee, an assessment of the extent to which the broadcaster has met its objectives, and the revenue earned from advertising or sponsorship during the year.

The SBS Board is required to establish codes of practice relating to programming matters, and to inform the ABA of them. However, the SBS is not subject to programme standards determined by the ABA. Nevertheless, if a citizen files a complaint on the grounds that the SBS has failed to comply with one of its own codes of practice, and fails to receive a satisfactory response, he or she may lodge a complaint with the ABA. The process is similar to that which applies to the ABC, discussed above.

Pursuant to section 50, the SBS Board is required to establish a Community Advisory Committee to advise it on community needs and opinions, including those of newly arrived ethnic groups, on matters relevant to the Charter. The Board appoints members, who must have an understanding of Australia's multicultural society and, in particular, of ethnic, Aboriginal and Torres Strait Islander communities.

IV. Financing

As with the ABC, the principal source of revenue for the SBS is an annual public grant voted directly by parliament.⁹⁹ Unlike its larger sibling, however, the SBS is permitted to broadcast up to five minutes of commercials per hour as a supplemental source of income. Section 45 of the SBS Act permits the SBS to broadcast advertisements and sponsorship announcements before or after programmes and during natural programme breaks. The Board is required to develop and publicise guidelines on the kinds of advertisements and sponsorship announcements that SBS may broadcast and it may also develop guidelines on other matters relating to advertisements and sponsorship announcements, including placement and duration, and the kind of advertisements and announcements that that may be carried on particular kinds of programmes.

The Annual Report for the year to June 2010, indicates that the SBS received about Aus\$ 207 million (approximately US\$ 205 million) or about 65% of its funding from government sources that year. As with ABC, this is allocated on a triennial basis, but voted in Parliament through the budget annually. The other Aus\$ 107 million of its revenues that year came mainly from advertisements and sponsorship (nearly \$78 million), along with pay TV subscriptions (nearly \$6 million) and production services (nearly \$5 million).

Introduction

Under the Canadian Constitution, broadcasting is a matter of federal jurisdiction given its national significance. The broadcast regulatory regime was placed in proper context by the Federal Court of Appeal when it stated: “[T]he importance of broadcasting to the life of the country is reflected in section 3(b) of the Broadcasting Act, which [provides] that ‘the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fibre of Canada.’”¹⁰⁰

The cornerstone of the regulatory regime is the 1991 Broadcasting Act (the Act)¹⁰¹ which defines the basic mandate and philosophy for broadcasting in Canada, and creates an independent administrative agency, the Canadian Radio-Television and Telecommunications Commission (CRTC), to oversee and administer broadcasting policy. The Act also establishes the Canadian Broadcasting Corporation (CBC) as Canada’s public service broadcaster.

V. Services Provided

The CBC was first created by Parliament in 1936 to provide a national radio service, to some extent in response to fears of emergent American broadcasting growing to dominate the Canadian airwaves. Today, the CBC produces an extensive array of information and entertainment programming on terrestrial and cable television, AM and FM radio, international short wave, satellite and the Internet, available in both official languages, French and English, as well as a variety of indigenous languages.

The CBC presently operates two main television networks, CBC Television in English, and Télévision de Radio-Canada in French, which offer news and general and special interest programmes, two financially self-sustaining cable news and information television networks, CBC News Network in English and RDI (Le Réseau de l’information) in French. These are supplemented by a number of other television services, mostly distributed via cable (cable and satellite penetration in Canada is between 90 and 94 per cent of all households),¹⁰² including ARTV, in French and focusing on arts and culture, bold, in English and offering drama, comedy, performing arts and sports, documentary, in English and offering Canadian and international drama and films, and TV5MONDE, featuring programming in French from 10 partners in different countries, including Radio-Canada.

In terms of radio, the CBC operates a number of national network services in both French and English. These including the premiere channel, Radio One, with a wide programming selection, Radio 2, focusing on jazz and classical and popular music, Première Chaine, with information and cultural programming, Espace musique, with classical music, jazz and emerging music, and Première plus, focusing on news and culture, in partnership with Radio France International. All of these are available digitally via satellite, as well as in analogue on the FM and/or AM bands, and CBC also offers a number of ‘pure’ satellite channels (also available over Internet), such as Radio 3, Band à part and Sports extra.

100 *Re Canadian Broadcasting League and C.R.T.C.*, (1979) 101 DLR (3d) 669 (Fed. CA), p 676.

101 S.C. 1991, c. 11. Available at: <http://laws.justice.gc.ca/PDF/Statute/B/B-9.01.pdf>.

102 See <http://www.cbc.ca/canada/story/2009/06/01/f-digital-tv-transition.html>.

CBC has a wide selection of Internet offerings. Most of its radio channels are also available on the Internet, and it has two dedicated Internet sites with news, information and streamed audio and video, CBC.ca in English and Radio-Canada.ca in French. It also offers a number of French services exclusively over the Internet including TOU.TV and radio channels Espace classique, Espace jazz and Espace monde.

In order to serve the unique needs of the geographically remote northern regions, the CBC provides radio and television services to the North in English, French and eight aboriginal languages. The CBC also broadcasts two international short-wave services (also available over Internet and satellite) known as Radio Canada International and RCI Plus, which provide programming in seven languages to worldwide audiences.

VI. Public Service Mandate

The public service mandate of the CBC is set out at section 3(1)(l) and (m) of the Act. The national public service broadcasting organization is established to, “provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains.” More specifically, the programming provided by the Corporation should:

- (i) be predominantly and distinctly Canadian,
- (ii) reflect Canada and its regions to national and regional audiences while serving the special needs of those regions,
- (iii) actively contribute to the flow and exchange of cultural expression,
- (iv) be in English and French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,
- (v) strive to be of equivalent quality in English and French,
- (vi) contribute to shared national consciousness and identity,
- (vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and
- (viii) reflect the multicultural and multiracial nature of Canada.+

For its part, the CBC describes its mission as “the telling of Canadian stories and the reflection of Canadian realities.” In furtherance of its mandate to inform Canadians on matters of public importance, the CBC has formulated a Journalistic Standards and Practices¹⁰³ which governs its news and current affairs programming, and is intended to guarantee that the corporation lives up to its “duty to provide consistent, high-quality information upon which all Canadians may rely.” The CBC’s corporate goals are also informed by its role as a public service broadcasting organization and it continues to insist that its schedules be driven by considerations of public service rather than market imperatives.¹⁰⁴

103 Available at: <http://www.cbc.radio-canada.ca/docs/policies/journalistic/>.

104 CBC materials available through their Internet site, <http://www.cbc.ca>.

VII. Governing Structure

The CBC is a crown corporation, wholly owned by the Canadian government. This means that the federal government controls the terms and conditions of the CBC's existence and operation through its legislative authority. Since it is a creature of statute, the CBC does not have a share structure, and its governance is based not primarily on general companies legislation, but rather on the specific terms of the Act which delineate its structures of corporate governance, as well as the terms of the Financial Administration Act.¹⁰⁵

Despite the fact that the CBC is accountable, through the Minister, to Parliament for the conduct of its affairs (section 40), and the broadcaster's substantial financial dependence on the public purse, the CBC is firmly independent. CBC journalists are often at the forefront of critical investigations into the conduct of government and politics. This independence is not merely a product of fortunate happenstance, but is clearly established in the Act. Most importantly, section 35(2) states that the part of the Act dealing with the CBC, "shall be interpreted and applied so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers."

This is supported by a number of other references in the Act. For example, section 46(5) states: "[T]he Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence." Section 52(1) states:

Nothing in sections 53 to 70 [dealing with financial matters] shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

Section 52(3) makes it very clear that CBC is not required to submit information to either the Treasury Board (the only statutory Cabinet committee, which is in charge of the civil service and important parts of governmental activity) or the Minister if doing so would undermine its independence or freedom of expression.

Furthermore, pursuant to section 44(3) of the Act, the officers and employees of CBC are not to be considered as officers or servants of the government. In considering whether the CBC constitutes a branch of government for the purposes of being bound by the *Charter of Rights and Freedoms*, the Alberta Court of Queen's Bench made the following observations as to the broadcaster's independence:

Even in respect of financial matters dealt with in ss. 53 to 70 of the Broadcasting Act, Parliament has taken great pains to ensure that the CBC functions as an autonomous body within its mandate. Parliament in its wisdom enacted in 1991 specific provisions aimed at protecting the journalistic, creative and programming independence of the C.B.C. parliament recognized that the broadcast media must be free from government interference – a touchstone of a democratic society.¹⁰⁶

As discussed below, Cabinet has the power to appoint the CBC's Directors, and so some form of party patronage cannot entirely be ruled out. However, in practice, political interference by the Directors in the work of the organization would be inconsistent with the spirit and probably also the letter of both the Act and the Canadian Charter of Rights and Freedoms. It would also provoke widespread public and political outrage.

¹⁰⁵ R.S. 1985, c. F-11. Available at: <http://laws.justice.gc.ca/PDF/Statute/F/F-11.pdf>.

¹⁰⁶ *National Party of Canada v. Canadian Broadcasting Corporation*, (1993) 106 DLR (4th) 568 (Alta. QB), pp. 572-573, affm'd (1993) 106 DLR (4th) 575 (Alta. CA).

C. Internal Governance

A Board of Directors of up to twelve members, comprised of prominent citizens from the fields of law, medicine, accounting, business and the arts, representing all regions of the country, is charged with principal oversight of the CBC's performance. Directors are appointed by the Governor in Council (the federal Cabinet) for up to two consecutive five-year terms, after which they may not be reappointed for at least twelve months. All Directors, including the Chairperson and the President, who are also named by the Governor in Council, hold office during good behaviour, and may only be removed for cause (section 36).

As with private corporations, Directors owe an obligation of good faith and due diligence to the CBC and its public service mandate, not the interests of the government. They are required to swear an oath of commitment to the office. They are also not permitted to have outside activities or dealings in the broadcasting industry – whether of an employment or ownership nature – which might give rise to conflicts with the CBC's interests. Where they become owners of such an interest through a will or by succession, they must rid themselves of that interest within three months (sections 37-38).

As with broadcasters in some other established democracies, the law provides only very weak structural guarantees to protect the independence of the Board. There is no requirement of public consultation, the grounds for removal are extremely vague and, apart from rules on conflict of interest, there are no prohibitions on politically connected individuals from being appointed. In practice, however, the Board has generally demonstrated strong independence from government where this has been relevant.

Pursuant to section 45 of the Act, the CBC is required to establish standing committees on both English and French language broadcasting.

The Board bears overall responsibility for the management of the businesses, activities and other affairs of CBC (section 39). The Chairperson of the Board presides over meetings, which shall be held at least six times per year, and serves on a part-time basis (sections 41 and 50). Section 51 gives the Board the power to adopt by-laws, among other things for setting the fee for Directors other than the Chairperson and President, respecting the conduct of meetings, and governing the duties and conduct of directors, officers and employees.

The President, who serves on a full-time basis, is the chief executive officer of the CBC and, as such, supervises and directs the work and staff of the Corporation. The Chairperson and President are paid at a rate fixed by the Governor in Council, while other Directors are paid for attending meetings at a rate fixed in the by-laws (sections 42-43).

In practice, editorial control rests with the President while the Board plays a more oversight role, even if this is not spelt out in the law.

As a matter of company policy, the CBC retains an internal Ombudsman, fully independent of the Corporation's management, to review serious unresolved public complaints related to the discharge of its mandate. The Ombudsman reports directly to the President, and does not possess any statutory or otherwise binding authority, but this office serves as an effective means of resolving many complaints.

D. Regulatory Mechanisms

As a corporate entity, the CBC is bound by laws of general application which relate to its operations. Three bodies, however, have a specific measure of control over the CBC, Parliament, the CRTC and the Cabinet. Since Parliament has the jurisdiction to regulate the broadcast system, it has the prerogative to establish general principles relating to this field.

The Act also makes the CBC formally accountable to Parliament for the conduct of its affairs,¹⁰⁷ and specifies, at section 71, that the CBC shall submit an annual report to Parliament, through the Minister, on its operations. The annual report must include the financial statements of the CBC and the auditors report, required, respectively, by sections 131(4) and 132 of the Financial Administration Act, a statement on the extent to which the Corporation has met its objectives for the year, quantitative information on the performance of the Corporation and such other financial information as the Minister may require. The Minister is also required to lay the summary of its corporate plan and proposed budget, which the Corporation is required to prepare, before Parliament (section 55(5)).

The CRTC, Canada's general broadcast regulator, is an independent agency, vested with administrative and quasi-judicial authority,¹⁰⁸ operating at arms-length from government and reporting directly to Parliament through the Minister. Its mission statement declares its purpose to be "ensuring that Canadian communications contribute fairly and equitably to Canada's economic, social and cultural prosperity through regulation, supervision and public dialogue."¹⁰⁹ The CRTC consists of thirteen full-time and six part-time commissioners, appointed by Cabinet for renewable five-year terms. Its task is to "regulate and to supervise all aspects of the Canadian Broadcasting system with a view to implementing the broadcasting policy,"¹¹⁰ and it is required to meet at least six times per year.

Under section 28 of the Act, the Cabinet has the power to override CRTC decisions.¹¹¹ The Act specifies that the Cabinet can only take such action if it is satisfied that the decision derogated from the attainment of the policy objectives for the Canadian broadcasting system set out in the Act. This provision imposes an obligation on the Cabinet to observe certain principles of natural justice and substantially fetters what would otherwise be a purely discretionary decision-making power. Section 28(5) of the Act requires that the Cabinet to produce reasons for overturning a CRTC licensing decision. In practice, it is rare for Cabinet to override a CRTC decision and this almost never directly affects CBC.

The CRTC has no power as a censor of specific CBC programmes, or those of any other broadcaster, but sets overall standards by issuing, renewing and even revoking broadcast licenses, consistent with the purposes of the Act and the public interest. The CRTC may also issue guidelines and statements, which are not necessarily binding but provide guidance to broadcasters.¹¹² The CRTC consults widely in its work, receiving submissions from individual citizens on the past performance of broadcasters, including the CBC, as well as the need and desire for future services. Indeed, pursuant to section 18 of the Act, the CRTC is required to hold public consultations in the case of license applications and renewals.

In theory, the CBC is treated like a private broadcaster by the CRTC, and it remains accountable to the Commission for its licensing and renewals. Importantly, however, no licence issued to the CBC may be suspended or revoked by the CRTC except on application by, or with the consent of, the CBC.¹¹³ Furthermore, the Act enables the CBC to request a consultation with the CRTC if the Commission proposes to attach any conditions to one or more of the CBC's broadcast licenses. If the CBC is satisfied that these conditions would unreasonably impede its operations, it may refer the condition to the Minister for consultation and the Minister may order the Commission to remove the condition (section 23). As a result, the CBC's appearance before the CRTC for periodic license renewals is largely *pro forma*, although it serves the useful purpose of exposing the CBC's senior management to public scrutiny, accountability and criticism.

107 Section 40

108 Pursuant to section 17 of the Act, the CRTC has the authority to determine questions of fact or law in relation to matters within its jurisdiction, which creates a certain accountability of the CBC before the Commission.

109 CRTC public information materials. Available at: www.crtc.gc.ca.

110 The Act, section 5.

111 The Cabinet must refer the impugned decision back to the CRTC for reconsideration before finally vetoing it. See, for an article on a related topic, D. Kaufman, "Cabinet Action and the CRTC: An examination of section 23 of the Broadcasting Act" (1985) 26 *Les Cahiers de Droit* 841.

112 Section 6.

113 Section 24.

The CBC's relative immunity from the CRTC's jurisdiction is tempered by the power of the Commission, under section 25 of the Act, when it is satisfied that the CBC has contravened or failed to comply with any condition of a licence, order, or regulation, to address a report to the Minister, who will provide a copy to each House of Parliament.

The Cabinet and/or the Minister also wield some power over CBC. Pursuant to section 26(1)(b) of the Act, the Cabinet may issue directions to the CRTC respecting the reservation of channels or frequencies for the use of the CBC. The CBC is also subject to the Cabinet's discretionary power to issue orders, through the CRTC, directing all or some broadcast licensees to broadcast a specific programme deemed to be of singular public importance.¹¹⁴ Pursuant to section 71(1), along with the Minister and Parliament, Treasury Board receives a copy of CBC's Annual Report.

Although a power vested in political figures to require messages to be broadcast by the public broadcaster is not uncommon, it is both unnecessary and unfortunate. Given the responsible public role of modern public broadcasters, there is simply no need for this sort of power. And yet it remains potentially open to political abuse.

An important area of ministerial powers is in relation to oversight of CBC's finances. Pursuant to section 54 of the Act, CBC is required annually to submit a corporate plan to the Minister, which encompasses all of the businesses and activities of the Corporation. The plan shall include a statement of the objects of the CBC, its objectives for the next five years and for each year within that, along with its strategy to achieve them, its expected performance, its proposed capital and operating budgets. The capital budget must be submitted to Treasury Board for approval.

VIII. Financing

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CBC is primarily financed by public funds, provided in the form of a direct annual grant. It submits a yearly corporate plan to the Minister, which includes the proposed budget of the Corporation for the following fiscal year. This budget may then be approved or amended by the Treasury Board and subsequently Parliament. Once the estimates for a financial year have been approved, the CBC submits a summary of the corporate plan, modified to accord with the actual funding which it has been allocated (section 55 of the Act).

In the fiscal year ending on 31 March 2010, public funding for CBC amounted to CND 1,143 million (approximately USD 1,124 million), or about 64% of its total expenses for that year, mostly in the form of approved annual funding (CND 957 million). A further CND309 million, or about 17% of overall funding, came from advertising revenues, with smaller amounts coming from other commercial sources such as subscriptions (CND 144 million) and services and rental of property (CND 107 million).¹¹⁵

These levels are not fixed, and in fact, the level of public funding has fallen significantly since the early 1990s. Friends of Canadian Broadcasting, a public-interest advocacy group concerned with "the quality and quantity of Canadian programming in the Canadian audio-visual system," suggests that, in real terms, funding for CBC has fallen from about CND 1,602 million in 1990-91 to CND 1,090 in 2010-11, a drop of about 32%.¹¹⁶ With the current climate of fiscal restraint in Canada, as in most of the developed world, further cuts, at least in real terms, may be expected.

114 Section 26(2). An order of this sort has to be laid before each house of Parliament within fifteen days of its having been made.

115 See the Annual Report 2009-2010.

116 See the Friends Of Canadian Broadcasting website at <http://www.friendscb.org> and specifically at: <http://www.friends.ca/fact-sheet/238>.

Introduction

In France, unlike in many jurisdictions, the main public service broadcasting is delivered by two separate undertakings, one for television and one for radio. These are established and regulated by the 1986 Law relating to freedom of communication¹¹⁷ (1986 Law). The main regulatory body, the Conseil supérieur de l'audiovisuel (CSA), is an independent statutory body (autorité administrative indépendante), established under a 1989 Law.¹¹⁸ Laws governing broadcasting are subject to Article 11 of the Declaration of the Rights of Man of 1789,¹¹⁹ which guarantees freedom of dissemination of thought and opinion. The Conseil constitutionnel (Constitutional Court) has applied Article 11 to broadcasting regulation on a number of occasions, modifying or striking out inconsistent provisions.

There have been a number of important changes to broadcasting in France recently. Between 1945 and 1982 the State had a complete monopoly over the broadcasting sector.¹²⁰ Until 1964 the government exercised direct control over broadcasting and it was only in 1982 that value of regulatory independence was formally and practically recognised with the establishment of an independent regulatory authority. Broadcast regulation became a bit of a political football as the Chirac government substantially amending the mandate of the regulatory body in 1986, and the Rocard government in turn established the CSA in 1989, which remains the main regulatory body for broadcasting today. Both the 1986 and 1989 laws were challenged before the Constitutional Court, which recognised the constitutional principle of pluralism of sources of information and held that specific provisions of these laws needed to be assessed against this principle. In both cases, a number of changes to the laws were required.¹²¹

Until 1974, public broadcasting in France was undertaken by a single government office. In that year, the institution was divided into seven separate “national programming companies”, each responsible for a different activity. Amendments to the 1986 Law introduced in 2000 consolidated these into the two main public service broadcasters, France Télévisions and Radio France. These are supplemented by L'Audiovisuel extérieur de la France (AEF), in charge of France's international broadcasting, ARTE-France, La Chaîne parlementaire and L'Institut national de l'audiovisuel.

IX. Services Provided

France Télévisions runs five main channels, with a claimed total daily audience of four out of ten French citizens, as follows:

- France 2, its leading channel, with a mandate to provide general television programming throughout the whole metropolitan territory.

117 Law No. 86-1067 of 30 September 1986, as subsequently modified. Available online, in French, at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930&dateTexte=20101203>.

118 Law No. 89-25 of 17 January 1989. The changes introduced in 1989 were incorporated into the 1986 Law. References to the 1986 Law will be as amended.

119 Affirmed in the Preamble to the Constitution of the Fifth Republic (1958).

120 Private radio broadcasters did exist prior to the war.

121 See Decision 86-217 of 18 September 1986 and Decision 88-248 of 17 January 1989.

- France 3, made up of a network of regional stations, which carries both national programming and a significant complement of regional programming for and about the regions.
- France 4, available only in digital format, which aims at an audience of 15-34 years, and specialises in innovative programming and entertainment.
- France 5, described as the channel of discovery and learning.
- France Ô, operating in the French overseas departments and territories, as well as in metropolitan France, which aims to share culture and news from around the world.

France Télévisions also holds interests in a number of thematic cable and/or satellite channels, as well as ARTE-France and AEF.

Radio France provides a number of radio channels, including:

- France Inter, the flagship channel, offering general programming including information, debate, entertainment and culture, which claims to reach five and one half million listeners daily.
- France Info, an information channel, reaching five million listeners daily.
- France Culture, billed as the space for all knowledge, including science, philosophy, literature and global politics.
- France Musique, focusing on classical music.
- France Blue, a network of 42 local radio stations, mirroring life in the regions and with a cultural and historical slant.
- FIP (France Inter Paris), a space for innovative and alternative music.
- Le Mouv, a rock music station.

