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The Media Pluralism Principle, The Financing of Public Broadcasters, and EU Law

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Abstract

In the rise of authoritarian trends in Hungary and in Poland, public broadcasters play a crucial role in supporting the political forces in power. There are many examples which show how public broadcasters influence public opinion by selective coverage and distorted remit. While the problem of media plurality is often commented upon from the perspective of fundamental rights or the rule of law, another relevant perspective is that of internal market and economic law. The article analyses how can one make sure that the use of public funds to support State media does not lead to the distortion of citizens' rights to be informed. The article argues that the current EU State Aid framework allows the balance of Member States' prerogatives in respect to media freedom and content with the risk of EU-imposed censure. The article analyses the place of media pluralism in EU law and demonstrates that media pluralism has been integrated within the internal market framework, including an analysis of recent amendments to the Audiovisual Media Services Directive. Then, it focuses on the relationship between media pluralism, public service broadcasting and EU State aid law.

Keywords: media pluralism; State Aid; rule of law crisis; public broadcasters; freedom of expression

A. Introduction

Due to the rise in authoritarian trends in Hungary and Poland, public broadcasters¹ are crucial to the political forces in power. Many examples show how public broadcasters influence public opinion through selective coverage and a distorted remit; for example, public broadcasters have been used to question the European Union's (EU's) founding values, such as the rule of law.² At the same time, private broadcasters and digital media's role in challenging these dominant narratives is not significant to specific groups of voters, such as older people. This is a noteworthy shift in perspective on the role of public broadcasters; hitherto, public broadcasters were perceived as an element that strengthens media pluralism throughout the EU. By contrast, these Member States are used to curtail media pluralism by promoting government-related content.

¹The term "public broadcaster" refers to broadcasters that are owned by the State. Broadcasters (both public and private) can be subject to public service obligations. Rachael Craufurd Smith, *State Support for Public Service Broadcasting: The Position Under European Community Law*, 28 LEGAL ISSUES OF ECONOMIC INTEGRATION 1 (2001) <<https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/28.1/333757>> accessed 15 May 2023.

²Kim Lane Scheppelle, Dimitry V. Kochenov & Barbara Grabowska – Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39 YEL (2020) 3–121.

This situation raises an interesting question: how do we ensure that public funds supporting such broadcasters do not undermine media pluralism by distorting citizens' rights to be informed (rights of freedom of expression and information)?³ The European Commission expressed its primary view on this issue – regarding a complaint it received about the anticompetitive mode of funding the public broadcaster in Hungary – explicitly stating that the violation of freedom of expression goes beyond state aid control. However, it left this issue out of the scope of its analysis.⁴ Nevertheless, I argue that the problem of Member States curtailing media pluralism can be addressed by rethinking state aid and services of general economic interest (SGEI) rules and their application, combined with an effective monitoring system.

In Section B, I set the scene by briefly presenting the background to the issue, the meaning of media pluralism, and its relevance. Then, in Section C, I analyze the relationship between media pluralism and EU law and case law on media pluralism from the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). The Audiovisual Media Services Directive (AVMSD)⁵ and the European Media Freedom Act (MFA)⁶ draft are also discussed. Finally, in Section D, I focus on the relationship between media pluralism, public service broadcasting, SGEI, and EU state aid law. The article presents the legal situation as of May 2023.

B. Threats to media pluralism in the EU

Results from a Eurobarometer survey in 2016 showed that European citizens are worried about the independence of the media.⁷ These worries are justified. The European Commission's public consultation summary report showed examples of legislative changes influencing public service media governance, its management bodies, and the "politically motivated manipulation of funding and politically motivated staffing changes" from sixteen Member States.⁸ The link between the rule of law crisis and public broadcasters was noted for the first time by the European Commission – including public service media – in its 2022 Rule of Law Report.⁹ Within the rule of

³Promotion of culture falls outside the scope of this paper. Article 107 (3)(d) TFEU allows the Commission to regard aid to promote culture as compatible with the common market if such aid does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest. As this provision has not been applied as an exemption from Article 107 (1) TFEU, it is not analysed in this Article. See also Karen Donders, *State Aid to Public Service Media: European Commission Decisional Practice Before and After the 2009 Broadcasting Communication*, 1 EUROPEAN STATE AID LAW QUARTERLY 71 (2015).