For its part, AEF describes its mission as coordinating French broadcasters which operate internationally. A key driver for AEF is as an anchor for France's international cultural diplomacy. This includes France 24, a 24-hour news channel that operates simultaneously in French, English and Arabic and is available in 160 countries globally, Radio France International (RFI), an international radio channel, TV5Monde, a global generalist television channel, and Monte Carlo Doualiya, an Arabic language affiliate of RFI, covering mostly the Middle East. These channels work in synergy with each other, for example by loaning each other reports produced by journalists of the other channels so as to extend their global coverage. For example, France 24 routinely hosts RFI radio journalists reporting on a region of the world where it does not have its own reporters.

France Télévisions, Radio France and AEF are all established by Article 44 of the 1986 Law, which refers to them together as "les sociétés nationales de programme mentionnées à l'article 44" (the national programming companies mentioned in Article 44). This is important because there are frequently collective references to the obligations of these companies (as reflected in this chapter).

ARTE-France is part of a French-German cooperative project, along with ARTE Deutschland, which provides bilingual (French and German) cultural and European programming.¹²² To some extent, the ARTE project can be seen as an exercise in public diplomacy aimed at improving and strengthening relations with Germany

The 1986 Law also establishes La Chaîne parlementaire, responsible for providing coverage of the National Assembly and Senate.¹²³ Finally, maintenance of, and access to, archives is, pursuant to Article 49, the responsibility of the Institut national de l'audiovisuel (INA), also a public company.

¹²² Article 45 of the 1986 Law.

¹²³ Article 45-1 to 45-3 of the 1986 Law.

X. Public Service Mandate

The notion of even commercial broadcasting as a public service rather than simply a commercial exercise is still very strong in France. Article 1 of the 1986 Law guarantees the freedom of all broadcasters, largely in line with Article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression.

Many of the public service obligations established by the 1986 Law are imposed on both private and State-funded broadcasters. For example, Article 13 tasks the CSA with ensuring pluralism in broadcasting, in particular in relation to news and current affairs. Article 14 strictly forbids political advertising, while Article 14-1 allows the CSA to set clear rules regarding product placement, which may never undermine editorial independence or be designed to directly promote the sale of goods or services. Article 15 makes the CSA responsible for ensuring that programmes broadcast by either public or private companies do not harm children or adolescents, or incite to hatred or racially motivated violence. Télévision française 1 (TF1), a formerly public channel which was privatised in 1986 and remains the leading channel, is subject to particularly stringent public service obligations.¹²⁴

The main public service obligations for the Article 44 companies and ARTE-France (established by Article 45) are set out in Article 43-11. Taken together, their programming must be diverse and pluralistic, of high quality and innovative, and respect human rights and democratic principles as defined in the Constitution. They must present a range of programming in the areas of information, culture, knowledge, entertainment and sport, and favour democratic debate, exchanges between different parts of the population, and the promotion of social values, national cohesion, cultural diversity, citizenship and the fight against discrimination.

At the same time, programming should represent the diversity of French society and culture, and promote the French language and, as appropriate, regional languages. It should project the Francophonie and French culture to the world. It should also contribute to developing and disseminating artistic and intellectual work, and fostering civil, economic, social, scientific and technical understanding, and an understanding of foreign languages, the environment, sustainable development and media literacy.

Overall, these companies must ensure that their work is honest, independent and pluralistic, and respects equality of treatment. They must also explore new ways to enrich their programming, along with new techniques for production and dissemination of broadcasting. Pursuant to Article 16 of the 1986 Law, the CSA fixes the rules governing election programming by Article 44 companies.

More specific rules for each of the public service broadcasters are set out in the provisions under which they are established (i.e. mostly under Article 44), as well as in their individual *cahier des charges*, or Charters, which are adopted by decree (see below). For example, pursuant to Article 44(I), France Télévisions must provide programming of a national, regional and local nature, through several services, including on demand services. It is specifically tasked with developing digital technologies. Reference is made several times to both respecting editorial independence and to promoting diversity in both the creation and production of audiovisual works. It must produce programming reflecting the economic, social, cultural and religious life of the regions, and disseminate this in the regions and nationally, throughout its schedule, including during peak hours. Article 56 also provides that France Télévisions must provide religious programming for all of the main religions practised in France on Sunday mornings. These programmes must be developed in consultation with religious leaders.

The specific obligations for Radio France in the 1986 Law are far less detailed, but include producing national and local programming, and promoting cultural heritage, artistic creativity and musical innovation. AEF, for its part, is tasked with promoting French language and culture abroad, as a part of France's public diplomacy efforts.

The mandate of La Chaîne parlementaire is to cover the work of the National Assembly and Senate, to raise awareness about how they function and about citizens in public life, and to promote public debate about

124 See, in particular, Articles 62 and 64 of the 1986 Law.

their work, while respecting the range of parties represented in these bodies. It should, in its programming, promote social cohesion, cultural diversity and the fight against discrimination, and reflect overall French society. It must also protect its editorial independence and the impartiality of its programming.¹²⁵

INA is established by Article 49 of the 1986 Law, which describes its mandate as being to conserve and develop the national audiovisual heritage, in particular through maintaining the audiovisual archives of the Article 44 companies, and promoting their exploitation. INA is very active in promoting these materials and has a very sophisticated website containing extensive archival material that can be browsed online.

XI. Governing Structure

E. Internal Governance

The Article 44 programming companies all have the same status. They are subject to the relevant body of commercial law as *sociétés anonymes* – except inasmuch as those laws conflict with the 1986 Law, for example concerning structure and capital requirements – and the State is the only shareholder.¹²⁶

Cahier des charges, or charters, set out in detail the programme obligations of these companies, particularly as this relates to their educational, cultural and social missions. Where a company operates more than one channel, a separate charter must be adopted for each. These charters are fixed by decree, adopted by the Prime Minister upon the advice of the CSA, and they have the status of secondary legislation or regulations. Both the charters and the CSA advice relating to them must be published in the *Journal officiel de la République française*, the equivalent of an official gazette.¹²⁷

The various charters are broadly similar in nature, taking into account the different mandates of the various national programming companies, and represent for the most part an elaboration of the obligations set out in the 1986 Law. For example, the charters approved by decree on 16 September 1994 for France 2 and France 3¹²⁸ require those channels to ensure the provision, to all sectors of the public, of information, cultural and entertainment programmes, according to their respective mandates. These charters also elaborate a number of general programme obligations, requiring France 2 and 3, for example, to protect children and teenagers, promote honesty, independence and pluralism, particularly for news and political programmes, respect the principle of equality, human dignity and the recommendations of the CSA, and contribute to the promotion of French language and culture. The charters also specify in some detail a number of obligations provided for in the 1986 Law, for example regarding government messages, electoral campaigns, parliamentary debates, opinions by trade unions, religious programmes and special programmes of an educational or social nature.

The 1986 Law also provides for the establishment of Boards of Directors (*conseils d'administration*) for the Article 44 programming companies. The chair of all three companies is appointed for five years by decree, upon the advice of the CSA and of the parliamentary committees at the National Assembly and Senate dealing with cultural affairs.¹²⁹ There is normally a very heated, and often quite political, public debate about who should be appointed as chair. Article 47-5 of the 1986 Law provided that chairs might be removed by a decree setting out reasons, upon the advice of both the CSA, adopted by a majority of its

125 Articles 45-1 and 45-2 of the 1986 Law.

126 Article 47 of the 1986 Law.

127 Articles 46 and 48.

128 Décret n° 94-813 du 16 septembre 1994 portant approbation du cahier des missions et des charges de la société France 2 and Décret n°94-813 du 16 septembre 1994 portant approbation du cahier des missions et des charges de la société France 3. Both available at: <http://charte.francetv.fr/>.

129 Article 47-4 of the 1986 Law.

members and also with reasons, and the relevant parliamentary committees. This was, however, held to be unconstitutional by the Constitutional Court in 2009.¹³⁰

For France Télévisions and AEF, the board consists of the chair and 14 other members, also appointed for five years. The two relevant parliamentary committees each appoint one parliamentarian to the board, the State (government) appoints five members, five independent members are appointed by the CSA (of which, in the case of AEF, at least one must have expertise on the Francophonie) and there are two representatives from staff.¹³¹ The Radio France board has 12 members in addition to the chair, namely two parliamentarians, four State representatives, four independent members appointed by the CSA and two staff representatives (Articles 47-1 to 47-3 of the 1986 Law). The board of the INA is similar to that of Radio France (Article 50).

It may be noted that these structures are not particularly well-suited to guaranteeing the independence of these public broadcasters. It is, in particular, problematical that the government appoints the chair and so many of the members. The important role of the CSA in appointing members is also problematical, given the weak guarantees of the independence of that body (see below).

F. Regulatory Mechanisms

Three bodies exercise some regulatory authority over public service broadcasters in France, parliament, the government (executive branch) and the CSA. Parliament has overall authority for the legal framework for broadcasting and it may determine the manner of broadcast of parliamentary debates on France Télévisions (Article 55 of the 1986 Law). Parliament also exercises considerable financial power over the public service broadcasters (see below).

An important source of government regulatory authority over broadcasters is its power to issue various decrees, such as those establishing the charters, noted above. A number of the specific public service obligations noted above are elaborated upon by executive decree, including regulations regarding advertising and the broadcast of French programmes during peak hours.

Pursuant to Article 53 of the 1986 Law, the Board of Directors of all five of the public broadcasters described in this chapter are required to agree contracts of objectives and means ('contracts d'objectifs et de moyens') with the State which are to last for between three and five years. The Law includes a long list of the items to be included in these contracts, such as developmental priorities, commitments regarding diversity and innovation, minimum investments in original, European and film productions, commitments to make programming available to the disabled, various financial matters, and quantitative and qualitative indicators for the achievement of the above.

These contracts must be put before the committees on culture and finance of both houses of parliament. The committees may call for a parliamentary debate on the proposed contracts or provide their recommendations on them. Importantly, the public broadcasters are all required to report annually to parliament, specifically to the committees on culture and finance in each house (and the committee on foreign affairs in the case of AEF) on the manner of execution of these contracts.

The development and adoption of these contracts once again creates a risk of government interference in the work of these public service broadcasters. Although somehow subject to parliamentary oversight, the role of the government here is still very significant.

Pursuant to Article 54 of the 1986 Law, the government may also require the Article 44 companies to broadcast any declaration or communication it deems necessary. Furthermore, a decree fixes the obligations of these companies to disseminate messages as required to protect national and public security, and government communications in emergencies. While many public broadcasters are required

130 Decision No. 2009-577 DC of 3 March 2009.

131 Who must be appointed in accordance with the provisions of Law No. 83-675 of 26 July 1983, which sets out detailed rules on this.

to carry some government messages, this is bad practice and very few laws give such extensive powers to government in this regard as that of France.

The CSA is the main regulatory body for both public and private broadcasters. As noted above, the present body was established by amendments to the 1986 law introduced in 1989. Its independence is guaranteed by Article premier and an attempt has been made to provide structural guarantees for that independence. It is composed of nine members, appointed by the President of the Republic but nominated in equal proportion by the three Presidents of the Republic, National Assembly and Senate respectively. The term of office is six years and may be neither renewed nor abrogated. The President of the CSA is designated by the President of the Republic.¹³² Once again, the structural guarantees of independence are weak and, should one party control all three appointing bodies, it would exercise considerable potential power over the CSA. Furthermore, this is a real threat in practice, given that the process of appointments is not open and involves little external participation.

Pursuant to Articles 5 and 8, members of the CSA are subject to strict conflict of interest and professional secrecy rules which prevent them from engaging in activities deemed incompatible with their mandate (for example, holding elected office) or expressing their opinion on matters which have been or are being considered by the CSA. The CSA is funded entirely out of the State budget.¹³³

The CSA has a range of powers regarding public service obligations, the content of the charters and the appointment of chairs of the Boards, noted above. The CSA also has the direct power to establish rules regarding broadcasting during election periods and messages relating to health.¹³⁴ The CSA has developed very specific rules about how much time must be allocated to each party relative to the others and these rules are strictly enforced during election time, when the CSA actually does a per-minute count. It also has the right to be consulted on a number of issues noted above under public service role such as the rules regarding advertisements. An attempt in 1989 to give the CSA significant powers over advertising and sponsorship was ruled unconstitutional.¹³⁵

42

Article 18 of the 1986 Law requires the CSA to address an annual report to the President, the government and the parliament. The report must contain information concerning its activities, the way the law has been applied and the extent to which public service broadcasting organizations have respected their obligations. The report may also recommend modifications of a legal or regulatory nature and formulate observations on the way the license fee and advertising revenue is shared between the various public service broadcasting organizations.

Amendments to the 1986 Law introduced in 1994 considerably enhanced the CSA's enforcement powers over public service broadcasters.¹³⁶ It may now order them to conform to their legal obligations, provided than any such order must be made public. Where such an order or the law have not been complied with, and a warning has been issued, the CSA may suspend a portion of the programme for up to one month or impose a fine, for which a maximum is set as a percentage of revenues (see Article 42-2). It may also order the broadcaster to broadcast a message to the effect that they have breached their obligations. Refusal to do so may lead to a fine. The broadcaster can appeal such CSA decisions to the Conseil d'Etat within two months.¹³⁷ In practice, the CSA does often impose sanctions, including suspensions, on broadcasters, albeit not necessarily public service broadcasters.¹³⁸

Article 46 of the 1986 Law requires France Télévisions to create a programme council composed of viewers to provide it with advice on its programmes. The President of France Télévisions must detail the activity of this council in its annual report to the National Assembly and Senate. This is useful but more could be

132 Article 4.

133 Article 7.

134 Articles 16 and 16-1.

135 Decision 88-248 of 17 January 1989.

136 Law No. 94-88 of 1 February 1994.

137 Articles 48-1 to 48-10 of the 1986 Law.

138 See, for example: http://www.lepost.fr/article/2010/10/27/2283452_csa-vs-difool-la-sanction-de-skyrock-est-confirnee-par-le-conseil-d-etat.html.

done to ensure that these councils are sufficiently independent of France Télévisions itself to ensure that they can do their jobs properly.

XII. Financing

France is bucking the trend in terms of funding for public broadcasting, by increasing public funding and decreasing advertising revenues. Starting in 2000, France Télévisions was largely banned from carrying advertising between the hours of 8pm and 6am, and the rule will be extended to the entire day with the switch-over to digital or at the latest by 30 November 2011. The changing funding structure of France Télévisions over the last few years is shown in the table below. By 1 May 2011, at the latest, the government is required to submit a report to parliament evaluating the impact of this rule on advertising overall and on other television companies (Article 53 of the 1986 Law).

The primary source of funding for public service broadcasting organizations in France is the annual licence fee paid by TV owners, currently about Euro116 per year. This is, however, increasingly supplemented by direct public transfers, in part to offset the increased public funding required for France Télévisions due to the decrease in advertising revenues. The vast majority of the remaining revenue comes from a combination of advertising and sponsorship of programmes, and public broadcasters also sell audio-visual works to which they have the rights.

Parliament sets the rate of the license fee each year and also approves the distribution of this fee among the various public broadcasters and INA. This distribution should take into account the proposed budget and resources of the company, the effort made to promote production and the public service obligations being undertaken (Article 53 of the 1986 Law).

France Télévisions' Budget by Source

	2007	2008	2009	Difference 2007-09
Public Sources	1880	1945	2412	28%
Advertising and sponsorship	821	619	431	(48%)
Other	316	278	293	(7%)

Introduction

Japan's public service broadcasting organization, Nippon Hōrō Kyōkai, or NHK, traces its roots to 1926, when it was created out of three city-based radio broadcasters. It lists its first broadcast as being on 22 March 1925, as a radio broadcast by the Tokyo Broadcasting Station. Its first television broadcasting was started in 1953.

Since then, it has grown into one of the world's best-funded public service broadcasting organizations, with the total income for fiscal year 2010 expected to reach 679 billion yen or nearly US\$8.4 billion. NHK currently operates as a classical public service broadcasting organization, as established pursuant to the Broadcast Law of 1950, as amended.¹³⁹

NHK has fully embraced digital television and radio, and is set for the switch-off of analogue television broadcasting scheduled for July 2011. Japan has pioneered its own digital technology, ISDB-T, which is claimed to be well suited to mobile digital services. NHK already offers services over "One-Seg" (short for One Segment), which are aimed at mobile phones and car navigation systems.

XIII. Services Provided

NHK operates five national television services, two broadcast terrestrially and three via satellite, and three national radio services. The two terrestrial television services are General TV and Educational TV. The former, the heart of NHK's television service, presents a mix of news, education, culture and entertainment programming. In 2010, the breakdown was approximately 46% news, 10% education, 23% culture and 20% entertainment, a very strong public interest mix (i.e. with entertainment having a relatively modest share). The other terrestrial channel, Educational TV, provides mainly educational (83%) and cultural (15%) programming, consistent with its title.

The three other television services are subscription satellite services. BS-1 focuses heavily on news, at 52%, followed by culture (24%) and education (14%), with entertainment last, at 8%. BS-2 is more oriented towards entertainment (25%) but still carries more both educational (31%) and cultural (25%) programming. Hi-Vision is a high-definition sound and picture service, which focuses heavily on culture (nearly 50% of its fare) and entertainment (27%). As these breakdowns show, public television in Japan remains very public interest oriented, more so than in most other countries.

From among the national radio channels, Radio 1 focuses on news, current affairs and practical information (52%). It prides itself on providing up-to-date news services and on being flexible enough to respond rapidly and effectively to disasters and other emergencies. Radio 2 is heavily oriented towards educational programming (nearly 70% of the total), as well as broadcasting in foreign languages. FM Radio is NHK's music channel, focusing on classical music, as well as regional programming.

¹³⁹ Law No. 132 of 2 May 1950. Available at: http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/Legislation/BroadcastLaw/BroadcastLaw.pdf.

NHK also provides a worldwide service, consisting of NHK World TV, NHK World Premium and NHK World Radio Japan. World TV is an English-language service disseminated in both standard and high definition quality. It is available in some 120 countries through local satellite and cable service providers. NHK World Premium is a Japanese language service which mainly redistributes NHK's domestic programmes, also available mostly through local satellite and cable service providers. World Radio Japan distributes its signals via shortwave, FM and MW, and broadcasts in 18 different world languages.¹⁴⁰

NHK's different channels are widely available on the Internet. World TV streams live at the same time as the original programmes are broadcast, as does World Radio Japan. The national services also have a strong Internet presence.

XIV. Public Service Mandate

The general purposes of NHK, set out at Article 7 of the Broadcast Law, are to provide abundant, high-quality domestic programming for the public welfare, which can be received all over Japan, as well as to conduct international broadcasting. Article 44 elaborates additional public service obligations of NHK, to supplement those binding on all broadcasters. These additional obligations include, for domestic channels, satisfying the wishes of the people, enhancing the level of civilisation, providing local, as well as national, programmes and striving towards popularising modern civilisation, as well as preserving excellent features from the past. The international service shall promote international friendship and economic interchange by promoting an understanding of Japan and Japanese culture, and providing entertainment to Japanese nationals abroad.

Article 9 grants NHK the right to conduct AM and FM broadcasting, television broadcasting, both radio and television multiplex broadcasting and international broadcasting. At least one of AM or FM, as well as its television broadcasting shall be available throughout the country.

NHK is subject to a number of obligations binding on all broadcasters in Japan, in addition to its specific public service broadcasting obligations. Pursuant to Article 3-2 of the Broadcast Law, broadcasters shall not disturb public security, good morals and manners, and shall be politically impartial and accurate as regards news and present controversial matters from a variety of viewpoints. Broadcasters must provide for a variety of programming, including in the genres of culture, education, news and entertainment. Wherever possible, broadcasters should provide sound messages to help blind persons understand television programmes, and visual images to assist deaf persons. Pursuant to Article 3-3, broadcasters are required to establish, and make public, broadcasting standards applicable to each type of programming. This appears to be a model based on transparency and consumer choice, rather than the imposition of standards from above. Article 6-2 provides that in the event of a disaster, broadcasters must conduct programming so as to minimise the harmful effect of the disaster.

The NHK may provide candidates for elective office with an opportunity to broadcast their views or make campaign speeches, provided they grant similar access to all other candidates.¹⁴¹

This is an interesting but rather eclectic mix of public service obligations, containing some that are not very common in other countries, but also omitting some that are. Thus it refers to enhancing the level of civilisation and preserving excellent features of the past, but not promoting a sense of nationhood while also serving minority groups, or providing educational material (although in practice, as noted, NHK does this admirably well).

140 The above information comes from NHK's website, <http://www.nhk.or.jp>.

141 Article 45.

XV. Governing Structure

NHK is, pursuant to Article 8 of the Broadcast Law, a juridical person, with its head office in Tokyo and such branch offices as it may deem necessary.¹⁴² Pursuant to Article 11, the Articles of Corporation shall provide for a Board of Governors and a Board of Directors. Article 24 provides, in addition to these bodies, for a President, a Vice-President, between seven and ten directors and not more than three auditors as officers of NHK. A form of independence for all broadcasters, including NHK, is established by Article 3, which prohibits anyone from interfering with or regulating broadcast programmes, except as provided for by law.

G. Internal Governance

NHK has 12 Governors, who appoint their own Chair, as well as an alternate should the Chair not be available.¹⁴³ Pursuant to Article 16, Governors are appointed by the Prime Minister, with the consent of both Houses of the Diet, from among people capable of making fair judgements and having wide experience and knowledge of relevant issues, including the fields of education, culture, science and industry. At least one Governor shall be appointed from each of the eight districts listed in the Annex, to ensure geographic representativeness. No one may be appointed a Governor who has been sentenced to imprisonment, who has, within the last two years, been dismissed for cause from the public service, who is a national public servant or staff member of any political party, or who has a substantial interest in any broadcasting or related enterprise. No more than 4 Governors shall belong to any one political party.

The term of office of Governors is three years, and they may be re-appointed. The Prime Minister may dismiss Governors who no longer satisfy the conditions of appointment¹⁴⁴ and may, under Article 20, and with the consent of both Houses of the Diet, dismiss Governors who are deemed unable to perform their duties, have acted contrary to their official obligations or are guilty of malfeasances which render them unfit to be Governors. In these cases, Governors will be given a chance to argue their case before both Houses of the Diet. Governors may also be dismissed by the Prime Minister, with the consent of both Houses of the Diet, where the number of Governors from any one party grows to exceed four. Outside of these limited conditions, Article 21 protects Governors from being dismissed against their will.

The rule on a maximum number of governors from one party somehow suggests that it is expected that these individuals will tend to have strong party connections. This would be unfortunate and undermine the independence of the broadcaster if true. The three year term of office is rather short compared to many other public broadcasters, while there does not seem to be any limit to the number of times an individual might be re-appointed. It would be preferable to set a longer term of office, but allow only one reappointment. The grounds for dismissal of members are also rather general and could allow for political interference in the Board.

Quorum for a meeting is six Governors, including either the Chair or his or her alternate. Matters shall be decided by majority vote, with the Chair having a casting vote (Article 23). This is a rather low number for quorum, and could result in only three affirmative votes, representing only 25% of the full Board, from carrying a motion.

The overall role of the Board of Governors is to decide on management, policy and other important matters relating to the NHK.¹⁴⁵ Article 14 sets out their role in more detail, which includes, among other things, their approval for adopting:

142 Article 10.

143 Article 15.

144 Article 19.

145 Article 13.

- The budget, including revenues and expenditures, business projection, financial plan and settlement of accounts.
- The plan for establishing and abolishing broadcasting stations, and domestic and international programming operations.
- The broadcasting standards provided for in Article 3-3, and the basic plan for the programme schedule.
- Any amendments to the articles.
- Remuneration of officers.

The Governors also appoint the President, by a vote of not less than 9 of the 12 Governors, and the auditors, and approve the appointment, by the President, of the Vice-President and Directors. The prohibitions on individuals being Governors, set out in Article 16, apply *mutatis mutandis* to the President, Vice-President, Directors and auditors.¹⁴⁶ Furthermore, the President, Vice-President and Directors may not become an officer of any other body with pecuniary interests or make any investment in a broadcasting business (Article 30). The term of office for the President and Vice-President is three years, and for the Directors and auditors, two years, and all may be reappointed (Article 28).

The Board of Governors has the power under Article 29 to dismiss a President or auditor who is deemed unable to perform or to have acted contrary to his or her duties, or who is guilty of a malfeasance which renders him or her unfit to be the President or an auditor. For the same reasons, and with the consent of the Governors, the President may dismiss the Vice-President or a Director. Where one of these officers falls foul of the prohibitions set out in Article 16(4), he or she shall be removed by the appointing body (Article 28-2).

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The Board of Directors is composed of the President, the Vice-President and the Directors. It is generally responsible for deliberating on “matters relating to the execution of important business of NHK”.¹⁴⁷ Pursuant to Article 26, the President shall represent NHK and also act as Chair of the Board of Directors, although he or she may delegate these functions to the Vice-President or a Director. The auditors audit the business of NHK and report directly to the Governors, while organisationally, they have their own secretariat, which is separate from the organization (as do the Governors).

Thus, as with many public broadcasters, there is a clear separation of the powers of the governing and executive boards, with the former responsible for overall oversight and direction, and the latter responsible for day-to-day running of the organization and editorial issues.

H. Regulatory Mechanisms

Pursuant to Article 3-4, all broadcasters, public and private, are required to establish a Consultative Organization on Broadcast Programs to oversee quality and service. This advisory body must be consulted in relation to the development or amendment of the broadcast standards provided for in Article 3-3, and the broadcaster is legally required to take this body’s comments into account. To facilitate the Consultative Organization’s work, broadcasters are required to provide it with a range of information, including as to how its comments have been taken into account by the broadcaster.

For NHK, these requirements are spelt out in greater detail in Article 44-2. It is required to establish a Central Consultative Committee on Broadcast Programs of more than 15 members, Regional Consultative Committees on Broadcast Programs of more than seven members in every district, as may be prescribed by a Cabinet Order, and an International Consultative Committee on Broadcast Programs of more than ten members. These bodies are responsible, in their respective areas, for monitoring programming and

¹⁴⁶ Article 27.

¹⁴⁷ Article 25.

providing input into broadcast standards. Members of these bodies shall be appointed by the President, with the consent of the Board of Governors, from among persons of learning and, in the case of the Regional Committees, from among people living in that region. Before making amendments to broadcasting plans for a particular district, the relevant Regional Committee must be consulted.

These sorts of bodies to reach out to audiences and provide a wider base of reflection for programming policies and output are common in public service broadcaster around the world.

NHK is required to conduct regular scientific listening polls, which it shall make public.¹⁴⁸ According to its website, NHK held 2,112 public meetings in 2009, attended by 53,721 people. It also received 4.6 million communications by telephone, fax, letter and email, of which 50% related to fees, while 35% were about the programmes broadcast. Pursuant to Article 9(6), NHK is required to take into account any views received from persons of learning or having any relation to broadcasting, as long as the view contributes to the development of broadcasting.

Article 4 of the Broadcast Law provides for a right of reply for anyone whose rights have been infringed by the broadcasting of untrue matter, as well as for a correction whenever a broadcaster discovers that it has broadcast incorrect material. To give effect to this right, which may be claimed at any time within three months of the original broadcast, Article 5 provides for the archiving of broadcast material for three months.

Pursuant to Article 33, the Minister of Internal Affairs and Communications may order NHK to conduct international broadcasting. The Minister also has the power to order NHK to undertake research designed to develop and improve broadcasting, pursuant to Article 34. Both of these powers are subject to a requirement that their cost be borne by the State.¹⁴⁹ While circumscribed, it is still unfortunate that a minister may order NHK to conduct certain types of broadcasting. This could undermine its independence and send an unfortunate signal to the public.

NHK is required to present an annual report, along with its inventory, balance sheet, and profit and loss statement, together with the statement of auditors' views, to the Minister of Internal Affairs and Communications within two months of the end of the business year. Upon receipt of these reports, the Minister shall present them to Cabinet, and then to the Diet, in the case of the audit, after it has been audited by the Board of Audit, which is responsible for auditing NHK (Articles 38, 40 and 41).

Pursuant to Article 43, the NHK cannot abolish any of its broadcasting stations, or suspend them for more than 12 hours, or abolish its domestic or international broadcasting operations without the consent of the Minister of Internal Affairs and Communications. The same Minister, pursuant to Article 2-2, is responsible for developing a basic broadcasting plan setting out a number of matters in relation to broadcasting stations.

XVI. Financing

NHK shall prepare an annual budget of revenues and expenditures and present it to the Minister of Internal Affairs and Communications. The latter shall present these to the Diet for approval through the Cabinet, providing his or her views. Before making any changes to the proposed budget, the relevant committee of the Diet must seek NHK's views.¹⁵⁰

The dominant source of funding for NHK is the receiver's fee, which in fiscal year 2010 is projected to be ¥653.3 billion (approximately USD 8 billion), providing 96.5% of its overall revenues, the rest coming from programme revenues and financial income. Pursuant to Article 32, anyone with equipment capable of receiving NHK television broadcasts must conclude a contract with NHK regarding the reception of its

148 Article 44(2).

149 Article 35.

150 Articles 37.

broadcasting. The prior approval of the Minister of Internal Affairs and Communications is required in relation to the content of this contract.

Contracts may provide for payment on a two-monthly, six-monthly or annual basis, with discounts for longer contracts. Contracts may also be for terrestrial reception or for satellite reception (which includes terrestrial reception). For fiscal year 2010, the annual fee for terrestrial reception was ¥14,910 (approximately US\$185) and for satellite ¥25,520 (approximately US\$315). The level of the fee is, pursuant to Article 37(4) of the Broadcast Act, set by the Diet through the budget approval process. In fiscal year 2007, NHK collected the fee from 71% of households; it hopes to increase that to 78% in five years. It also aims to reduce the cost of collecting the fee to 10% of its value.¹⁵¹

Article 46 of the Act prohibits NHK from carrying commercial advertisements on either its domestic or international services. NHK is also, pursuant to Article 9(4), prohibited from making a profit.

The NHK requires the prior approval of the Minister of Finance to issue bonds, and may not, without the prior approval of the Minister of Internal Affairs and Communications, transfer or lease any part of its broadcast equipment.¹⁵²

This system of funding provides strong protection for the independence of NHK from both political and commercial interests. Given the relatively high level of the receiver fee, it also provides an extremely strong funding base for the broadcaster.

151 See <http://www.nhk.or.jp/pr/koho-e.htm>.

152 Articles 42 and 47.

Introduction¹⁵³

Poland represents a case of transformation of a government-controlled broadcaster – Polish Radio and Television – into a set of public service broadcasters. Although problems remain, there is no question that a significant transformation has taken place and that the new broadcasters largely conform – at least formally – to key public service values.

In December 1992, the Polish parliament adopted the Broadcasting Act of 1992 (the Act).¹⁵⁴ This dissolved the old Polish Radio and Television and, in its stead, created 19 new public service broadcasters, Polish Television (Telewizja Polska), Polish Radio (Polskie Radio) and 17 regional radio services, each as a separate company. The property, both real and moveable, of the old Polish Radio and Television was transferred to the new companies, and even employees were transferred (see Articles 65-67).

Historical tendencies die hard, and Polish Television, in particular, has been the subject of much political interference from the top, as well as from below, as many members of the staff reflect their political leanings in their programmes. Directors have been dismissed on a regular basis, and the new appointees often have close links to the ruling party. For example, in February 2007, Andrzej Urbanski was appointed as President; he had been President Lech Kaczynski's first Chief of Staff. In late 2005, after a change of government, the whole system for appointing the members of the main broadcast regulator, the National Broadcasting Council, was changed, and all of the existing members were dismissed and new ones were appointed, in part so as to control appointments to the governing body of Polish Television. The happened again in 2010 and the broadcasting law was again amended to clear the NBC of incumbent members and appoint new ones, and to end the terms of office of the governing bodies of PSB organizations.¹⁵⁵

On the other hand, major changes have been brought about since Communist times, if progress has not been perfect. As Jakubowicz points out, "no societal institution – and least of all the media – could avoid being caught up in [the intense social and political conflict involved in resolving post-Communist issues] or escape the consequences."¹⁵⁶ In 2009, Polish Television commanded over 40 per cent of the total audience share.¹⁵⁷

153 The author would like to thank Karol Jakubowicz, who provided significant input to this chapter both through his direct comments and his paper, "How do PSBs Mirror Society: The Polish Case", on file with the author.

154 Adopted 29 December 1992. Official journal „Dz.U.” 04.253.2531.

155 The 2010 amendments were provoked in part by anti-government propaganda aired especially by Polish Television but also by other public service broadcasters, operating under managements with political ties to the opposition.

156 Jakubowicz, note 1.

157 Down from 50 per cent a few years earlier. See Krajewski, Andrzej, "Poland" in Open Society Institute, *Television Across Europe: Follow-up Reports 2008* (2008: Budapest, Open Society Institute), p. 271.

XVII. Services Provided

Polish Television is offered through one centralised joint stock company. It offers three national terrestrial channels. TVP1 and TVP2 provide a range of programming, while TVP Info is more of a news channel, which also serves as a network for the 16 regional branches of TVP, carrying their content in regional opt-outs. Polish Television also offers a number of channels over satellite, including TVP Kultura, offering more culturally-oriented programming, TVP Sport, TVP Historia, TVP HD, a high definition service, Belsat TV, a Belarusian language channel, and TVP Polonia, aimed at the Polish speaking diaspora. The satellite channels are also available in digital format.

Article 26(2a) of the Act requires Polish Television to establish regional branches in 16 different cities across Poland. The use of TVP Info as a network for disseminating the output of these regional branches, in addition to running network programming for most of the day (about 85 per cent of total air time), flows largely from practical, and particularly economic, reasons. Indeed, the cost of running such a large number of regional branches remains significant. Of the regional programming, some 43 per cent is allocated to news and another 26 per cent is devoted to current affairs. This also includes a small proportion of programming in regional languages, such as Belarussian, Ukrainian, Roma and Russian. According to the law, the proportion of programmes produced by regional branches that is carried over national services should be set by the National Broadcasting Council (NBC), upon a motion from the Board of Management (Article 30(5)).

Polish Radio operates four national channels, PR1, with a stronger focus on news and current affairs, PR2, more focused on culture and the arts, including classical music, PR3, a music and news channel for younger and educated urban audiences, and Radio Euro, aimed at a younger audience and concentrating on European issues, educational and music programming. It also operates Radio Polonia, aimed at international audiences. As noted, there are also 17 regional radio services, offering an average of about 25 per cent local programming. The heaviest concentration of this is in the areas of news and current affairs, although overall, 60 per cent of their output is music (where, however, somewhat surprisingly, the local content contribution is small).

All of the radio channels are available online¹⁵⁸ and both Polish Television and Polish Radio also operate Internet portals.¹⁵⁹ To celebrate its 85th anniversary, Polish Radio has decided to set up 80 audio Internet channels devoted to particular programme genres and drawing on Polish Radio sound archives for their contents.

XVIII. Public Service Mandate

The main statement of the mandate of Polish public broadcasters is set out in Article 21 of the Act. This article does not distinguish between radio and television, or between the national and regional services. Article 21(1) provides, very generally, that public broadcasters shall provide the entire society, as well as different groups within it, with diverse programme and other services, in the areas of information, journalism, culture, entertainment, education and sports. These services shall be pluralistic, impartial, well balanced, independent and innovative, as well as of high quality and of integrity, and they should be guided by a sense of the need to protect the good reputation of public broadcasting.

More specific obligations relating to programming are set out in Article 21(1a), including:

- producing programming for reception abroad in Polish and other languages;
- meeting the democratic, social and cultural needs of local societies;

¹⁵⁸ See <http://www.polskieradio.pl/>.

¹⁵⁹ See <http://www.tvp.pl/>.

- encouraging artistic, literary, cultural, scientific and educational services, with a special emphasis on Polish achievements;
- promoting knowledge of the Polish language;
- serving the needs of national, ethnic and linguistic minorities, including through broadcasts in minority languages;
- producing educational programming;
- providing “reliable information about the vast diversity of events and processes taking place in Poland and abroad”;
- encouraging development of citizens’ views and the formation of public opinion, as well as enabling citizens to take part in public life through providing them with a diversity of information and critical reflection of social events; and
- serving various other interests, such as promoting respect for Christian values, strengthening family ties, fostering healthy attitudes and combating social pathologies.

This is a relatively comprehensive list of public service obligations. Perhaps it is a bit too extensive. It would appear, for example, that public broadcasters manage to provide only very little programming in minority languages, presumably in part because of the cost but also because of the small audiences this may attract and consequential advertising concerns.

A number of provisions in the Act refer to the obligation of public broadcasters to transmit the views and perspectives of others. Pursuant to Article 22(2), they must “facilitate direct presentation and explanation of the State policy by supreme State authorities”. Article 23 obliges them to enable political parties, as well as national trade unions and employer’s organizations, to present their policies and positions on major public issues, in accordance with a regulation adopted by the NBC. It would appear that NBC adopted a regulation to give effect to this rule only in relation to political parties, leaving out unions and employers’ organizations. Public broadcasters are required to provide public service organizations, for free, with an opportunity to disseminate information about services that they provide without any charge (Article 23a(1)). They are also required to produce programmes in Polish for consumption abroad, and to produce educational programmes for schools and other educational institutions, which shall comply with the requirements of school curricula (Articles 25(1), (2) and (3)).

The Act provides a rudimentary framework of rules for election coverage in Article 24, to be further developed by ‘separate provisions’. Thus, entities participating in elections to the Sejm (lower house of parliament), Senate, office of the President, local self-government or European Parliament are allowed to transmit election programmes over public broadcasters. The same is true of entities entitled to take part in referendum campaigns.

While it is important for public broadcasters to provide good coverage of State policy and action, placing an obligation on them to grant officials direct access to the airwaves could be abused. It may also be disruptive for them to have to give direct space to all of the other actors mentioned here, although it is common for broadcasters to be required to give political parties and candidates access during elections.

Article 21 also refers to a number of powers or means of achieving these goals, such as through providing additional thematic services, if a licence has been awarded for this, operating transmitters and relay stations, transmitting teletext services and using new technologies.

Supplementing these obligations, which are specifically directed at public broadcasters, are a number of other rules that apply to all broadcasters, including public ones. Pursuant to Article 15, all television broadcasters must reserve 33 per cent of their quarterly transmission time – excluding news, advertising, teleshopping, sports, teletext services and games – for programmes originally produced in the Polish language, and 50 per cent for European works. Both radio and television broadcasters must reserve,

from among their overall programming devoted to music, a similar 33 per cent of for Polish language performances.

Article 15a requires television broadcasters to reserve at least 10 per cent of their quarterly transmission time for European works produced by independent broadcasters, at least 50 per cent of which shall have been produced in the last five years. Advertising may not exceed 15 per cent of transmission time, up to 20 per cent including teleshopping, or 12 minutes in any given hour (Article 16). Article 18 sets out a number of rules regarding the content of programming, which shall not discriminate, encourage immoral values, impact negatively on minors and so on.

These rules are largely designed to give effect to European Union obligations. However, the strong percentage reserved for Polish language works from among European works (two-thirds of the total) goes beyond minimum European requirements and demonstrates a strong commitment to promoting local programming.

XIX. Governing Structure

Public broadcasters in Poland operate in the form of sole-proprietor joint stock companies owned by the State Treasury. As a result, the provisions of the Code of Commercial Companies apply, for the most part, to them (Article 26 of the Act). The Minister in charge of the State Treasury represents the shareholders at a general meeting of shareholders, which is required by company law to be held.

However, the Act specifically provides that any directions imposed by the shareholders in relation to the contents of a broadcasting service are not binding upon the broadcaster. Furthermore, shareholders are not entitled to share in the profits of public broadcasters (Article 31(3)). The Act also prohibits State authorities from taking action in respect of the functioning of public broadcasters other than as specifically authorised by law (Article 22(1)).

The general meeting adopts the statutes, in line with corporate law, but these may not be amended without the consent of the NBC (so that, in practice, the Minister and NBC agree the statutes together) (Article 29). This is less than ideal, however, and it would be preferable for the NBC or perhaps Supervisory Council to adopt the statutes, without the involvement of a minister.

Although a corporate form is common for public broadcasters, leaving them subject to most general corporate rules may have some unfortunate consequences. Jakubowicz, for example, claims that the law provides for no effective mechanism for holding them accountable for their programming.¹⁶⁰

I. Internal Governance

Formally, the Supervisory Council is the primary governance body for public broadcasters in Poland. However, it is important to understand how the NBC operates, since most of the members of the Council are appointed by the NBC, and given the important role played by the NBC in overseeing the work of public broadcasters, including by approving their statutes.

The five members of the NBC are, in accordance with Article 7 of the Act, appointed by the Sejm (two members), the Senate (one member) and the President (two members).¹⁶¹ According to the law, the Council elects its own Chairman and Vice-Chairman. Members are elected for six years, and may not be re-elected. The appointing body may, in accordance with Article 7(6), dismiss a member, but only where he

¹⁶⁰ See Jakubowicz, note 1.

¹⁶¹ Article 214 of the Constitution vests the right to appoint members of the NBC exclusively in these three bodies.

or she resigns, has become unable, for health reasons, to discharge his or her duties, has been sentenced for a deliberate criminal offence, has submitted an untruthful statement as part of his or her screening, as confirmed by a court, or has committed a breach of the Act, as confirmed by the Tribunal of State. The Constitutional Tribunal has confirmed that members may not be dismissed for any other reason.¹⁶² However, should the NBC's annual report be rejected by both houses of parliament and the president, its term of office ends and new members are appointed.

The system for appointments to the NBC is a variant on the French model for the Conseil Superior de l'Audiovisuel (CSA), which allocates three appointments each to the National Assembly, Senate and President. Such a system has not proven robust in the Polish context against threats of political interference. This is particularly the case as other protections against interference, such as a prohibition on individuals with strong political connections from being appointed, are not found in the Act. Article 214 of the Constitution does provide: "[A] member of the National Council of Radio Broadcasting and Television shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function". Despite this, it has become common in Poland to divide membership of the NBC in rough proportion to the electoral success of different parties,¹⁶³ and many NBC members resign their party memberships only after appointment to the Council. Clearly this undermines a public interest approach to broadcast regulation.

The NBC plays an extremely important role in the oversight of broadcasting generally, as well as in relation specifically to public broadcasters. It draws up, with the Prime Minister, the main directions of State policy on broadcasting, it licenses broadcasters and sets the terms for their work, including licence fees, and it supervises the activity of broadcasters (Article 6). Under the 2010 amendment, the NBC must be consulted by public service broadcasters regarding their annual financial and programme plans, and it effectively has the power to accept or reject them.

The Supervisory Councils of public broadcasters consist of seven members for national public broadcasters and five for regional ones. These members are appointed by the NBC (and selected in a three-stage contest procedure from among candidates competent in such areas as the law, finances, culture and the media, and proposed by universities), with the exception of one member appointed by the Minister of Culture and the National Heritage, and another appointed by the minister in charge of the State Treasury. The Act instructs the NBC to regulate the procedure for this contest in a way that guarantees its objectivity, transparency and efficiency, and ensures assessment of candidates based on merit and their competence.

The Act sets the term of office at three years, and provides that the Council shall select its own Chairman and set its own rules of procedure, provided that resolutions shall be adopted by a majority vote, in a meeting at which at least one-half of the members are present (Article 28).

As with the NBC, these rules are sparse in terms of provisions protecting the independence of the Supervisory Councils. The Constitutional Tribunal has ruled that members may not be dismissed¹⁶⁴ but, otherwise, the rules lack any other protections for independence, such as conditions on who may be appointed, requirements of expertise and so on.

The approval of the Supervisory Councils is required to employ senior staff, to conclude a collective agreement with employees, to establish a company (other than the main public broadcasting corporation) or purchase shares in a company, and to transfer or encumber real estate. According to the Statutes of Polish Television, the Supervisory Council is also responsible, among other things, for appointing the auditor, for setting dates for the Board of Management to submit annual and strategic plans, for approving strategic and annual financial plans, and for approving promissory notes issued by the Board of Management that are in excess of Euro 50,000.

162 Judgment of 10 May 1994 (Case W. 7/94) (dismissal of members of the National Broadcasting Council). Referenced in Jakubowicz, Karol, "Study on Constitutional Courts' Jurisdiction on the Remit of PSM – Poland", on file with the author.

163 See Jakubowicz, note 1.

164 Judgment of 13 December 1995 (Case W. 6/95) (dismissal of members of Supervisory Councils). Referenced in Jakubowicz, *ibid*.

Pursuant to Article 27 of the Act, the Board of Management comprises between one and three members. Members of these Boards, including the President, are appointed by the NBC upon a motion from the respective Supervisory Council following a contest procedure, held under rules to be specified by the NBC along similar lines as those for members of Supervisory Councils. The members are appointed for four years, although they may be dismissed by the NBC, upon a motion from the Supervisory Council or the general meeting or shareholders (i.e. the Minister). The Supervisory Council also appoints the managers of regional branches of public broadcasters (i.e. of Polish Television), upon a motion from the Board of Management.

These rules create an appropriate division of responsibilities between the Supervisory Council and the Board of Management, ensuring that the former remains responsible for general oversight, while the latter looks after the day-to-day running of the organization, as well as editorial matters. However, the influence of the Supervisory Council over the Management Board, in particular in relation to appointments and removals, has been significantly weakened, thereby reducing their power to conduct effective oversight.

J. Regulatory Mechanisms

Pursuant to Article 28a of the Act, the NBC appoints the 15 members of the Programme Councils for public broadcasters, of which ten shall represent (and in practice be nominated by) parliamentary groups and the other five shall be appointed from among persons "with a record of experience and achievement in culture and mass media". The Councils are appointed for four-year terms.

The function of the Councils is to represent public interests and expectations in relation to the programming of public broadcasters. To this end, they are mandated to adopt resolutions evaluating the quality of programming and the programme schedule. The Supervisory Council is obliged to consider and act upon their recommendations, where they have been adopted by a majority of votes cast at a meeting at which at least one-half of the members are present.

To ensure that the Councils can do their job properly, Boards of Management are required to provide members with adequate organisational and financial support, including to commission independent audience research and studies to assess the social impact of programming.

Programme Councils are also appointed for the regional branches of Polish Television, although their role is to serve as an advisory and consultative body for the branch director. These Councils are appointed by the respective branch directors, who are required, in this regard, to take into account candidates put forward by social groups working with national and ethnic minorities (Article 30). The Council for TV Polonia is also to serve as an advisory and consultative body in respect of the programming carried by that channel (Article 30a).

The idea of Programme Councils is a good one, and in many countries analogous bodies help ensure that public broadcasters are responsive to the needs and interests of the public. It is unfortunate, however, that a large majority of the members of the Councils represent parliamentary groups. This will tend to politicise the work of the Councils, and thereby undermine the independence and public interest orientation of the public broadcasters.

The Act does not require public broadcasters to establish internal systems of complaints and it would appear that none of them have done so or appointed Ombudsmen to carry out this role. The Act also fails to establish a more general complaints system for the public vis-à-vis all licensed broadcasters.

The National Council is given the power to regulate a number of the direct access rules in the Act, including those in favour of officials to explain policy (Article 22(3)), of political parties, national trade unions and employers' organizations in respect of major public issues (Article 23(3)), and of public service organizations in respect of their free services (Article 23a(3)). Rules regarding public broadcasters' obligations to produce materials in Polish for foreign consumption and to carry educational material, including as to costs, which

are to be borne by the State budget, are to be defined in agreements between the ministers in charge of foreign affairs and national education (Article 25(5)).

Given that these obligations impact directly on programming and scheduling, they are sensitive matters. It would be preferable not to give ministers these powers. Even in the case of the NBC, there is potential for abuse. It would be preferable to leave it to public broadcasters to determine how to discharge these obligations, subject to NBC oversight. At a minimum, NBC should consult closely with public broadcasters in developing these rules.

Articles 31a-31c set out a number of rules for reporting on financial matters. Article 31a tasks the NBC with setting out, by regulation, the manner in which financial documents are to be kept, and how the financial reporting obligations in Article 31b are to be discharged. This must be done with due regard for openness in the use of funds allocated for the public service broadcasting mandate, in a manner that does not distort market competition. Article 31a also requires public broadcasters to set out clearly their accounting principles, which should ensure that revenues and costs are reported separately for all public service activities (as set out in Article 21(1)), as well as their other activities.

Pursuant to Article 31b, Boards of Management are required to file, with the NBC, an annual report on their use of funds, in accordance with the standards established pursuant to Article 31a. They must also file, again with NBC, quarterly reports on the use of funds, as well as on the costs of discharging their public service obligations (again, as set out in Article 21(1)), indicating the sources of the funding for them. Finally, by 30 April each year, they must file with the NBC the programme and financial guidelines relating to the implementation of their Article 21(1) mandate. Some of these requirements have been introduced to comply with European Union State aid regulations. In a separate procedure, the Board of Management prepares an annual report for the general meeting of shareholders, which must first be approved by the Supervisory Council. Both the report to the general meeting of shareholders and the public report contain detailed descriptions of their programming.

Boards of Management must also prepare and make publicly available a report on how the licence fee and related proceeds (such as interest for late payment and fines for non-payment) have been used to deliver the Article 21(1) mandate. This should also indicate the use of funds for the separate activities under the mandate listed in Article 21(1a).

It is somewhat surprising that there is no requirement that these reports be laid before parliament, as is the practice in many countries. Requiring annual reports to be tabled with parliament can both help protect the independence of public broadcasters and promote greater public accountability.

Formally, the reporting obligations of Polish public broadcasters are mainly limited to financial matters, although, as noted, in practice they do cover programming matters. Most other public broadcasters are subject to much wider formal reporting obligations including on their activities, achievement of their public service obligations, complaints and so on. This may exacerbate the problem, noted above, of weaknesses in the corporate form in terms of holding these bodies accountable for the quality of their programming.

XX. Financing

The main rule on funding for public broadcasters is found at Article 31 of the Act. This stipulates that the sources of funding for public broadcasters shall include licence fees (imposed for possession of a television or radio set), along with interest for late payment of the fee and fines for non-payment of the fee. The Licence Fees Act of 2005¹⁶⁵ elaborates further rules governing the licence fee, including fines for non-payment, the general level of the fee (which is calculated as a percentage of the minimal wage, with the actual amount set by the NBC) and so on. For 2011, the monthly fee is set at PLN 5.35 (approximately US\$1.90) for radio sets and PLN 17.15 (approximately US\$6.00) for television sets. Rebates can be obtained by paying the licence fee for several months or the whole year in advance.

165 Adopted 21 April 2005. Official journal „Dz.U.” of 16 May 2005.

The fee is in practice collected by the Post Office and transferred to the NBC, which decides how to allocate it among the different public broadcasters (in 2009 this was just under 50 per cent for television and just over 50 per cent among the different radio companies, on the grounds that public television can achieve much higher advertising revenues than radio). NBC also determines the allocation within Polish Television between the national and the regional operations. This system apparently works well and there is no delay in the transfer of funds.

According to the 2006 census, however, 35 per cent of the populace is exempt from paying the licence fee (for example due to age, disability or poverty),¹⁶⁶ while the rate of licence fee evasion was such that about another 22 per cent of households did not pay the fee. In 2008, the government significantly expanded the scope of people exempted from paying the licence fee, and this was deemed not to breach the constitution by the Constitutional Tribunal.¹⁶⁷ Though licence fee evasion is very high, it appears that the Post Office does not make it a priority to prosecute offenders; in 2005, fines of only 108,000 Euros were imposed for failure to pay, a mere 0.04 per cent of the total licence fee.¹⁶⁸

As a result of this, in 2009 licence fee revenue covered just over 17 per cent of the total operating costs of Polish Television (compared to about 25 per cent in 2007).¹⁶⁹ The situation is a bit better for radio, with the fee revenue covering about just over 63 per cent of the costs of the national broadcaster and between 61 per cent and 84 per cent of the costs of the regional radios. In 2008, public funding for PSB amounted in Poland to 0.61 per cent of GDP, as against an average of 1.62 per cent for 20 European countries.¹⁷⁰

Other sources of funding provided for in Article 31 are trade in programme rights, advertising and sponsorship, direct grants from the State budget, and other sources of funding. Pursuant to Article 32, public broadcasters may, with the consent of the NBC, found new business operations.

For television, over 80 per cent of the revenue in 2009 came from advertisements and sponsorship. Other commercial operations and very limited direct budget transfers make up the rest. This means that Polish Television is highly dependent on its market share for its financial survival (resulting in a strong degree of influence of commercial considerations in programming), an unenviable position for a public broadcaster. In line with the licence fee contribution, the situation is different for public radio, where advertising represents about 40 per cent of overall revenues on the nation-wide services and between 16 per cent and 39 per cent on the regional services.

166 See Article 4 of the Licence Fees Act.

167 See Winsvold, Lars, "Constitutional Tribunal Judgment of the Act on Licence Fees", 2010-1 IRIS 26.

168 Krajewski, note 5, p. 294.

169 *Ibid.*, p. 293.

170 Information provided by Karol Jakubowicz from Dr Paweł Stępkowski, Albert Woźniak and Ewa Murawska-Najmiec, *An update on the public funding of audiovisual media – a comparative analysis of selected European countries* (Warsaw: National Broadcasting Council, March 2010).

Introduction

Like many public institutions in South Africa, the South African Broadcasting Corporation (SABC) has undergone very significant changes in the post-Apartheid era to bring it into line with the new democratic dispensation and to ensure that it serves the needs of all of the citizens of South Africa. It was transformed into a limited liability company in 1999, with all of the shares vested in the State, and divided into public service and public commercial sections, operating different services.

To achieve these changes, new legislation governing the SABC was adopted in 1999 in the form of the new Broadcasting Act¹⁷¹ (1999 Act), replacing the former 1976 Act. A new regulator, the Independent Broadcasting Authority (IBA), was established by a law passed in 1993,¹⁷² but this was replaced, in 2000, by the Independent Communications Authority of South Africa (ICASA).¹⁷³ Pursuant to the Electronic Communications Act 2005 (2005 Act),¹⁷⁴ and in line with the earlier IBA Act and the 199 Act, ICASA has broad regulatory powers over broadcasters, particularly in relation to licensing and content, and these extend to SABC.

SABC is overwhelmingly the dominant broadcaster by any measure in South Africa in both the television and the radio sectors and, although commercial television is seeing its audience share grow, this overall dominance will not change very soon. It is characterised by very strong public service programming obligations, along with strong structural guarantees of independence.

Despite this, and especially in recent years, it has lurched from crisis to crisis, both financially and politically. As this is being written, a process is ongoing to replace several Board members who have quit in recent months. This Board was appointed to address very serious governance and financial issues that plagued the previous board and interim board. The CEO has been suspended, and serious political infighting has raged around the appointment process for the Head of News, whom the Chair of the Board tried to appoint unilaterally. The government had proposed a bill which would have radically transformed the funding arrangements for SABC, and impacted importantly on other governance rules. The new Minister of Communications, appointed in November 2010, has withdrawn the bill and instead introduced a policy review process with a particular focus on broadcasting funding in the digital age. It is, therefore, very unclear what the future will bring for public broadcasting in South Africa.

171 No. 4 of 1999, assented to 23 April 1999. On the web at: <http://www.parliament.gov.za/acts/1999/act4-99.html>.

172 The Independent Broadcasting Authority Act, No. 153 of 1993, 18 October 1993. On the web at: <http://iba.org.za/actaaa.htm>.

173 The Independent Communications Authority of South Africa Act, No. 13 of 2000, 5 May 2000. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=101146>.

174 Act No. 36 of 2005. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=67890>.

XXI. Services Provided

Section 9 of the 1999 Act provides for the division of the SABC into commercial and public service operations. The SABC currently offers three national television channels, SABC1, SABC2 and SABC3, of which SABC1 and 2 form the public service channels and SABC3 is what is known as a public commercial service. Together, these channels provide wide geographical coverage of South Africa, although penetration of television remains lower than in the other countries in this study due to lower rates of television set ownership and lack of electrification in some rural areas.

SABC1 is by far the largest of these channels, indeed, by far the largest television channel in the country, with some 14.5 million adult viewers, or 32% of the market. In its 2008-2009 Annual Report,¹⁷⁵ in relation to the last quarter of 2008, SABC describes the total prime time audience as being 68% of the population, and SABC1 as reaching 38% of that population. SABC2 follows, with 19%, and then SABC3, with 11%. The largest commercial station, eTV, had a 21% share.

SABC2 positions itself as the “Channel for the Nation”, providing a range of content in seven of the country’s official languages. In 2008, it covered such events as the opening of Parliament, the budget speech and the Beijing Olympics, and invested in preparations for the 2010 World Cup. One of its goals is to promote social cohesion and nation building.

SABC also operates 19 radio channels, including its international channel, Channel Africa, which broadcasts in six languages and which it administers on behalf of the Department of Foreign Affairs through a separate grant for this purpose. Channel Africa is distributed via shortwave, satellite and the Internet.

Of the other 18 channels, three – METRO FM, 5FM and Good Hope FM – are part of the public commercial service, while the other 16 are public service channels. SAfm is the historic SABC English language channel, which dates back over 70 years. Ukhozi FM is the largest radio station in South Africa, broadcasting in isiZulu. Lotus FM targets the Indian community, carrying a mix of Indian music, news and current affairs. Radio 2000 focuses on sports, providing live coverage of such South African favourites as cricket, soccer and rugby. The other channels broadcast in different national languages as follows: Motswedding FM in Setswana; Umhlobo Wenene FM in isiXhosa; XK RM in Khwedam and Xintali; Phalaphala FM in Tshivenda; Tru FM, aimed at the Eastern Cape, in isiXhosa and English; RSG in Afrikaans; Thobela FM, in Sepedi; Lesedi FM in seSotho; Ligwalagwala FM in siSwati; Ikwekeswzi RM in isiNdebele; and Munghana Lonene FM in xiTsonga.

It is worth noting that the broadcasting ecology in South Africa is different from that of most democratic States, with SABC being the overwhelmingly dominant voice. Their dominance in television is noted above. As for radio, in the six months to the end of March 2009, SABC radio had a total listenership of nearly 25 million, with the public services sitting at 22 million and the public commercial services having 7 million. By contrast, the entire independent radio sector only had 8 million listeners.¹⁷⁶

In terms of numbers of radio stations, the situation is also unique. There are only 16 private commercial radio stations, less than the number offered by SABC, compared to approximately 120 community radios. Part of the reason for this is a desire to democratise broadcasting following on from the massive distortions of the Apartheid era.

XXII. Public Service Mandate

Section 8 of the 1999 Act sets out the objectives of the SABC as a whole, which govern both its public service and its commercial operations. Sections 10 and 11 set out more detailed obligations relating, respectively,

175 Available at: <http://www.sabc.co.za/portal/site/sabc/menuitem.6a648065b498223a5f1de217a24daeb9/>.

176 The above information comes from the SABC website, <http://www.sabc.co.za>.

to the public service and commercial operations. Pursuant to section 8, and in line with obligations on many public service broadcasters, SABC is required to make its services available throughout the territory of South Africa, on a free to air reception basis, and to provide programming that informs, educates and entertains. It must be responsive to audience needs, including those of the deaf and blind. To further its objectives, SABC is also obliged to maintain libraries and archives of materials relevant to its objectives, to publish books, magazines and the like, to host concerts and other performances, to collect news and information, to establish and subscribe to news agencies, to carry out research on new technologies, and to nurture South African talent and train people in production skills. And it may provide such other services as are ancillary to its main work.

Pursuant to section 10, the public service must make services available in all official languages, reflect both the unity and cultural and multilingual diversity of South Africa, and enrich the country's cultural heritage, both traditional and contemporary. The public service must strive to be of high quality in all languages, providing significant amounts of news and public affairs programming that meets the highest standards of journalism, and is fair, impartial, balanced and independent from government, commercial and other interests. In addition, the public service must provide significant amounts of educational programming, both curriculum-based and informal, national and minority sports programming, and programming targeting children, women, the youth and the disabled. Finally, the public service must broadcast both its own programmes and those commissioned from the independent sector.

Pursuant to section 11, the commercial services must also comply with the values of the public service and commission a 'significant amount' of their programming from the independent sector.

Pursuant to their licences, which are agreed with ICASA, SABC's television channels are required to meet a number of quotas, including in relation to programming genres, local content and languages. SABC's 2008-2009 Annual Report shows that it met or exceeded almost all of its programme genre requirements. Thus, SABC1 provided more than 7 hours of news per week, 4 hours of current affairs coverage, 10 hours of educational programming, 24 hours of drama and 20 hours of children's programming. In terms of local content, it exceeded the minimum quotas as well (for example, providing 73% against a requirement of 55% for children's programming, 88% against a requirement of 80% for current affairs, and 98% against a requirement of 60% for educational programming). The situation was similar with languages, with SABC1 providing over 54 prime time hours of programming in languages other than English, compared to a requirement of 39 hours.

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SABC is also subject to rules of general application for the whole broadcasting sector. Pursuant to section 3 of the 1999 Act, these include safeguarding and enriching the cultural, political, social and economic fabric of the country, operating in the public interest, and strengthening the spiritual and moral fabric of society. Section 6 adds that broadcasting must encourage the development of South African expression, providing programming in South African official languages, and offering a plurality of views.

SABC is also subject to special rules for election coverage for its public service channels, along with general rules for such coverage for all broadcasters (Articles 57-59 of the 2005 Act).

Taken together, these are extensive and detailed public service obligations. Perhaps part of the reason for this is that they reflect not only SABC's role as a public service broadcaster, but also the fact that it is by far the dominant player in the South African broadcasting system.

XXIII. Governing Structure

Formally, under the 1999 Act, as noted, SABC has been transformed into a limited liability company with a share capital and subject to the Companies Act. However, section 8A recognises that the normal rules for companies need to be modified to take into account the special nature of the SABC as a corporation. In particular, the State owns one hundred percent of the shares of the SABC, a deviation from the normal rules, which require at least seven shareholders. Section 9 of the 1999 Act provides for the division of SABC into public service and commercial operations, to be separately administered under a single corporate

structure. The latter is for the most part to be treated like other commercial broadcasting operations while the former is subject to more stringent statutory obligations.

Like all broadcasters, SABC is licensed by ICASA, which will award it with additional licences taking into account the overall objects and principles for broadcast regulation as set out in section 2 of the 2005 Act, as well as the need and demand for that service (section 49 of the 2005 Act).

Section 6(2) of the 1999 Act formally guarantees freedom of expression, and journalistic, creative and programming independence, for all broadcasters, including SABC, in line with the Constitution.

K. Internal Governance

Under the 1999 Act, SABC is governed by a Board and an Executive Committee, formed from a subset of the Board, both of which are subject to the objectives and other binding rules set out in the legislation.

Section 12 of the 1999 Act provides that the Board shall consist of 12 non-executive members, along with the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer, who are considered executive members. Pursuant to section 13 of the Act, the 12 non-executive members are appointed by the President on the advice of the National Assembly in a manner which ensures transparency, openness and public participation in the nominations process, after publication of a shortlist of candidates. The President designates one of the non-executive members to be chairman and one to be deputy chairman. Nine members of the Board, including either the chairman or deputy chairman, constitute quorum.

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Viewed collectively, section 13 requires members of the Board to have suitable qualifications, expertise and experience in various broadcasting areas, to be committed to fairness, freedom of expression, the objects of the SABC and accountability, and to represent a broad cross-section of the population. Individually, Board members must, pursuant to section 16, be citizens and permanent residents of South Africa, not be determined by a court to be mentally ill, and not have been convicted of a serious crime, a crime of dishonesty or an offence under the Act. The Act also sets out strict conflict of interest rules at section 17 and, if a conflict of interest issue arises at any point, the Board member involved must leave the proceedings and let the remaining members determine the appropriate course of action.

The term of office is for such period as the President may designate, which shall not exceed five years (section 13(5)). The appointing body has the power under section 15 to remove a Board member on account of misconduct or inability to perform his or her duties, after due inquiry and upon recommendation of the Board. And the entire Board may also be removed (section 15A).

Pursuant to section 14, the Executive Committee is appointed by the Board and consists of the Chief Executive Officer, along with six other Board members.

It terms of functions, the Act simply states that the Board controls the affairs of the SABC and that it is tasked with protecting the interests set out in section 6(2), including the freedom and independence of SABC.¹⁷⁷ The functions of the Executive Committee are similarly briefly defined, as being to perform such functions as may be determined by the Board, to which it is accountable.¹⁷⁸ It would appear from this that the Board, and the subset thereof which comprises the Executive Committee, effectively exercise direct control over the affairs of the SABC. It is unclear how this relates to the general guarantee of freedom of expression and of journalistic, creative and programming independence, which it is the duty of the Board to protect. Presumably, the latter would prevent the Board from interfering in day-to-day activities of the SABC and, in particular, in programming and news choices, but allow it to set policy and overall direction and goals for the SABC.

177 Section 13(11).

178 Section 14(3).

In some ways, these are very robust provisions, ensuring the independence and representativeness of the oversight bodies for SABC. At the same time, they have in practice failed to work effectively, or even to safeguard independence well. Part of the problem lies in the fact that executive officers from SABC sit on the main board as full members, rather than having just the chief executive officer sitting on the board on an ex officio basis. Another problem is that the respective roles of the Board and Executive Committee are not well defined, a problem that exacerbates the confusion about roles created by the first problem. Finally, perhaps inevitably, given its dominance, SABC has been subject to higher-level pressures on its independence, of the sort against which even the best structures cannot be watertight.

L. Regulatory Mechanisms

The SABC is subject to oversight by Parliament, which may amend or even repeal its enabling legislation. Other persons or bodies with some power over the SABC include the Minister responsible for the Act (the Minister of Communications), especially in the area of finances, and ICASA, the regulator and licensing authority.

The Minister has overall responsibility for broadcast policy development under section 3(2) of the 1999 Act, as well as a number of specific responsibilities in relation to SABC. He or she adopts the memorandum and articles of association for SABC (section 8A(3) of the 1999 Act). The Minister also has the power to approve the extent of the subsidy provided by the commercial to the public service operation, as recommended by the Board,¹⁷⁹ as well as to approve any financial regulations drawn up by SABC, after consultation with the Minister of Finance, and to approve surplus fund investment.¹⁸⁰ The Minister, along with the Minister of Finance, must approve any borrowing by the SABC.¹⁸¹ The Minister may also direct the SABC as to how to draw up its annual statements and Annual Report.¹⁸²

Pursuant to section 38 of the 1999 Act, the Minister must establish the South African Broadcast Production Advisory Body to advise him or her on how to develop local television and radio production. This clearly overlaps with the role of the SABC in developing local talent and in providing programming in all official languages.

The 1999 Act is silent about how the executive members of the Board – the Chief Operating Officer, the Chief Financial Officer and the Chief Operating Officer – are to be appointed. In practice, the Articles of Association allow the Minister to approve these appointments. Given that the CEO is also the editor-in-chief, this gives the Minister undue structural influence over content.

ICASA has significant powers in relation to SABC. Section 6(2) gives it overall responsibility for ensuring compliance with SABC's Charter, which comprises many of the significant provisions in the 1999 Act relating to SABC. Pursuant to section 3(5)(f) of the 1999 Act, all broadcasters, including SABC, must comply with the Code of Conduct prescribed by section 54 of the 2005 Act, which is enforced by ICASA.

According to section 21 of the 1999 Act, SABC is required to obtain a licence from ICASA, although ICASA is required, upon payment of the license fee, to issue such a licence. Pursuant to section 22(2) of the Act, ICASA may impose any appropriate licence conditions which may be necessary to reflect the SABC's reorganisation into public and commercial service divisions and its related obligations in terms of the Broadcasting Act and the IBA Act. In 2005, in an historic move, ICASA amended the SABC's sound and television broadcasting service licences.

179 Section 11(d).

180 Section 18.

181 Section 23.

182 Sections 20(2) and 28(1)(g).

ICASA is required by the law to ensure equitable treatment of political parties by broadcast services during election period and SABC is required by law to permit a party political broadcast during an election period (section 57 of the 2005 Act). ICASA determines the time to be made available to political parties for party election broadcasts, including the duration and scheduling.

Pursuant to section 8 of the 1999 Act, SABC is required to draw up proper financial regulations, which must be approved by the Minister. The Companies Act requires annual financial statements to be drawn up and, in the case of SABC, the Minister may give directions as to how these are to be done. These must be tabled by the Minister in the National Assembly (section 20 of the 1999 Act). This is reinforced by section 24, which requires SABC to keep proper accounts of all monies received or spent, as well as its assets, liabilities and financial transactions. These must be audited annually by a recognised auditor (section 25).

The SABC must also provide the Minister with an annual report. This must include a report on the work of the Corporation during the previous year, along with detailed financial information, such as a description of the value of all property owned by the Corporation. The Minister must table this in Parliament, within seven days of receiving it (section 28). This is supplemented by section 10(4), which requires SABC to submit to the Minister, within four months of the end of its financial year, an annual report on its activities, its financial statements and the report of the auditors on the financial statement.

SABC is subject to a number of external complaints mechanisms, in addition to running its own internal complaints system. It is subject to the complaints system run by the Broadcast Complaints Commission of South Africa, an independent self-regulatory body created by the National Association of Broadcasters (NAB).¹⁸³ In 2008-2009, 112 complaints against SABC services were lodged with the BCCSA, of which 106 were rejected and six were upheld. SABC is also subject to the Advertising Standards Authority of South Africa, another self-regulatory body to which NAB belongs.¹⁸⁴ In 2008-2009, only nine complaints were lodged with the ASA against SABC, all of which were rejected. SABC is, in addition, subject to the ICASA Code of Conduct, and was the subject of one complaint lodged with ICASA in 2008-2009, which remains pending.

XXIV. Financing

Pursuant to section 10(2) of the 1999 Act, the public services of SABC may fund their activities through advertisements, sponsorship, grants, donations and licence fees. In 2008-2009, SABC had total revenues of R 4.7 billion (approximately US\$ 680 million), of which R 3.6 billion (76%) came from advertising and sponsorship, R 864,000 (18%) came from the television licence fee, and small additional amounts came from direct government grants and other sources.

Section 27 of the 1999 Act provides for a licence fee to be levied on all private owners of television sets, as well as certain categories of businesses. In practice, the potential of this form of funding is significantly undermined by a combination of high rates of piracy and low fees.

Section 11(1)(d) of the Act provides that the commercial services shall subsidise the public services, to the extent recommended by the Board and as approved by the Minister. In practice, however, there has been little cross-subsidisation and for fiscal year 2008-2009, the Public Commercial Services of SABC achieved revenues of R330 million (approximately US\$47 million), or 22%, below target, and 7% less than the previous year's revenues. The commercial services provided negligible if any funding to SABC's public service operations in 2008-2009.

In practice, the SABC has had very significant financial problems, spending more than it has been generating in operating revenues. Thus, it lost over one billion Rand (approximately US\$ 150 million) in just one year (2008-2009) and had to be rescued by the government which provided a loan guarantee. As noted above, the new Bill being discussed proposes to completely reform the system of public financial support for SABC, replacing the licence fee with a tax-generated fund on which the SABC would have to bid, in competition with other public interest proposals.

¹⁸³ See <http://www.bccsa.co.za/>.

¹⁸⁴ See <http://www.asasa.org.za/>.

Introduction

Thailand presents a complex scenario regarding public broadcasting. It is often said that all broadcasting in Thailand is State broadcasting, due to the fact that all frequencies are controlled by State bodies, mostly by the Mass Communication Organization of Thailand, Plc. (MCOT), supervised by the Prime Minister's Office, by the Royal Thai Army and to a lesser extent by the Public Relations Department (PRD), a service delivery unit within the Thai government which runs Radio Thailand and Television of Thailand (Channel 11). In fact, however, the MCOT and Army both operate their own channels and provide concessions to private actors to run radio and television channels, in what might be described as a form of sub-licensing.

The MCOT and Royal Thai Army each run their own television channels, which fall directly under their control and cannot be described as public service. However, increasing commercial pressures, and the battle for audience share, have impacted significantly on their programming, which in recent years has moved increasingly towards entertainment and away from news.¹⁸⁵

Channel 11, operated by PRD, while also firmly under government control, is more oriented towards public interest programming, although it has a very small market share. It does not carry advertisements, and its programming includes more news and educational material than most other channels, as well as some regional content. Historically, groups like the Campaign for Popular Media Reform (CPMR) targeted this channel for transformation into a public service broadcaster.

Perhaps ironically, true public service broadcasting in Thailand developed as a result of a series of otherwise unexpected events. iTV (Independent Television) was launched in 1996 as the first non-State terrestrial television station. In part a response to demands for media reform from civil society and others after what is commonly referred to in Thailand as "Black May",¹⁸⁶ iTV was initially welcomed by those interested in media reform and independence. It benefited from a 30-year licence and a three-year licence fee waiver, but was also under an obligation to carry 35 per cent news and 35 per cent 'edutainment' in its schedule, and was subject to a 10 per cent cap on ownership by any one individual/company. These obligations were, however, largely set aside after the severe 1997 financial crisis, which rocked the media sector, along with most other sectors. In 1999, Shin Corp, controlled by Thaksin Shinawatra, who was the Prime Minister of Thailand between February 2001 and September 2006, took a controlling share of iTV.

After Thaksin's removal as Prime Minister as a result of a coup in September 2006, a long-simmering dispute over iTV's failure to meet its concession fee obligations of around Bh. 2.2 billion (approx. US\$61 million), along with fines of Bh. 100 billion (approx. US\$2.8 billion), came to the fore. iTV's concession was cancelled in March 2007, management of the station was handed over to the Public Relations Department, and its name was changed to Thai Independent Television (TITV).

PRD control over the station was always seen as temporary and lobbying began almost immediately to turn the station into a true public service broadcaster. A draft Thai Public Service Broadcasting Agency Act was prepared and was the subject of discussions at a June 2007 conference sponsored by UNESCO, the Thai Broadcast Journalists Association, the National Health Foundation, the Thai Health Promotion Foundation, and the Committee on Consumer Protection of the National Legislative Assembly. The

185 Tangkitvanich, S. and Tanawit, S., "Radio and Television Market Structure" in *Media Reform Research project* (2003, Bangkok, Thailand Research Fund).

186 Black May refers to the attempt by a military clique in 1992 to regain power, which was thwarted by mass protests led by students and the middle classes in Bangkok.

Thai Public Broadcasting Service Act (the Act) came into force in January 2008, creating the Thai Public Broadcasting Service (Thai PBS).¹⁸⁷ This chapter focuses mainly on Thai PBS, as the main public service, as opposed to State, broadcaster in Thailand.

Positive features in the Act include strong guarantees for the independence of the new broadcaster, along with effective accountability mechanisms and an innovative funding mechanism through an additional 'sin' tax on liquor and tobacco, which is largely insulated against political interference. In terms of possible areas for improvement, there could be fewer or no official representatives on the Selection Committee for the Board, explicit guarantees of the independence of the Board and the broadcaster itself could be added to the law, and the complaints function could be moved from under the Board to a body which is more independent of the broadcaster.

It is still too early to tell how this public service broadcasting experiment will work out. Early signs seem to be positive, although Thai PBS's market share remains small and the station is still getting established. It has also come under political pressure arising in part from the complex and confrontational politics that have enveloped Thailand in recent years, presenting a challenge to it as it seeks to map out a new space for public broadcasting in the country.

XXV. Services Provided

The commercial-free terrestrial TV station, TV Thai, is Thai PBS flagship station which broadcasts 20 hours a day nation-wide. Its content is 40 per cent news and current affairs, 30 per cent educational and informative programmes, and 30 per cent entertainments. Thai PBS, in partnership with the Thai Health Promotion Foundation, runs a radio station, known as Radio Thai (FM105), which focuses on issues of children and families and is disseminated through the website (www.thaipbs.or.th). Thai PBS has plans to expand into terrestrially transmitted radio, but first needs to obtain a licence for this, which has to wait until the broadcasting regulator has been appointed, a process which is currently taking place.

XXVI. Public Service Mandate

Sections 7 to 9 of the Act set out the objectives and powers of Thai PBS. The objectives of the Organization, set out in section 7, include:

- To carry out radio and television broadcasting which strengthens social 'quality and virtue', based on information services which are accurate, thorough and balanced, and in strict accordance with the code of conduct.
- To produce high quality programmes with reasonable proportions of information, education and entertainment, without political bias and being in the public interest rather than for commercial benefit.
- To use programming to make the public aware of global, national and local events.
- To promote freedom of information so that citizens enjoy informational equality, in order to strengthen democracy.
- To promote direct and indirect participation of the public in the affairs of the Organization, so as to ensure that it continues to operate in the public interest.
- To support other public interest activities.

¹⁸⁷ B.E. 2552 (2008).

These objectives shall all be pursued with regard to the need to ensure that equal and sufficient access to information is provided to the public, in a manner that promotes its effective utilisation.

To help ensure the achievement of at least some of these objectives, Thai PBS is required to provide part of its ongoing income, as prescribed by the Board but not exceeding ten per cent of its revenues, to support the development of and production by independent producers (section 11).

These objectives are supplemented by section 43, which requires the programming schedule to be developed by Thai PBS and free of commercial influence. This section also requires Thai PBS to broadcast the following:

- Information affecting the public (i.e. news), which shall be presented in a timely manner, accurately, comprehensively and fairly, with an appropriate proportion being provided in prime time.
- Programming that enhances public participation and which includes different points of view, balancing opinions and critical analysis.
- A fair proportion of programming that is educational, that enhances the quality of life and that is addressed to children and youths, during times which are “convenient for viewing and listening”.
- Sports and entertainment programming that is creative and that fosters positive social values, as well as programming on health.
- Material that promotes a national Thai identity within the concept of a multicultural society, as well as programmes that allow disadvantaged persons to present their views.
- An appropriate amount of programming by independent producers.

Thai PBS is also required to archive material it has broadcast that may be of historical interest. It may charge a service fee for granting others access to this archival material (section 44).

To achieve these objectives, Thai PBS is given the following powers, pursuant to section 8:

- To establish radio and television stations covering the whole country, and additional stations as part of its networks, and to disseminate its programming through other technologies (such as the Internet).
- To provide audiovisual media production services, information network system services, or other services relating to or supporting its main broadcasting services.
- To support and develop the capacity of independent producers to undertake programme production.
- To coordinate with government agencies, private bodies, foreign and international organizations, and foreign public service broadcasters in the production of programmes that enhance public knowledge or that promote cross-cultural cooperation.

Its operational powers are set out mainly in section 9 and include:

- The power to perform any act relating to management aimed at achieving its objectives.
- The power to own and dispose of property, real or otherwise.
- The power to engage in juristic acts, both within Thailand and abroad, for the purpose of delivering its objectives.
- The right to collect fees, dues or other forms of consideration in exchange for the provision of services.
- The power to perform other acts relating to the achievement of its objectives.

XXVII. Governing Structure

Thai PBS is, pursuant to section 5 of the Act, a juristic person and a 'State agency' other than a government agency or a State enterprise under the law on budgetary procedure. As such, it is responsible for its own funds, property and income. Its head office is in Bangkok and it may establish branch offices in such places as it may deem fit (section 6).

General protection for the independence of Thai PBS is found in section 56, which makes it an offence for a person holding political office or a government official to do any act which, directly or indirectly, obstructs or interferes with the work of the Organization, with a view to undermining its ability to meet its objectives or perform its duties, or to conform to its Rule on Professional Ethics. Any such act shall be deemed to be a "misuse of powers" and shall be "unenforceable", unless it is provided for by law.

There is no direct statement in the Act of the independence of either the Board or the Organization itself, although there are strong structural guarantees of independence. Such statements can help bolster respect for independence.

M. Internal Governance

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A key feature of the internal governance structure of Thai PBS is the Board. The nine members of the Board of Directors are nominated by a fifteen-member Selection Committee comprised of the president or another representative from three media bodies (the National Press Council, the Thai Broadcast Journalists Association, and the Confederation of Radio and Television Professional Associations), from eight other representative bodies (the Council of the Mass Communication Academic Institutes of Thailand, the NGO Co-ordination Committee, the Confederation of Consumer Protection Organizations, the National Council of Child and Youth under Royal Patronage, the Council of Disabled People, the Lawyers Council, the Environmental Institute and the Health Promotion Foundation), and from four official bodies (the Office of the Prime Minister, and the Ministries of Finance, Culture and Education). Another individual may represent the relevant institution, but only where the rest of the Selection Committee approves him or her (section 18).

At least ten members of the Selection Committee must meet to make up quorum but, otherwise, the Committee sets its own rules, including by electing its own Chairperson and secretary. Thai PBS itself provides secretarial functions to the Committee (section 18).

Subject to various conditions on members (described below) and their consent, the Selection Committee nominates precisely nine people for membership of the Board. The nominees select from among themselves one person to be Chairperson. The Selection Committee then forwards all of the names, indicating who shall be the chair, to the Prime Minister who formally appoints them (section 20). It would appear that the Prime Minister may have the power to refuse to appoint Selection Committee nominees, although this is not clear and in practice would probably only happen if there had been serious problems or controversies in the appointment process. The Act simply states: 'The Prime Minister shall publish the names of the Board in the Government Gazette.'

Members hold office for four years and may be reappointed for up to two consecutive terms, provided that four of the original members, identified by drawing lots, shall serve for only two years (section 23). Members may be removed only upon death, resignation, conviction to a term of imprisonment or falling foul of the requirements or prohibitions noted below (section 24). Where the Chairperson vacates this office, an interim Chairperson shall be appointed by the remaining members, and a new chair shall be appointed when all nine members of the Board have been appointed (section 25). Remuneration of the Chairperson and other Board members, and of members of the Executive Board, is set by Royal Decree.

A number of conditions are placed on who may be nominated for Board membership. Of the nine members, two must have experience in the field of mass communications, three in the area of organisational

management, and four in various social fields (such as promoting democracy, or working with children, the disabled or in community development) (section 17). Members must be Thai nationals, at least 35 years old and be able to perform their duties independently, impartially and honestly. They must not be bankrupt or incompetent, have been convicted of a serious offence (and sentenced to imprisonment for two years, which has not been discharged for five years or more), have been fired or removed from office for dishonest performance or a crime of dishonesty, or have had their assets vest in the State due to the accumulation of “unusual wealth” (section 19).

Various individuals may not be appointed as Board members, including civil servants and government officials, political incumbents at all levels of government, board members or officials of political parties, board members of State enterprises or other State agencies, and partners and staff of broadcasting enterprises, although individuals are given an opportunity to resign from these positions in order to clear the way for their appointment to the Board (section 21). There are also strong conflict of interest prohibitions on membership (section 22).

These rules provide strong structural guarantees for the independence of the Board. It might be preferable if there were no official representatives on the Selection Committee. It might also be useful if the process was required to be open and transparent, and to involve civil society (for example, through providing for an opportunity to make comments on proposed nominees).

Quorum for meetings of the Board is not less than one-half of the total number (i.e. five persons when all members are appointed). Where the Chairperson cannot preside over a meeting, a replacement shall be selected by the members present (section 26). Decisions are by majority vote, with the person presiding over the meeting (normally the Chairperson) having a casting vote in case of a tie (section 27).

The Act also makes provision for the appointment of a temporary Committee of not more than five members to perform the duties of the Board, until the first Board is appointed, within 180 days (sections 58-59). In practice, the first Board was appointed in 2008.

The main powers of the Board are set out in section 28. The Board is responsible for the overall policy of Thai PBS, for the annual report, and for approving the budget, code of conduct¹⁸⁸ and the Rule on Professional Ethics in relation to programme production. It also appoints the Director and the Executive Committee (see below), and has as an explicit function the protection of the independence of these bodies, as well as of all staff. It also, among other things, supervises the handling of public complaints, issues regulations on personnel matters, administration, finance and related issues, sets the salary and benefits of the Director and Deputy Director, with due regard to their capacities and experience, taking into account remuneration for similar responsibilities in the private sector (section 37).

This appears to describe a clear role for the Board, and to ensure that it focuses on oversight of the broadcaster, rather than getting involved in day-to-day programming matters.

The Executive Board, appointed by the Board, is comprised of the Director, who is the *ex officio* Chairperson, up to six officials of the Organization, and up to four other representatives. Where the Director vacates office, the Executive Board is dissolved. The requirements and prohibitions for members of the Board apply to the Executive Board, and rules on conflict of interest also apply to them (section 29).

The powers of the Executive Board, as set out in section 29, include ensuring that programming is in line with Board policy, ensuring that the Organization operates in line with the law and applicable rules and regulations, in light of a complaint from a member of the public, proposing administrative, programming, organisational, financial and personnel development plans to the Board for approval, preparing the master plan for network development, conducting programme quality evaluations and carrying out any other duties that may be assigned to it by the Board.

188 It is not entirely clear what this refers to, since there is no further reference to this code in the Act.

As noted, the Board appoints the Director, who is responsible to the Board, and it also determines the number of deputy directors (section 31). The Director must be of Thai nationality, less than 65 years old, have various kinds of expertise, and not be under the prohibitions for Board members relating to bankruptcy, criminal behaviour and dismissal, or similar prohibitions to those for Board members relating to political activities and conflicts of interest (section 32). The Director appoints the Deputy Directors, who must meet some of these conditions (section 34). He or she also appoints the stationmaster and station administrative committee (section 38).

The Director and Deputy Directors hold office for a term as specified in their employment contracts, which may, however, not exceed four years (section 35). They may be removed for coming within the scope of the rules on disqualification, for having failed a performance evaluation or by a two-thirds vote of the Board for a valid reason (section 36).

The Director is responsible for issuing regulations on administration of the Organization in accordance with the rules set by the Board, and for overseeing personnel matters. He represents Thai PBS in external affairs, but may delegate this authority (section 39). He or she is also responsible for developing the programming schedule, which shall be submitted to the Executive Board for approval every three months or when there are significant changes (section 43).

These rules appear to provide for an appropriate separation of duties between the Board and the more operational side of the Organization as represented by the Executive Board and Director.

Although otherwise independent of government, the members of the Board and of the Executive Board, as well as the Director and other members of staff, are all considered to be officials for purposes of the law against corruption. The members of the Board and of the Executive Board, as well as the Director and Deputy Directors are also considered to be high-ranking officials for purposes of the same law (section 41).

The implications of this are that as officials, staff are subject to investigation by the National Counter-Corruption Commission (NCCC) if cases of corruption or negligence of duty are brought against them. High-ranking officials are required to file asset reports with the NCCC upon taking and leaving office. There were initially fears that such requirements would hamper Thai PBS's public service mandate, but in practice so far there have been no negative implications.

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N. Regulatory Mechanisms

Thai PBS is subject to a number of external regulatory and accountability mechanisms. Very generally, section 4 states that the Prime Minister and the Minister of Finance shall have "charge and control of the execution" of the Act. Presumably this only means that they are responsible for taking the actions set out in the Act itself.

The Organization is not subject to labour laws of general application, but its employees are entitled to benefits that are at least equal to those prescribed by these laws (section 10). Pursuant to section 61, until the broadcast regulator, as envisaged by the general broadcasting law, is appointed, Thai PBS may use the frequencies previously allocated to iTV (in practice just one national television licence, over which it holds proprietary rights pursuant to section 57 of the Act), and it does not need to apply for a broadcasting licence.

The Act is otherwise silent as to the relationship between Thai PBS and the regulator. The broadcasting law has just been adopted and, as noted above, the process of appointing the Broadcasting Commission is currently being undertaken. Once that happens, Thai PBS will be subject to its oversight just like any other broadcaster, including to obtain frequencies.

The Act establishes a public complaints system for Thai PBS. Pursuant to section 42, the Board shall prepare a Rule on Professional Ethics as a guideline for overall practice and the production, procurement

and dissemination of programming, taking into account the views of staff, audiences, producers and experts. The Rule, which shall be disseminated to the public, shall, at a minimum, cover:

- accuracy, impartiality and fairness;
- independence and accountability to the public;
- respect for human dignity, privacy and personal rights;
- protection of children from violence, illegal or immoral behaviour, promotion of wrong-doing and coarse language;
- respect for victims and others in distress;
- payment for information or for broadcasting news, and participation in other acts that may undermine fairness and independence; and
- protection and fair treatment of confidential sources.

The Rule was adopted and disseminated in 2009, and is currently being applied.

Pursuant to section 46, the Board is required to establish a Sub-Committee for Considering Public Complaints, which shall assess claims from members of the public that Thai PBS has failed to respect the Rule on Professional Ethics. Complaints shall be examined rapidly, accurately and equitably. Where a complaint discloses a breach of the Rule, the Sub-Committee shall provide for corrective or remedial measures. Rights of correction, reply and apology shall also be available for false statements.

This is a good system for complaints, but consideration might be given to trying to enhance the independence of the complaints body. It could, for example, include representatives of the public instead of just being a sub-committee of the Board.

An original record of all programmes broadcast shall be kept for at least 30 days, and in case of a complaint or dispute, the record shall be kept until the matter has been resolved (section 47).

The Organization is not under a general obligation to hold public hearings, but these are required to be held for purposes of ensuring that disabled persons can access and make use of programming by Thai PBS (section 43).

Section 45 requires the Board to appoint an Audience Council of not more than 50 persons representing the different regions and groups in Thailand. The Board may also appoint Regional Audience Councils. The Council shall meet at least once a year, in accordance with rules set by the Board, and shall serve to improve services and responsiveness to the public, and to increase public participation in shaping the Organization. The Executive Board is required to compile suggestions and comments made by the Council, and to make recommendations to the Board for improving the work of the Organization on the basis of these suggestions.

Thai PBS is required to prepare annual internal audit reports on its finance, accounting and procurement, in accordance with international accounting standards, to be submitted to the Board. For this purpose, an internal auditor shall be appointed who reports directly to the Board (section 48). A financial statement showing financial status, income, expenditure and cash flow shall be submitted to the auditor within 120 days of the end of the fiscal year. This statement shall be audited by the Office of the Auditor-General, or a licensed accountant approved by that Office, and this audit shall include an evaluation of whether the financial activities of the Organization are in line with its objectives, proper and represent value for money. The Board shall cooperate fully with the Office of the Auditor-General in relation to this audit (section 49).

Each year, the Board is required to ensure that an external evaluation committee undertakes a performance evaluation of Thai PBS, with a view to strengthening its efficiency, outcomes, accountability and service to the public. The evaluation shall assess the extent to which the Organization performs in line with its

objectives and established project and work plans, the effectiveness and efficiency of the Organization, its development, the degree of public support it enjoys, and audience satisfaction (section 50).

The Organization is also required to submit, within six months of the end of the fiscal year, an Annual Report to the Council of Ministers, the House of Representatives and the Senate, and to make this report public. The Report shall present the activities of the Organization during the year, compared to its targets, its work and budget plans for the upcoming year, the schedules of the previous and upcoming years, the financial statement, the internal and external auditors reports and the report of the evaluation committee, the legal entities owned by the Organization and with which the Organization has business activities, the programmes produced by independent producers, along with details about them, the opinion of the Audience Council and the Organization's response, and complaints by the public and responses thereto (section 52).

At least once every ten years, Thai PBS is required to undertake a major review of its sources of income and expenditure in relation to its mandate and objectives. This review shall make proposals regarding its overall funding and the remission of any excess revenue to the State budget, along with proposals to review relevant laws affecting the performance of the Organization.

Overall this is a very comprehensive set of external regulatory and accountability measures, which involves a number of different structures and systems. The one area where these systems might be improved is in terms of specific systems to gather direct public input. Public hearings are required to ensure the participation of disabled persons; consideration might be given to broadening this to include more general public hearings.

XXVIII. Financing

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The Act takes an innovative approach towards funding for Thai PBS, stipulating as the main source of funding a tax on liquor and tobacco. Specifically, section 12 gives the Organization the power to collect an additional levy of one and one-half per cent on the taxes paid on liquor and tobacco under the relevant laws relating to these goods. Pursuant to section 13, the Excise Department and the Customs Department are tasked with collecting this levy and remitting it directly to the Organization (it does not become part of State revenue), thereby building collection costs into already existing operations and promoting efficiency. These bodies may deduct the additional costs of collecting the fee from the amount remitted to Thai PBS, in accordance with regulations approved by the Minister of Finance, but these costs shall not exceed one and one-half per cent of the levy collected.

Sections 14-16 contain rules that ensure that the levy is paid, including that anyone liable to taxation under the relevant liquor and tobacco laws must pay the levy (except where that person is eligible for an exemption from paying tax, which shall also apply to the levy). Failure to pay the levy on time will attract interest surcharges of one and one-half per cent per month, not to exceed the total amount of the levy. Furthermore, failure to pay the required levy is an offence punishable by imprisonment of up to one year and/or a fine of between five and twenty times the levy (section 53).

The overall amount of funding from the levy is capped at two billion Bhat (approximately US\$ 70 million) for each fiscal year, with any excess to be remitted as general State revenue. The Minister of Finance has the power to adjust this maximum every three years to ensure that the Organization has sufficient funding to enable it to deliver on its objectives, taking into account inflation, the changing scope of the work of Thai PBS and the annual external performance evaluation of the Organization, as required by section 50 of the Act (section 12).

Although some may object to the idea of funding public service broadcasting through a 'sin' tax, this approach provides an interesting alternative which should be observed closely over time. For most countries which do not yet have a licence fee system in place, it is politically extremely difficult to introduce one and even for some countries with a fee, these have proven difficult either to collect or to justify to the public. A sin tax offers an interesting alternative possibility which is relatively insulated from political

interference (at least compared to a direct government subsidy) and which may generate less of a negative reaction from the public. Furthermore, the collection system used is far more efficient than having Thai PBS collect the fee itself.

One shortcoming of this system, in terms of independence, is that a government minister, the Minister of Finance, controls any increases in funding over time. His or her discretion is limited by the fact that he or she is required to take into account inflation and the external performance evaluation (which is organized by the Board). However, it would be preferable if further safeguards were in place, including such possibilities as parliamentary oversight and involvement of civil society in the process.

Pursuant to section 11, Thai PBS may also take advantage of a number of other funding sources. This section cross-references section 57, pursuant to which the all of the affairs, property, rights, obligations and frequencies under the control of the Public Relations Department (PRD) (i.e. the former iTV), with some exceptions to protect the new Thai PBS from some of iTV's liabilities, were handed over to Thai PBS on the date the Act came into force.

Thai PBS was also supposed to benefit from a start-up fund provided by the government, pursuant to section 60, while it was waiting for the first round of the levy to be collected. In 2007, the government made a commitment through a Cabinet decision, to provide Thai PBS with a start-up fund of 340 million baht (approximately US\$11 million) but despite repeated official requests from Thai PBS, this funding has not been forthcoming.

Other general sources of funding, as listed in section 11, include fees and other charges in exchange for the provision of services, funds provided by supporters (i.e. donations), income from intellectual property rights, and interest and the like earned on the Organization's existing resources. The Act specifically prohibits donations from supporters from undermining the independence of the organization, or from deterring it from pursuing its objectives.

Thai PBS may not, however, collect a membership fee, or generate income from advertisements, except in the form of direct subventions from its supporters (section 8). This ensures that the Organization is protected against commercial influences over its programming and that it remains largely funded by the levy.

In practice, 97 per cent of Thai PBS' funding comes from the levy, with the remaining 3 per cent coming from co-productions. The organization is, however, looking at ways of generating revenues from other sources to lessen its dependence on the levy.

Introduction

The British Broadcasting Corporation (BBC) is perhaps the most recognised public service broadcaster in the world. Founded in 1926 under a Royal Charter (Charter), the BBC continues to enjoy the same status to this day. Royal Charters are granted for a number of years, the most recent for a 10-year period running from 31 December 2006 until 31 December 2016.¹⁸⁹ Royal Charters are formally grants from the Sovereign to undertake certain activities, often on an exclusive basis, but in practice prerogative powers, including the grant of Royal Charters, are exercised by the executive.

Perhaps ironically, the services that people in most countries identify as the BBC – provided through the BBC World Service and, more recently, BBC Worldwide – are not part of its public service operations.¹⁹⁰ The public service part of the wider BBC operations consists of its core broadcasting services, directed at UK audiences.

From its inception in 1926 until 1954, the BBC had a monopoly on broadcasting. Even after 1954, the monopoly continued with respect to radio broadcasting, seen at that time as the BBC's traditional market. In 1973, local commercial radio was finally authorised. Between 1954 and 1981, independent television was under the same general duty to provide broadcasting as a "public service for disseminating education, information and entertainment" as the BBC.¹⁹¹ Private broadcasters in the UK, particularly those disseminated via terrestrial transmission, remain subject to certain statutory public service obligations, but they are not public service broadcasters as defined internationally.¹⁹²

As noted, BBC operates under a Royal Charter. Procedurally, a Charter is similar to secondary legislation or regulations and is hence not subject to mandatory Parliamentary scrutiny. Significantly, decisions made by bodies established under a Charter cannot be subjected to judicial review under administrative law. The fact that the Charter is periodically renewable and has the status of secondary legislation means that, formally, the BBC is less secure than public service broadcasting organizations which operate under a statutory mandate.¹⁹³

189 Available at: http://www.bbc.co.uk/bbctrust/about/how_we_govern/charter_and_agreement/index.shtml.

190 The World Service has hitherto been funded by, and subject to a degree of formal control by, the Foreign and Commonwealth Office (FCO). See, for example, clause 64 of the Agreement. This was significantly reduced in the 2006 Agreement, and under an agreement reached in October 2010, the World Service will be funded directly out of the licence fee. However, the World Service has not traditionally been considered part of the UK Public Services of the BBC. BBC Worldwide is part of BBC's commercial services, operating on a competitive basis without public funding and organisationally separate from the public services (see clause 68 of the Agreement).

191 Television Act 1963, s. 2(1)(a).

192 This is not true, however, of Channel 4, which is a publicly owned entity.

193 Indeed, article 53(3) of the Charter provides that when the current Charter expires in 2016, the "undertaking of the BBC shall cease", unless it is continued.

An Agreement¹⁹⁴ between the Secretary of State for Culture, Media and Sport and the BBC specifies in further detail the obligations of the BBC. The Agreement is technically a contract between the Minister and the Trust, the highest governance body of the BBC, the most recent having been signed in 2006. Both the Agreement and the Charter are presented to Parliament for its approval and the BBC is required to comply strictly with both (Charter, article 52(1)). The Charter focuses more on governance issues, while the Agreement focuses more on the programming obligations of the BBC services.

XXIX. Services Provided

Clause 11 of the Agreement authorises the BBC to provide a range of broadcasting services to be known as the BBC's UK Public Services. In terms of television, these include two terrestrially broadcast television channels – BBC One and BBC Two – along with a number of other channels distributed through other means. BBC One is the BBC's leading television channel, offering a mix of programming for a mainstream audience, and including some regional programming for Scotland, Wales, Northern Ireland and regions of England. BBC Two is similar, but with more of a focus on factual programmes and innovative comedy and drama, also offering some regional programming.

The BBC also offers BBC Three (aimed at a younger audience), BBC Four (with more alternative programming), CBeebies (aimed at very young children), CBBC (aimed at pre-teens), BBC News 24, BBC Parliament and BBCi.

All of the BBC's television services are broadcast on the its digital television multiplex, as well as on Freesat, the partly BBC owned free-to-air satellite platform. They all also benefit from 'must carry' terms on pay TV platforms (cable and satellite).

In the radio sector, BBC operates a number of national services, as well as a number of regional and local services. Radio 1 is a music service aimed at younger audiences, Radio 2 includes a broad range of music as well as news, Radio 3 focuses on classical music and Radio 4 is more oriented towards news and current affairs. These four services are national FM analogue services. Radio Five is a national AM service which is talk and sports based. In addition, the BBC offers a number of national digital radio (DAB) services including 1Xtra, carrying contemporary urban music, Radio Five Live and Sports Extra, with additional sports coverage, and BBC Asian Network, focusing on the UK's Asian population, mostly in English but also in a variety of Asian languages.

BBC also operates regional radio services, including two for Scotland (Radio Scotland in English and Radio nan Gaidheal in Gaelic), two for Wales (Radio Wales in English and Radio Cymru in Welsh) and two for Ireland (Radio Ulster and Radio Foyle). As of May 2010, BBC also ran 38 local radio services throughout England.¹⁹⁵

BBC is also active online, including through BBC i-Player, the first online catch up TV service in the UK.

BBC manages to maintain remarkably high audience shares, considering how fragmented the markets are. Thus in November 2010, BBC 1 had a 21.3 per cent market share, and BBC 2 had a 6.7 per cent share, with other BBC television stations making up about another three per cent, for a total of about 31 per cent of the market.¹⁹⁶ The figures for radio are even stronger, with all BBC stations capturing about 55 per cent of the market in the third quarter of 2010.¹⁹⁷

194 Available at: http://www.bbc.co.uk/bbctrust/about/how_we_govern/charter_and_agreement/index.shtml.

195 See http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/service_licences/radio/2010/english_local_radio_may10.pdf.

196 See http://www.barb.co.uk/report/monthlyViewing?_s=4.

197 See http://www.rajar.co.uk/listening/quarterly_listening.php.

XXX. Public Service Mandate

The public service mandate of the BBC is guaranteed by a number of provisions in both the Charter and Agreement. Article 3 of the Charter establishes BBC's main public service obligations, namely to serve the public interest and to promote the Public Purposes set out in article 4. Article 5 states that BBC's main activities shall be to promote its Public Purposes, by means of television, radio and online services, as well as related services, that provide information, education and entertainment. The Public Purposes are to sustain citizenship and civil society, to promote education and learning, to stimulate creativity and cultural excellence, to represent the UK and bring it to the world and the world to it, and, in doing the above, to help promote the benefits of emerging communications technologies and play a leading role in the switchover to digital television.

Far more detailed public service and content obligations are spelt out in the Agreement. Clause 3 requires the Trust to develop separate purpose remits (pursuant to article 24(2)(a) of the Charter) for each of the six Public Purposes, following a process of public consultation, setting out priorities and how performance will be judged against them. The Executive Board is also required to develop statements of programme policy which state, for each service, how it will contribute to the fulfilment of the BBC's public service remit (clause 21).

The Agreement includes separate clauses, numbers 6 to 10, addressing the first five of the Public Purposes. These provide, among other things, that BBC must provide accurate and impartial news and analysis of current events and ideas, promote understanding of the UK political system, including Parliament, promote media literacy, stimulate interest in a wide range of subjects and issues, provide specialist educational content, enrich cultural life through "creative excellence in distinctive and original content", foster interest in cultural activities among new audiences, provide appropriate coverage of sport, including sport of minority interest, reflect and strengthen cultural identity through original content, promote awareness of different cultures and viewpoints, including different religious beliefs, make people in the UK aware of international issues and bring high-quality international news coverage to international audiences. The content of the Public Services as a whole must be high quality, challenging, original, innovative and engaging, and every programme must exhibit at least one of these characteristics (Agreement, clause 14).

The BBC is also required, in its activities, to take account of the general "purposes of public service television broadcasting" set out section 264(4) of the Communications Act, 2003.¹⁹⁸ This, in turn, refers to a wider notion of public service obligations imposed on all terrestrially transmitted television services, in addition to the BBC (i.e. on Channels 3-5), as well as on some other services.¹⁹⁹ For example, for Channels 3 and 5, the remit is to provide high quality and diverse programming. The specific purposes are for the most part wider than the specific BBC obligations, and include such things as carrying programmes covering a wide range of topics, which satisfy a range of audiences and which are of high quality.

The Board is required to prepare annual statements of programme policy for approval by the Trust. These statements must be made public (Agreement, clause 21).

This is an interesting and rather unique approach to the question of the programming mandate of a public broadcaster. In effect, the legal documents set out a broad framework governing the mandate, but the Trust and Board are each expected to elaborate more specifically on that mandate and, importantly, are held publically accountable for delivery of their promises.

Furthermore, the BBC is required to make sure that its services are available to audiences across the UK in a range of convenient and cost effective ways, and the BBC may not charge, directly or indirectly, for the reception in the UK of its Public Services (Agreement, clauses 12-13). In relation to the digital switchover, it must ensure that by the date of the switchover, substantially the same proportion of households in the UK can receive services in digital format as received the analogue signal (clause 35), which in practice is almost all UK households. This is an extension of the BBC's traditional universal access obligations. It

198 C. 21. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/contents>.

199 See section 265 of the Communications Act.

must also make sure that viewers are aware of the nature of the digital switchover, as well as practical options for continuing to receive signals (clause 38).

Clauses 43-63 of the Agreement set out in great detail a wide range of content obligations for the BBC. Several of these require the BBC to reach agreement with Ofcom on the relevant standards or to comply with standards set by Ofcom. Others call for the Trust to set standards which the Board is then required to make sure BBC observes.

Clause 43 provides generally for the Trust to approve guidelines to “secure appropriate standards in the content of the UK Public Services”. Pursuant to clause 44, the Trust must develop a code giving guidance as to how the BBC will ensure that controversial subjects are treated with “due accuracy and impartiality”. The Trust must also impose requirements regarding news and current affairs programming and, in particular, set a quota for current affairs coverage on BBC One and Two, taken together. Before doing so, the Trust must consult with Ofcom (clause 47). For 2009, the target for BBC One was 1380 hours of news, and the level of actual achievement was 1602 hours. Pursuant to clause 48, the Trust is also tasked with prescribing which of the BBC services shall carry party political broadcasts, and on which terms.

The Trust is also tasked with setting appropriate rules on regional programming, including quotas for different services, after consulting with Ofcom (clause 50). For BBC One and Two, the quota for 2009 was 6270 hours of regional programming, with a total of 6895 hours achieved. Clauses 49 and 51 require the BBC and Ofcom to agree on quotas for, respectively, original productions and programming produced outside of London. The rates for original production in 2009 were very high, for example, 70% for BBC One overall and 90% during peak hours, notwithstanding which they were exceeded by actual rates of 88% and 99% respectively.

Pursuant to clauses 45 and 46 of the Agreement, the BBC must comply with Ofcom’s Fairness Code, adopted pursuant to section 107 of the 1996 Broadcasting Act, which deals with unfair or unjust treatment in programmes, as well as unwarranted infringements of privacy. It must also comply with the Relevant Programme Code Standards, adopted by Ofcom pursuant to section 319 of the Communications Act 2003, which cover a range of issues such as protection of children, accuracy and impartiality in news, religious programming, advertising and so on. BBC must also comply with Ofcom’s code on services for the deaf and visually impaired, adopted pursuant to section 303 of the Communications Act 2003.

A number of rules relate to programming produced by independent producers. Pursuant to paragraph 1(1) of Schedule 12 of the Communications Act 2003, at least 25% of qualifying programmes (such as non-news programming) must be produced by independent producers. Clause 52 of the Agreement applies this percentage to programmes on both BBC One and BBC Two. In 2009, 40% of all qualifying programming met this criterion, including 34% on BBC One. For radio, pursuant to clause 58 of the Agreement, the Trust sets levels of programming to be produced by external producers. Finally, clause 61 imposes a duty on the Trust to require the Board to draw up a code for the commissioning of independent productions.

An interesting mechanism which complements the minimum 25% requirement of independent productions is what is termed the Window of Creative Competition. Effectively, this requires 50% of non-news programming to be produced in-house, with another 25% being the reservation for independent producers. The remaining 25% is allocated through a competitive process involving not only independent producers and in-house capacity, but also other external producers (i.e. those linked to other broadcasters). In 2009/10, 70% of this programming was produced by external producers, with only 30% being done in-house (Agreement, clauses 54 and 56).

The BBC is also required to establish and maintain an archive containing a representative selection of the programmes it has broadcast and to make reasonable arrangements for access thereto by the public, either with or without charge (Agreement, Clause 86).²⁰⁰ Clause 87 of the Agreement requires the Corporation to make appropriate arrangements to maintain a research and development programme in pursuance of the Public Purposes.

Taken together, this is a very detailed set of programming requirements and obligations. It comprises not only a strong framework of positive programming requirements, but also very detailed and extensive rules for the protection of the public.

XXXI. Governing Structure

The BBC is a body corporate, governed by the BBC Trust and managed by the Executive Board, as provided for in article 1 of the Charter. As such, the BBC has the power to sue and be sued, and to do everything else that a body corporate, as well as a natural person, may do, as long as it acts to further the purposes set out in articles 3-5 of the Charter. The powers of the BBC are exercised by or under the authority of the Trust or Board (Charter, article 47).

The independence of the BBC is guaranteed in article 6(1) of the Charter in the following terms:

The Corporation shall be independent in all matters concerning the content of its output, the times and manner in which this is supplied, and in the management of its affairs.²⁰¹

The parties to the Agreement affirm their commitment to this independence in clause 4.

In setting out the powers and obligations of the BBC, the Charter and Agreement make frequent reference to licence fee payers, for example in describing the obligations of the BBC. Article 57 of the Charter, however, makes it clear that this does not refer only to those persons to whom a TV licence is issued, but also other persons in the UK who make use of BBC services.

0. Internal Governance

The Charter provides for the establishment of both the Trust and the Executive Board. They must act separately and, in particular, the Trust must maintain its independence from the Board (articles 8-9). Furthermore, members of the Corporation, defined as the members of the Trust and Board, shall not act corporately, but as members of the respective body to which they belong (article 10).

The Trust consists of a Chairman, Vice-Chairman and 10 ordinary members, unless a different number is fixed by Order in Council (in effect by Cabinet). Members are appointed for a maximum of five years by Order in Council, and may be reappointed, (Charter, articles 13 and 15). One ordinary member shall be designated as the Trust member for each of Northern Ireland, Scotland, Wales and England, selected for "his knowledge of the culture, characteristics and affairs of the people in the nation for which he is designated" and for "his close touch with the opinion in that nation" (article 14).

Individuals cease to be members if they resign, are terminated by Order in Council, become bankrupt, suffer from a mental disorder or absent themselves from meetings for longer than three months without the consent of the Trust, and the Trust votes to remove them (article 16). Members of the Trust are remunerated in accordance with rates set by the Secretary of State, who also sets the level of their pensions and other allowances (articles 17-18). Currently, the Chairman is paid a whopping £142,800 a year (approximately US\$230,000), in return for which he is expected to spend 3-4 days a week on Trust business (so assuming he spends 3.5 days/week on Trust business, his stipend is equivalent to an annual salary of £204,000, far more than the UK Prime Minister earns), and the Vice-Chairman is paid £77,005 a year for about 2.5 days per week (also equivalent to more than the Prime Minister's salary).²⁰²

201 This formal guarantee of independence was added for the first time in the 1996 Agreement.

202 It may be noted that Trust members are currently taking a voluntary reduction of 8.3% off their fees.

Formally, the powers of Cabinet in relation to the appointment and termination of members is almost unfettered, so that Cabinet has broad discretion over who is a member of the Trust. This system therefore offers very few formal safeguards against abuse. In practice, however, when new trustees are wanted, the post is advertised and individuals are shortlisted and then interviewed, in a process overseen by the Commissioner for Public Appointments, an independent office. The interview panel is chaired by a senior civil servant from the Department for Culture, Media and Sport (DCMS) and includes an independent assessor and the BBC Chairman. They make a recommendation which goes to the Secretary of State for Culture, Media and Sport, then to the Prime Minister, and finally to the Queen.²⁰³

The Trust holds meetings to conduct its business and has the power to adopt standing orders dealing with a wide range of issues regarding meetings, including quorum, casting votes, holding meetings and so on (Charter, article 19). The Trust may also make regulations regarding both its own business and affairs, and the running of the BBC (Charter, article 21).

To facilitate the conduct of the business of the Trust, the Charter provides for the establishment of the BBC Trust Unit, to be overseen by a chief officer, operating under the control of the Trust. Staff who work for the Trust Unit are not subject to direction from the Board (articles 42-43).

Article 7 of the Charter provides, very generally, that the main roles of the Trust are to set overall strategic direction for the BBC, including as to its priorities, and to oversee the work of the Board. It shall discharge these functions in the public interest, with particular attention to the interests of licence fee payers. Article 9 makes it clear that the Trust is the supreme governing body of the BBC, which it describes as being “the sovereign body within the BBC”.²⁰⁴ Whenever it acts within its mandate, it may require the Board to respect its actions and, where it has power of approval, supervision, review or enforcement over the Board, the Board must respect its decisions.

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More detail on the role of the Trust is found in articles 22-27 of the Charter. It is the “guardian of the licence fee revenue and the public interest in the BBC” and has “ultimate responsibility” for stewardship by the BBC of its revenues and resources, upholding the public interest, and promoting the Public Purposes (article 22). It must represent the interests and assess the views of licence fee payers, secure the independence of the BBC, ensure “rigorous stewardship” of public money, have regard to the competitive impact of the BBC on the wider market, and ensure that the BBC observes high standards of openness and transparency (article 23).

Its functions are elaborated in some detail, and include, among other things, setting overall strategic direction for the BBC, approving high-level strategy and budgets, assessing the performance of the Board and holding it to account, setting multi-year purpose remits, defining performance criteria against which to measure progress in achieving the Public Purposes, issuing licences for additional services, approving content guidelines, setting the framework for handling complaints, and ensuring value for money (article 24). Several of the article 24 obligations of the Trust are further elaborated upon in the Agreement. Furthermore, the Trust is required to adopt Protocols establishing a detailed framework within which the Trust will discharge its functions (Charter, article 25).

Both the Trust and the Board must have regard to relevant general guidance concerning the management of public bodies and generally accepted principles of good corporation management, insofar as these are applicable to their functions (Charter, article 11).

Pursuant to article 28 of the Charter, the Board shall consist of a number of executive and non-executive members, as determined by the Board with the approval of the Trust, with the number of non-executive members being at least four, representing between one-third and one-half of all of the members.

The Chairman is appointed by the Trust, who may either be the Director General or a non-executive member (article 29). The terms of his or her appointment shall include the possibility of his or her removal by the Trust (article 32).

203 See http://www.bbc.co.uk/bbctrust/about/who_we_are/trustees/appointment.shtml.

204 Article 49(3) declares that the Agreement concluded in 2006 is fully compatible with the Charter.

The Director General shall always be an executive member of the Board (whether as the Chairman or not). The executive members of the Board are appointed by the Board, upon the proposal of a nomination committee. The required composition of the committee for purposes of nominating executive members to the Board depends on whether or not the Chairman of the Board is the Director General or a non-executive member.

Where the Director General is Chairman, the committee consists of the Director General, who shall be chairman of the committee and have a casting vote, an executive member of the Board nominated by the Director General and two non-executive members. Where the Chairman of the Board is a non-executive member, the composition of the committee is determined by the Board, subject to the requirement that non-executive members form a majority (article 30). This means that where the Chairman of the Board is the Director General, he or she is appointed by the Trust and effectively controls the nomination committee but, otherwise, the committee is controlled by non-executive members of the Board and appoints the Director General.

A nomination committee also nominates non-executive members of the Board (apart from a non-executive Chairman). This committee is appointed by the Board but must have a majority of non-executive members and be chaired by one of them. Where the Director General is Chairman of the Board, he or she must be a member of the committee. The nomination committee sends proposals directly to the Trust and, if the Trust approves them, the Board must make the appointments (article 31).

Paragraphs 5 and 6 of the Schedule set the rules for the initial appointment of the Board. The Trust is tasked with appointing a Director General, deputy Director General and four or five non-executive members of the Board as soon as possible after the start of the transitional period (which ran from 19 September 2006 to 31 December 2006), and either appoint the Director General or one of the non-executive members to be Chairman of the Board. As soon as possible after that, an initial appointments committee shall be appointed consisting of the Director General, the deputy Director General and two non-executive Board members selected by the Trust.

For both executive and non-executive members of the Board, not including the Chairman, the process of appointment also determines the terms of the appointment. However, membership may not be terminated prematurely except on the motion of the Chairman of the Board. The Board may acting on its own terminate an executive member, but the termination of a non-executive member or the Director General requires the approval of the Trust as well as the Board. However, if the Board refuses to terminate, the Chairman may apply directly to the Trust for approval to do so (article 33)

The Board issues its own standing orders and other regulations dealing with such matters relating to meetings as quorum, notice and so on, as well as the transaction of its business (articles 34 and 37). It may also set up committees, provided that it must have an Audit Committee and a Remuneration Committee, which determines remuneration for executive members, both of which must be composed exclusively of non-executive members of the Board (article 36).

For its part, article 7 of the Charter describes the role of the Board as being to deliver the BBC's services in accordance with priorities set by the Trust, and as being responsible for all aspects of BBC operational management, except in relation to the Trust.

Article 38 of the Charter describes the role of the Board in more detail. This includes, among other things, delivery of BBC's services in accordance with frameworks set by the law and the Trust, direction of BBC's editorial output, operational management of the BBC (except the Trust Unit which services the Trust), ensuring compliance with legal requirements and other obligations (except insofar as they relate to the Trust), appointing and holding to account management, oversight of the BBC's operational finances, ensuring value for money, and accounting to the Trust for its own performance.

As noted above, pursuant to article 9 of the Charter, the Trust is the supreme governing body of the BBC and, within its area of competence, its decisions take precedence over those of the Board. Article 25 provides that the Protocols which the Trust adopts must address in detail the Trust's relationship with the Board and the division of responsibilities between them (Charter, article 25). Otherwise, however, the framework or rules is consistent with the practice at many public service broadcasters, whereby the

governing body (i.e. the Trust) is responsible for general oversight while the executive body is responsible for day-to-day running of the body, and for editorial matters. This division of powers between the Trust and the Board, and in particular leaving editorial matters to the Board, provides an additional layer of protection in practice for the independence of the BBC.

The manner of appointment of the Director General depends, as described above, on whether he or she is also the Chair of the Board. Where he or she does hold that position, appointment is by the Trust but, otherwise, it is through the process of appointing members of the Board, but subject to approval by the Trust. Except for members of the Board and the Trust Unit, the BBC appoints its own staff (article 41).

P. Regulatory Mechanisms

The BBC is under a general obligation to seek the views of and engage with licence fee payers directly. The Trust must make detailed provision for how it will do this in the Protocols, and it must consult publicly beforehand (Charter, article 26). The Trust must also conduct public consultations, as noted, before developing purpose remits (Agreement, clause 5), before issuing service licences (clause 19), when developing various programme codes or rules and in developing a system for complaints (clause 89). The Protocols must also describe how the principal points from the proceedings of the Trust, and its reasoning and key considerations, will be made public (article 27).

There are a number of other mechanisms to help ensure that the BBC is responsive to public needs and accountable to the public. In general these fall into five categories: the role of the Audience Councils, enabling public complaints, powers granted to Ofcom, powers granted to the Secretary of State or other government ministers, and reporting obligations.

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Article 39 of the Charter mandates the establishment of four Audience Councils, one each for Northern Ireland, Scotland, England and Wales. This is a change over the previous arrangement, whereby there were a number of Regional Advisory Councils in each area of regional television output in England. Collectively, the members of the four Councils must reflect the diversity of the UK, have connections with both geographic communities and communities of interest and be able to take a view on how the Public Purposes should be promoted. A Protocol sets out how the Councils are set up and run, as well as supported, provided that the designated Trust member for the nation chairs that Council.

As a transitional arrangement, the existing Broadcasting Councils for Northern Ireland, Scotland and Wales were transformed into the respective Audience Councils, while the chairs of the Regional Advisory Councils in England became members of the Audience Council for that nation (Charter, Schedule, paragraph 13).

The role of the Audience Councils is to advise the BBC on how well it is promoting its Public Purposes from the perspective of licence fee payers in different parts of the UK. Councils are tasked with engaging with licence fee payers and have the right to be consulted on changes to services, any review of service licences and the BBC's performance in promoting the Public Purposes. They are mandated to report annually to the Trust on the BBC's performance in each nation and to publish an Annual Report for each nation assessing how well the BBC is meeting the needs of local licence fee payers.

Article 52 of the Charter requires the BBC to set up a complaints system so as to afford an appropriate remedy to anyone who is aggrieved or adversely affected by a failure by the BBC to comply with the Charter and Agreement. Clause 89 of the Agreement requires the Trust to establish procedures for complaints, including about the content of BBC services and compliance with clauses 43-46 of the Agreement, which, as noted above, deal with such issues as accuracy and impartiality and Ofcom's Fairness Code and the Relevant Programme Code Standards.

The Trust must consult on the framework for complaints, and that framework must ensure that the Trust is the final arbiter of disputes. The framework must also ensure that there is a clear division of responsibilities for complaints between the Trust and Board, that complainants are put on an equal footing

with the BBC, that the Trust not handle complaints in the first instance, that it is clear how an individual may lodge a complaint and how these will be handled, and that where the Trust handles a complaint, reasons are given (Agreement, clauses 89-90).

Ofcom exercises important powers over the BBC pursuant to legislation, primarily the Communications Act 2003, and the Agreement. Pursuant to section 198 of the Communications Act 2003, Ofcom is granted various powers to regulate the BBC, as provided for in that Act or the Charter or Agreement, including to impose fines of up to £250,000 on the BBC for breach of its duties. Clause 91 of the Agreement requires the BBC to cooperate with Ofcom and to provide Ofcom with such information as it may request in connection with its functions under section 198.

Pursuant to section 266 of the Communications Act 2003, the BBC must have regard to any guidance provided to it by Ofcom in the preparation of its statements of programme policy (adopted pursuant to Agreement clause 21). BBC must produce any programme recordings upon request by Ofcom. The Agreement requires BBC to keep all television programmes for at least 90 days and all radio programmes for at least 42 days (clause 62).

Ofcom's most significant powers in relation to the BBC are over its programming content. As noted above, Ofcom has the power to set or agree extensive programme content standards for BBC, including the codes that it applies to all broadcasters. Clause 95 of the Agreement defines the Relevant Enforceable Requirements as being, among others, those imposed by clause 45 (Ofcom's Fairness Code), clause 46 (Ofcom's Programme Code Standards), clause 47 (news and current affairs rules, adopted after consultation with Ofcom), clause 49 (original production quotas, agreed with Ofcom), clauses 50 and 51 (regional programming quotas and making, also agreed with Ofcom), clause 52 (independent production quotas, pursuant to the Communications Act 2003), clauses 59 and 60 (Ofcom's code for the deaf and visually impaired and modifications thereto) and clause 62 (retention of recordings).

Where Ofcom considers that the BBC has contravened a Relevant Enforceable Requirement, it may require the BBC to broadcast a correction or statement of findings, or to pay a fine up to the maximum of £250,000 pursuant to the Communications Act 2003, as described above.

Both the Charter and the Agreement grant substantial powers to various government ministers, frequently the Secretary of State, defined as the Secretary of State for Culture, Media and Sport, to regulate or require certain action of the BBC. Pursuant to article 54 of the Charter, where anything is required to be done with the approval or upon the direction of a minister, that approval must be given in writing.

Pursuant to articles 17 and 18 of the Charter, the Secretary of State sets the levels of remuneration for members of the Trust. He or she may also give directions to the Trust regarding what must be included in Part 2 of the annual report, and inspect the accounts of BBC as and when he or she may direct (articles 45 and 46). The BBC must also obtain the consent of the Foreign Secretary before concluding any agreements with foreign governments (article 50).

The Agreement allocates numerous powers to the Secretary of State, many relating to financial oversight and control, as well as the digital transition. The Secretary of State must approve BBC's digital coverage plan (clause 35), the Secretary may direct the BBC to continue to provide analogue services (clause 36) or to provide assistance relating to the digital switchover (clause 39), and the Secretary may also direct the BBC to provide access to a multiplex service (clause 42). The BBC is also required to report annually to the Secretary of State on progress regarding digital preparations.

Pursuant to clause 33 of the Agreement, the Secretary of State may veto any new proposed service for BBC and the BBC must obtain the approval of the appropriate minister to include sponsored material or to provide a subscription service (clause 76).

One of the more draconian powers, which is allocated to any government minister, is the power to order the BBC to broadcast a message, at its own cost, if it appears to the minister that an emergency has arisen. Furthermore, the Secretary of State may order the BBC not to broadcast any matter, apparently in his or her sole discretion (clause 81). Any minister may also order the BBC to monitor specified media output, apparently at his or her discretion. This is an unfortunate hangover from previous rules. It has

not been used for many years and is hard to justify by reference to the right to freedom of expression and protection for the independence of public service broadcasters.

The main reporting obligation on the BBC is the publication of an annual report and statement of accounts, Part 1 of which is prepared by the Trust and Part 2 of which is prepared by the Board. Part 2 includes financial information, and statements of compliance with applicable codes and regulations and complaints from viewers. It must also include the “whole of the statement of accounts in relation to the BBC”, which must be audited by an auditor approved by both the Trust and the Secretary of State.

Once Part 2 has been prepared, the Trust reviews it and prepares Part 1 as a commentary on it, along with a commentary on the activities of the Trust and the Trust Unit, and a summary of their expenditures. The annual report and accounts must be provided, within seven months of the end of the financial year to which they relate, to the Secretary of State, who must then lay them before Parliament (Charter, article 45).

In addition to this formal reporting obligation, the BBC must, upon demand and at all reasonable times, allow the Secretary of State, the Foreign Secretary or any person nominated by them to examine the BBC’s accounts and it must also furnish them with such information relating to the financial transactions of the organization as they may request (article 46).

XXXII. Financing

Funding for the UK PSB Group and other BBC operations (such as the World Service, BBC Worldwide and other commercial services) are accounted separately. For the PSB Group, the most significant source of funding is public funding and, in particular, the TV licence. This, in turn, is provided for in sections 363–365 of the Communications Act 2003 and clause 75 of the Agreement. In 2010, licence fee income amounted to GBP 3,447 million (approximately USD 5,522 million), or some 97 per cent of the total budget of the UK PSB Group. The remaining three per cent came from commercial activities, mostly from the provision of goods and services.²⁰⁵ This makes the BBC one of the best funded public broadcasters in the world, after NHK of Japan. According to the BBC, the cost of collecting the licence fee amounted to 8.7% of the overall fee in 2009.

According to clause 75(2) of the Agreement, Licence Revenue funds may not, without prior approval of the Secretary of State, be blended with revenue from other sources for the purposes of supporting any services, thereby effectively precluding the BBC from advertising. Clause 76 also requires the BBC to obtain prior approval of the Minister before carrying sponsored material.

From among the allocation of funds for different services, nearly 75 per cent goes to television, of which 58 per cent goes to BBC One and 24 per cent to BBC Two, with the remaining 18 per cent being shared among the other services. Radio gets another 19 per cent of the service funding, and BBC Online the remaining 6 per cent. Local radio gets the largest share of the radio funds, at 23%, followed by Radio 4 at 19%.

The UK government recently announced significant budget cuts across all public services and the BBC was not spared. An agreement reached between the BBC and the government, but not yet reviewed by Parliament at the time of writing, had the BBC taking over the costs of running BBC World Service, previously funded by the Foreign and Commonwealth Office (to the level of £293 million in 2010) and not considered to be part of the BBC’s public service operation. The BBC also agreed to take over a number of other costs, and to freeze the licence fee at current rates until April 2017.

²⁰⁵ See the 2009-2010 Annual Report.

C Comparative Analysis

Introduction

One fundamental principle underlies the development of democratic broadcasting policy: the airwaves belong to the people and must be used for their benefit. Today, with technology providing a previously unimaginable abundance of broadcasting opportunities, it is widely understood that the public interest is best served by an integrated broadcasting policy that combines the diversity, skills and resources of public, commercial and community broadcasters. As the German Constitutional Court observed, the press can “neither be at the mercy of the state nor of any single social group.”²⁰⁶ Similarly, the European Court of Human Rights held that Austria’s State monopoly on broadcasting was an unjustified violation of freedom of expression, noting that the media is incapable of fulfilling its essential purposes of informing the public “unless it is grounded in the principle of pluralism, of which the state is the ultimate guarantor.”²⁰⁷

All eight countries surveyed here, representing most major regions of the world, have strong mixed systems of broadcasting, with commercial broadcasters competing alongside strong, largely publicly funded public service broadcasters. The one exception to this is South Africa, where the commercial broadcasting sector is still relatively limited and where the public broadcaster relies mainly on advertising revenues.

Despite the ever-increasing availability of new television channels, and the more recent proliferation of platforms for disseminating broadcasting content, such as the Internet and mobile phones, support for public service broadcasting – as manifested by audience shares, the allocation of public funding and supportive statements from politicians, civil society and even other media – remains strong in all of the countries surveyed. Indeed, early predictions about the demise of public broadcasting, or its relegation to the interstices of broadcasting markets, have so far proven to be unwarranted.

This chapter surveys the way legislatures and governments in these eight countries have set the remit and mandate for public broadcasters, and maintained an appropriate tension between independence, accountability and the provision of public funding. Although there are areas of significant overlap and consistency of approach, there are also important differences between the various countries. Comparing these approaches should provide a reasonable panorama of possible ways to regulate public service broadcasting in a democracy.

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XXXIII. The Rationale for Public Service Broadcasters

Although the public monopolies which in many countries characterised the early development of radio and television have largely disappeared, at least in democracies, the essential role that public service broadcaster can and should play in ensuring a free flow of information and ideas to the people is still widely recognised. Notwithstanding technological developments and the capacity of private broadcasters to satisfy an ever-growing range of needs and interests, there remain important areas where these services need to be supplemented by public service broadcasting.

206 *Television I Case* (1962) 12 BverfGE 205, in D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1997), pp. 404-406.

207 *Informationsverein Lentia and Others v. Austria*, 28 October 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, p. 16.

In essence, the market and other private sector forces do not lead to the satisfaction of all public informational interests and, as a result, there is a need to supplement by them with public service broadcasting. In part this is a result of economic forces, as certain types of programming are either too costly or attract too small an audience to generate cost-recovery revenues. But in part it is also because of a need for the kind of leadership role public service broadcasters can play.

There are a number of ways States could promote broadcasting in the public interest which supplemented the programming provided by the private sector. Possibilities include regulatory frameworks which impose public broadcasting obligations on private broadcasters, providing funding for selected areas of programme production and supporting the development of community broadcasters. No doubt all of these are important in contributing to the free flow of information and ideas in society. However, only national public service broadcasters can provide a focal point for reliable, impartial news, for instilling democratic and other important social values, and for exerting an upward pressure in terms of the overall quality of programming. The provision of these key social benefits is one reason why public broadcasting remains so ubiquitous and popular around the world.

These arguments are not just theoretical in nature. Indeed, despite the massive proliferation of options for broadcasting consumers, public service broadcasters still command a surprisingly large market share, particularly where they are independent and receive a reasonable amount of public funding. It may even be that these broadcasters have become more important in a world in which broadcasting markets are so fractured, and in which a central source of trusted news is indispensable. New technologies are also allowing public broadcasters to provide new types of services in the public interest, such as creating interactive forums to engage the youth in participatory activities, tailoring programming more effectively to the needs of minority interest groups, and provided special services for the disabled.

In all of the countries surveyed, the primary legislation (or legal rules establishing the broadcaster) set out the main public service mandate for the broadcaster, usually in fairly general terms. In several countries, this is the only formal statement of this mandate. In both the United Kingdom and France, however, more detailed obligations are set out at a secondary legislative level, in the Agreement for the BBC and in detailed *cahiers des charges* for each individual channel in France. The BBC Trust, the main oversight body, is also required to develop more detailed "purpose remits" for each of its six main Public Purposes, as defined in law.

In some countries, such as France and Australia, the public broadcasting mandate is divided among different broadcasters. Thus, in France, a separate organization is responsible for providing coverage of parliament, while in Australia, the Special Broadcasting Services is specially tasked with promoting multicultural programming. In other countries, different channels offered by the same broadcaster are given different remits.

In some countries, specific quotas are established for certain public interest genres, such as content by independent producers, educational programming or local content. In the United Kingdom, the BBC Trust also sets quotas for news and current affairs, as well as regional programming.

At a general level, there is a relatively high degree of consistency in the specific tasks which public service broadcasters in the eight countries surveyed are required to fulfil. Almost all are required to provide comprehensive, varied, accurate and balanced news and current affairs programming of high quality for reception by the entire public. The need for news and current affairs services which provide a reliable community of information upon which citizens can inform their daily decisions, ranging from the political – such as choosing which candidate to vote for – to the most mundane – such as whether to plan a family outing for the day – is essential to basic citizenship and dignity. For this reason, provision of information services is seen as an important obligation of public service broadcasters.

In some cases, these obligations are spelt out more specifically. Thus in Thailand, the public broadcaster is tasked with making the public aware of global, national and local events, while in Japan, the service must promote international friendship. A number of countries impose specific democratic obligations on public broadcasters, such as to increase participation (Japan), favour democratic debate (France), meet the democratic information needs of citizens and develop citizens' views and forming public opinion (Poland),

and strengthen democracy and participation (Thailand). Many public broadcasters are also given specific roles during election periods.

Most public service broadcasters are also tasked with providing educational programming. The South African law makes it clear that this should include both programming linked to the formal school curriculum and more informal awareness-raising efforts. In Thailand, the law requires the public broadcaster to enhance the “level of civilisation” and to popularise “modern civilisation”.

A historic role for public service broadcasters is to engage in nation building, and this remains an explicit obligation for many. However, in recognition of the fact that we live in a modern multi-cultural world, the obligations on many public service broadcasters have shifted and the focus is now at least as much on reflecting cultural diversity and promoting social inclusion. For the BBC, the relevant Public Purpose is to “sustain citizenship and civil society”, whereas the French law talks of promoting social values, cultural diversity, citizenship and the fight against discrimination.

This meshes well with the widespread obligation on public broadcasters to combine programming of wide appeal with programming directed at specific audiences, which may include programming serving the specific needs of indigenous and emergent minority communities, as well as alternative tastes and interests which may not be adequately catered to by market-driven commercial broadcasting. In some countries, such as Poland and South Africa, and even in France, public broadcasters are under an explicit obligation to provide programming in minority languages. In Canada, the CBC is expected to provide programming of equivalent quality in both French and English, and in practice it also provides programming in a number of native languages.

In a few countries, such as France and Poland, public broadcasters are required to provide religious programming. This is less prevalent than it was in the past, perhaps because it may be harder to reconcile with the idea of a multicultural society. Thus in France, the public broadcaster is required to provide religious programming for all of the main religions practised in France, but on Sunday mornings.

Despite the importance of informational programming, the lion’s share of broadcasting in most countries is comprised of music, drama or other forms of entertainment, including sport. However, it would be a mistake to see these categories of programming as separate. Indeed, they are often closely related to the separate obligation on public broadcasters to promote national and local culture, since it is often through entertainment programming that learning and a sense of cultural identity are fostered, understanding of national history and development expanded, and a vibrant national cultural environment cultivated.

Many public broadcasters are required to commission programming from independent producers, in some cases to meet minimum quotas. European Union rules place a global obligation on all broadcasters to carry at least 10% of independently produced programming. The BBC must commission 25% of certain categories of programming from independent producers, and produce another 50% in-house. The remaining 25% is allocated through an innovative system known as the Window of Creative Competition, where in-house and independent producers compete for programming opportunities.

Other obligations which are placed on public broadcasters in some countries including maintaining related services such as libraries, archives and orchestras. In some countries, public service broadcasters are under an explicit obligation to produce significant levels of local content, in some cases to meet minimum quotas. In other countries, this is reflected not in the legal framework but, rather, in the established practice and culture of the public service broadcaster.

XXXIV. Regulatory Challenges

In their programming, public service broadcasters should, first and foremost, be answerable to the public through their public service mandates, rather than to the demands of the government of the day or to the commercial marketplace. However, public service programming is costly, requiring resources almost by definition beyond its potential for commercial returns. As a result, quality public service broadcasting

is dependent upon public financial support. As recipients of public monies, and trustees of an integral component of the public interest in the airwaves, public service broadcasters must be accountable for their conduct and the use of the resources they are given. At the same time, funding and accountability mechanisms should not lead to undue government control or interference with editorial independence. These key factors set up the central tensions that a proper, rights-promoting, framework for public service broadcasting must resolve. These three elements – independence, public accountability and adequate resources – define the challenge of public broadcast regulation.

The jurisdictions surveyed in this study have implemented public service broadcasting regimes that, in practice, institute relatively strong protection for editorial and creative independence, provide good and sometimes extensive amounts of public funding, and achieve an appropriate level of broadcaster accountability. When sifted for their better elements, they provide a useful basis of experience and ideas upon which emerging or transitional democracies may draw in establishing their own public service broadcasting systems.

In drawing on the examples presented here, a note of caution is in order. This study focuses mainly on the legal framework for public service broadcasting, and primarily in societies where the value of public broadcasting is well-established and popular support for it is strong. Indeed, in most, if not all, of the jurisdictions surveyed, there is a very strong tradition of public service broadcasting, which has become part of the national political culture, supported by effective civil society advocacy. This means both that it is difficult for governments in these countries to interfere with the public service broadcaster and that a variety of mechanisms to guarantee its responsiveness to the public are in place.

Emerging or transitional democracies do not, by definition, have these established traditions and practices. It is of fundamental importance in these countries to promote independence, financial security and accountability through legal means, in the hope that this, in turn may help promote a local culture of support for public service broadcasting. At the same time, it should be recognised that the legal framework is not enough to ensure independence, accountability or stable funding. It must be supplemented by active engagement from the public and civil society.

Q. Independence

While public service broadcasting organizations must act responsibly, they must also be free to discharge their mandates independently. These organizations can only properly serve the public interest if they have full creative and editorial freedom to present news, entertainment and other programming to the public without interference by the government, by other political or quasi-governmental institutions, or, indeed, by powerful private or commercial interests. Thus, independence is fundamental to fulfilment by these broadcasting organizations of their public service role. As public bodies, they are responsible to the public as a whole, not to specific vested interests.

Independence is also protected as a fundamental human right, an aspect of media freedom, an essential component of freedom of expression and information, and an indispensable foundation for a functioning system of democracy and human rights. It is now well established that international law prohibits political interference in the work of public service broadcasters.

Almost every jurisdiction in the world now includes a guarantee of freedom of expression, and often also of the media, in its constitution. As a matter of practice, public service broadcasters should enjoy the full benefit of these guarantees, and should be explicitly empowered to launch legal challenges against State actions that threaten to abrogate that freedom. The Canadian Broadcasting Corporation has, for example, been one of the leading litigants in pursuing constitutional media freedom claims, for example against publication bans and exclusions in criminal trials and Parliamentary proceedings. This adversarial role against the State, which funds and nominally owns it, is entirely consistent with public service broadcasters' fulfilment of their public obligations.

A very positive emerging trend in terms of practical protection for independence is the inclusion of explicit clauses guaranteeing independence and/or freedom of expression in the enabling legislation for public service broadcasters. Such guarantees are, for example, found in the laws governing public service broadcasters in Canada, South Africa and the United Kingdom. These provisions protect both high-level management decisions, as well as specific programming choices and content, from interference or censorship by agents of the State.

Although formal constitutional and legal guarantees are important, in practice the most effective means of promoting independence for public service broadcasters is through protecting their governing boards against interference. All of the public service broadcasters surveyed are headed by such boards, which have overall legal, policy and other responsibility for these broadcasters. One of the key roles of these boards is to act as a shield against government interference, while also serving as a mechanism of accountability to the public. In some jurisdictions – such as Australia and South Africa – the Board is explicitly tasked with promoting and maintaining the independence of the public service broadcaster.

Boards can only be effective in terms of protecting the independence of broadcasters if they, themselves, are independent of political interference. This is fairly obvious and is clear from a recommendation of the Council of Europe, stating:

The rules governing the status of the boards of management of public service broadcasting organizations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference.²⁰⁸

A number of means have been employed in various countries to promote the independence of the board, of which the manner in which individuals are appointed to the board is probably the most important. It should be noted that in many countries, the legal framework does not provide much direct protection for the autonomy of the board, in part because the tradition of independence is so strong. Thus, in the United Kingdom, the members of the BBC Trust are, according to law, simply appointed by the Cabinet. In practice, however, appointments are made on a professional basis, overseen by the Commissioner for Public Appointments, and they have traditionally been extremely independent.

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As a general observation, the involvement of a range of individuals in the appointments process, representing all significant political viewpoints, rather than just the president or prime minister, is a key way of bolstering independence. As a corollary of this, it is important that the process allows for input by civil society, as a means of further broadening participation and ensuring against partisan nominations.

In South Africa, this is achieved through providing for members to be appointed by the President, on the advice of the National Assembly, in a manner which ensures transparency and public participation. In practice, civil society is free to nominate members, which are then considered by the National Assembly. Another approach is taken in Thailand, where different social actors – mostly civil society organizations but also official bodies – each propose members to the board.

Yet other options are found in Japan and Poland. In Japan, members are appointed by the Prime Minister, with the consent of both houses of parliament, a sort of reversal of the South African approach. In Poland, members of the board of the public broadcaster are appointed by the broadcast regulator, whose five members are, in turn, appointed by the lower house of parliament (two), the upper house (one) and the President (two).

Another important means of protecting independence is to place certain conditions on membership of the board, both collectively and individually. Thus, in South Africa, only individuals with specific expertise may be appointed, while there are prohibitions on the appointment of political figures and those convicted of serious crimes, as well as conflict of interest rules and a requirement that membership collectively represents the society as a whole. Many other laws also include requirements and prohibitions along these lines.

208 Council of Europe Recommendation No. R(96) 10 on the guarantee of the independence of public service broadcasting.

Finally, it is important to protect board members' security of tenure, so as to prevent them from being subject to government retaliation should they make decisions which are politically unpopular. Such rules are in place in many of the countries surveyed.

The independence of the board must be distinguished from editorial independence, or the ability to make independent decisions about the content of what is broadcast, which in some ways is the real goal. As a means of bolstering editorial independence, in many countries the governing board's role is restricted to general oversight, and it is not supposed to interfere in day-to-day decision-making. This distance allows the board to serve as a point of liaison between the broadcaster and governing authorities, without that necessarily compromising editorial independence. Thus, a complaint by a senior government official that the news was biased might exert a chilling effect if directed to the news editor, but this would be far less likely if such a claim were presented to the board.

R. Accountability

While public service broadcasters should be independent of government interference, they must also be accountable to the public and mechanisms must be in place to ensure that they remain true to the public interest and their public service obligations, and accountable for the use of public funds. Otherwise, there is a risk that the interests of the board, the management or even the staff may predominate, to the detriment of the wider public. A number of mechanisms are commonly employed to ensure that public service broadcasters are accountable.

At a very general level, most public service broadcasters are subject in the ordinary way to laws of general application. This includes the general law of contract and tort (including defamation), any laws regarding pornography and hate-speech, labour relations codes and environmental standards, to name but a few. In short, public service broadcasters are expected to behave as ordinary responsible corporate citizens.

In the countries surveyed, four sets of actors – parliament, the government, the oversight regulator and the general public – benefit from some sort of tailored accountability mechanisms vis-à-vis the public broadcaster. It may be noted that in all of these relationships, the boards of public service broadcasters play a leading role. These boards stand apart from the day-to-day operations of the broadcasting organization, and are hence able to assess its performance with a relatively high degree of objectivity. At the same time, they can receive input from government or parliament without that necessarily constituting an interference with editorial independence. Their distance also puts them in a better position to weigh public input and to determine an appropriate response.

In the countries surveyed, the boards of public service broadcasters are formally accountable to the public through the legislature or parliament. This direct accountability is in all cases achieved through a reporting mechanism or annual report, which the board is typically expected to present to parliament, often through an intermediary, such as the minister responsible for this issue. These annual reports are normally required to include full financial accounting, including externally audited accounts, as well as details of how the broadcaster has fulfilled the various aspects of its mandate, its objectives and the extent to which they have been met and information relating to complaints. These reports are, again in all cases, supported by formally audited financial accounts.

Parliament, or the relevant committee thereof, can then call on the members of the board (or the chair) to appear before it to answer questions and to provide its views. In this way, the reporting process serves as an important opportunity for elected legislators to provide feedback and guidance to the broadcaster.

In all of the countries surveyed, government, usually in the form of the responsible minister, has some oversight role over the public service broadcaster. In most countries, this role is particularly prominent in relation to financial oversight. Often, the minister may review the books of the public service broadcaster, for example, or issue rules regarding financial management. This is a way of promoting an appropriate balance between ensuring editorial independence (in relation to programming) and yet fiscal accountability.

A role that remains for government in some countries – including France, Australia and the United Kingdom – is the power to order public broadcasters to carry statements on behalf of government. The theory behind this is that it may be important to ensure the dissemination of important official messages, but at the same time it harkens back to an era before the principle of independence was fully established. In practice, furthermore, in the modern, information-enabled, world, it is hardly likely that government messages would not get disseminated. Thus, notwithstanding this power, it is never, or almost never, actually used in these countries. Given the potential for abuse, it would be preferable to remove these powers.

The public service broadcasters surveyed have different relationships with the respective broadcast regulatory bodies in their countries, which have general responsibility for issuing licences and allocating broadcast frequencies. Most public service broadcasters do not, unlike private broadcasters, have to compete for licences and/or frequencies. Some do have to go through a pro forma licensing process, which represents an opportunity for regulators and the public to scrutinise and criticise the broadcaster's performance, rather than a substantive licence renewal procedure. In other cases, such as in South Africa, the licensing requirement would appear to go beyond a formality. While these licensing processes have some benefits in terms of promoting accountability, they may also provide an opportunity for government interference, given the implications of the threat of licence withdrawal. Accountability is better served by establishing separate and explicit oversight processes, which are distinct from the issues of licences and frequencies.

In some countries, including France and Poland, the broadcast regulator plays a role in making appointments to the board of the public broadcaster. In many countries, the regulator has the power to impose content standards on the public broadcaster, as it does for private broadcasters, and to entertain complaints for breach of those standards. In France, the regulator may order public broadcasters to conform to their legal obligations. In the United Kingdom, the regulator has extensive powers to set programming standards and obligations for the BBC, and to fine it, quite heavily, for breach of these standards. Similarly, in South Africa, SABC must respect codes of conduct set by the regulator, which may also require it to conform to the requirements of its Charter, which is set out in law. In other countries, such as Australia and Canada, complaints may be decided instead by a self- or co-regulatory body.

Mechanisms of direct accountability to the public are becoming increasingly important for public broadcasters. These may take various forms. Many broadcasters either are required to, or in practice do, establish internal complaints processes. These generally provide members of the public who have outstanding grievances with an opportunity to have their complaints reviewed either internally by the broadcaster, or by a neutral third-party, measured against an established code of conduct. In Japan, the law requires the public broadcaster to provide a right of reply to anyone who has been harmed by the broadcasting of incorrect material.

In some countries, public broadcasters are specifically required to seek the views of the public directly, for example by conducting opinion polls and surveys, and by holding face-to-face meetings. This is the case, for example, in the United Kingdom, Thailand and Japan.

There is an increasing trend towards the establishment of consultative bodies to advise public service broadcasters on the extent to which they are meeting the needs of audiences. Indeed, all but one of the countries surveyed public service broadcasters were required to put in place such a mechanism. In some cases, such bodies are required to be established on a regional basis. Thus in Japan, the public broadcaster must establish both a central and various regional Consultative Committees, while in the United Kingdom, the BBC must establish four regional Audience Councils. If carefully constituted to reflect the diversity of the broadcaster's audience, and properly shielded from political or patronage appointments, these bodies can provide a very constructive, non-coercive mechanism of accountability.

Thailand appears to be relatively unique inasmuch as it also requires the public broadcaster to establish an external evaluation committee, to evaluate its performance on an annual basis. And at least once every ten years, Thai PBS is required to undertake a major review of its work.

When considering accountability, it is important not to underestimate the importance of informal mechanisms. A host of civil society actors, including other media organizations, consumer groups,

academics and non-governmental organizations, can play a role in ensuring that the public service broadcaster remains true to its mandate. Publicity plays a crucial role in this regard, as every public service broadcasting organization is ultimately dependent on public support for its continued existence and funding.

S. Funding

In established democracies, the freedom of public service broadcasters from governmental interference is reasonably secure, both in law and conventional practice. Today, the main threat to the ability of public service broadcasters to fulfil their mandates stems from the financial constraints that are increasingly being placed on them. In these times of austerity, many public service broadcasters are being called upon to maintain previous levels of service with decreasing levels of public financial support.

Traditionally, public service broadcasters have been largely funded through public allocations, either from general government resources, or through the collection of a broadcasting or television or radio licence fee. From among the eight countries surveyed, five are funded through licence fees, three receive direct government grants and one, Thailand, has a rather unique system of funding, described below.

Both main forms of public funding have their advantages and disadvantages. A general charge on users, or broadcasting fee, is relatively insulated from government interference or manipulation, and provides consistent levels of funding over time. It does involve collection costs, which is an inefficiency. These may be minimised by using existing payment systems, such as electricity suppliers, to collect the fee, although this is done rather more rarely than one might expect.

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More seriously, it has often proved difficult for political reasons to introduce a broadcasting fee for the first time in countries where one has not traditionally been collected. It is a very visible source of funding, and has the effect of reminding people of the cost of public broadcasting every time they make a payment (unlike other public services). In addition, the fee may exert some pressure on broadcasting organizations to maintain high audience levels as a way of justifying the collection of the fee, which can undermine their commitment to public service goals.

In Thailand, a completely new source of public funding has been put in place for the public broadcaster, in the form of a dedicated 'sin' tax on tobacco products and liquor. Although it is perhaps unusual to fund public broadcasting, a public good, from what some might describe as public evils, in practice the system appears to be working well, although the system is still in its infancy.

From among the countries surveyed, Japan, Thailand and the United Kingdom all defray the vast majority of the costs of public broadcasting – some 97% in each case – through public sources. In a second group of countries – consisting of Australia, Canada and France – the larger portion of the funding, between 65% and 83%, comes from public sources. The last two countries, namely Poland and South Africa, provide far less public support to public broadcasters, only 30% and 18% respectively.

The main alternative to public funding for public service broadcasters is commercial advertising. Public broadcasters in Canada, France, Poland and South Africa, exactly one-half of the countries surveyed, carry advertisements.

There is nothing *per se* wrong with allowing some commercial advertising on public broadcasters, but it does carry a number of risks. There are only so many broadcast hours in the day, and the more time that is dedicated to quality programming, the better. Also, it is undoubtedly more enjoyable to watch programmes without being interrupted by advertisements.

More serious is the risk that commercial imperatives will result in public service broadcasters mimicking the private sector and basing their programming choices on popularity rather than quality. This can only lower the quality and diversity of public service broadcasting, undermining the whole rationale for it in the first place. At the same time, financial imperatives and dwindling public resources in many countries

mean that public service broadcasters cannot maintain levels and quality of programming unless they are allowed to supplement their income with outside revenue. Furthermore, having some non-public revenues can help enhance independence. A balance can be found by allowing a limited amount of commercial advertising while ensuring that most of the resources come from public sources.

Finally, many public broadcasters engage in other commercial activities, mainly spin-off industries from their core mandate, such as videos and books, or the provision of goods or services, again based on their public resources, to generate supplementary revenue.

It remains the case that in most of the countries surveyed, substantial public funding is the rule for public service broadcasters. This enables them to fulfil their public service mandates in a way that would be impossible without such support. Put differently, if public service broadcasters are forced to compete openly in the commercial marketplace, they will inevitably come to resemble the private broadcasters with whom they are competing, thereby abandoning their mandate and undercutting their very *raison d'être*.

C onclusion

The right of the public to receive a wide diversity of information and ideas through the media is now well established as a central component of international guarantees of freedom of expression. States are under obligations to take a number of measures to maximise media diversity and one of these is to promote the availability of public interest content which is not necessarily provided through the commercial media. There are, in theory, many ways in which this can be done, but one remains dominant, in both theory in practice, namely the establishment of national public service broadcasters.

At their best, public service broadcasters ensure the provision of reliable news and current affairs programming, promote a sense of inclusion and citizenship, foster democratic and other important social values, provide quality educational and informational programming, and serve the needs of minority and other specialised interest groups. They also play a key role in maintaining quality standards, a role which affects their own programming, but also impacts on the sector as a whole.

All of the eight countries surveyed in this book demonstrate a strong commitment to public service broadcasters. This is reflected in the important role these broadcasters play in the overall broadcasting ecology in each of these countries, as measured by audience share, public funding, expressions and other forms of support, and, ultimately, impact.

It is, at this point in time, quite clear that early predictions about the waning in importance of public service broadcasters in the new, choice enabled media environment have, at least in these eight and many other countries, been premature. Although the vast changes, indeed transformation, of the media environment in recent years has certainly not failed to impact on public service broadcasters, it is also true that they remain very important sources of information, education and entertainment in the modern world. And new technologies have even allowed them to expand the range of public services they provide, most particularly in terms of engaging citizens, including the youth, in participatory exercises.

A number of features are central to defining both the nature and success of these broadcasters. In each of the eight countries, they have been given a very clear and specific public service mandate or remit. In exchange for providing them with public funding, the public demands something in return, and this is fulfilment of that mandate. Although the way in which they are spelt out in law varies considerably, both as to form and detail, the general nature of these mandates is remarkably similar, notwithstanding massive variation in the societies they serve, politically, culturally, socially, ethnically and developmentally.

Sitting somehow below their overriding mandates are the practical arrangements by which these public service broadcasters function, namely their internal governance structures, the systems of oversight, and the manner in which they are funded, and in particular through public sources. The tension between these three structural arrangements – governance, oversight and funding – is the defining force of regulation for public service broadcasters.

Here, although some features are consistent – such as the establishment of governing boards to oversee the work of these broadcasters – there is more substantive differentiation among the countries surveyed. At the same time, certain key goals are crosscutting.

First, it is widely agreed that public service broadcasters must be able to operate largely free of political interference and, as far as possible, free of interference from powerful social interests, including commercial actors. Without this, they will always be under pressure to divert from their public service mandates so as to serve these other interests instead. At the same time, it is not possible to achieve perfect independence and governments everywhere suffer from an almost continuous temptation to try to influence the content of public service broadcasting. While more robust democracies largely manage to contain this threat, it remains a constant struggle in emerging or developing democracies. A well-designed legal framework is essential, but it is not enough of itself to ensure independence.

Second, it is necessary to support the work of these broadcasters with substantial public funding. Without this, they again cannot fulfil their public service mandates, which call on them to provide programming which is not otherwise supported by the market. Indeed, this is somehow a defining characteristic of public service broadcasting, since if their output were commercially viable, it would probably make sense simply to let the market supply it.

Third, as recipients of public funding, but also as guardians of an extremely important social function, namely imparting information and ideas in the public interest, these broadcasters must be accountable. Once again, this may be linked to their public service mandate, which calls on these broadcasters to serve public interests, not their own ideas of what is important or what the public needs. Ultimately, accountability must be to the public, whose interests these broadcasters were created to serve and, increasingly, these broadcasters are subject to direct public accountability mechanisms. But indirect accountability, importantly through the legislature, remains the primary mechanism.

All of the eight countries surveyed in this book have, sometimes in different ways, been successful in terms of serving the public interest through public service broadcasting, despite very different contexts and histories. Between them, they provide a rich tapestry of experience, experimentation and direction regarding the practical means of delivering all three of these crosscutting goals. Hopefully this experience can provide some inspiration and support for the successful development of public service broadcasting in other countries.

This book explores the legal and regulatory systems governing public service broadcasters in eight different countries around the world, looking at the services they provide, the way in which their mandates are defined, their internal governance systems, mechanisms of oversight or accountability and funding. In selecting the various countries, an attempt has been made to ensure wide geographic representation, while including only countries that have a strong commitment to public service broadcasting.

Special emphasis has been placed on the strategies that have evolved over the years to ensure that public service broadcasters are not undermined by two critical phenomena: external control (political or other), particularly over editorial output, and inadequate public funding. The book outlines tested approaches to resolving these key problems, but it also highlights innovative systems that are being piloted in different countries to address some of the new challenges that face public service broadcasters.

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