⁴Case SA.45463, Public service media in Hungary. Complaint 45463 of 2016 on the anti-competitive mode of funding the public broadcaster which acts as a State broadcaster; Mérték Médiaelemző Műhely, *Funding for public service media in Hungary – A form of unlawful state aid*, Mértékblog, (Jan. 9, 2019) <<https://mertek.atlatszo.hu/funding-for-public-service-media-in-hungary-a-form-of-unlawful-state-aid/>> accessed 15 May 2023.

⁵Directive 2018/1808/EU, 14 Nov. 2018, amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, 2018, O.J. (L303/69–92). Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), 2010, O.J. (L95/1–24).

⁶Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market and amending Directive 2010/13/EU, COM/2022/457 final.

⁷European Commission, *Special Eurobarometer 452, Summary. Media pluralism and democracy*, (Nov. 2016) <https://ec.europa.eu/information_society/newsroom/image/document/2016-47/sp452-summary_en_19666.pdf> accessed 15 May 2023.

⁸European Commission, *Public Consultation Summary Report - Annual Colloquium on Fundamental Rights 2016 'Media pluralism and democracy'*, (14 Oct. 2016) <https://ec.europa.eu/information_society/newsroom/image/document/2016-42/executive_summary_public_consultation_final_for_publication_18469.pdf> accessed 15 May 2023.

⁹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions 2022 Rule of Law Report The rule of law situation in the European Union COM/2022/500 final.

law crisis, the ruling parties in Poland and Hungary use public broadcasters to influence citizens. The situations in those countries are discussed in the section below.

I. Poland

Many examples of threats to media pluralism in Poland at various levels exist. This situation started with legislative changes aimed at taking control over public broadcasters. Under the Polish Constitution,¹⁰ the Radio and Television Authority (KRRiT) is responsible for safeguarding freedom of speech, the right to information, and the public interest in radio broadcasting and television. Although the governing party won the elections in 2015, it did not obtain the required majority to modify the Constitution. It, therefore, introduced a new legislative Act at the end of 2015¹¹ that terminated the terms of the KRRiT's board members. The new KRRiT was appointed in 2016 by the Parliament and the President, both from the same political persuasion. After that, the Act on the National Media Council¹² was adopted. This Act defines the tasks, powers, organization, and procedure for appointing the newly created National Media Council (NMC) members. The NMC is a body that has the power to appoint and dismiss the members of the public radio, television, and the Polish Press Agency governing bodies.

As a result, public broadcasters were flagrantly used to promote government-related content. For instance, when the Mayor of Gdańsk, Paweł Adamowicz, was murdered, it was pointed out that the Mayor had been frequently attacked on public television channels (TVP).¹³ In relation to the migration crisis on the border between Poland and Belarus, *Wiadomości* (a public television news program) used amateur videos of a store robbery from the filming location of the Netflix series "Snabba Cash" as an illustration of the danger from immigrants – without indicating that it was not a real-life scene.¹⁴ Moreover, more time was accorded to the ruling party than to the opposition.¹⁵ International observers characterized the first round of the Polish Presidential election in 2020 as influenced by an "intolerant rhetoric and a public broadcaster that failed to offer balanced and impartial coverage."¹⁶

The issue of media pluralism has come into play more recently concerning what is known as the *lex tvn*, an amendment to the existing Polish system of concessions that resulted in the refusal of an extension of the concession for a private broadcaster, TVN, known for its critical opinions

¹⁰The Constitution of the Republic of Poland of 2 April 1997, Official Journal ("Dz.U.") no 78, item 483.

¹¹The Act was a part of the "Media Law Reform Package" that included three drafts, i.e., the draft Act on National Media, the draft Act on Audiovisual Contribution, and the draft Act on Provisions introducing the Act on National Media and Act on Audiovisual Contribution, which was strongly criticized in the Council of Europe expert opinion, and subsequently, their adoption was postponed, with the exception of the Act on the National Media Council (with some changes). See Council of Europe, *Conclusions of an expert dialogue between the Polish Government and the Council of Europe* (6 June 2016) <https://www.coe.int/en/web/freedom-expression/home/-/asset_publisher/RAupmF2S6voG/content/communique-on-conclusions-of-an-expert-dialogue-between-the-polish-government-and-the-council-of-europe?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2F> accessed 28 July 2020.

¹²On 22 June 2016, the Act on the National Media Council was passed by the Polish Parliament, see Dz.U. of 29 June 2016, no 929. The English text of the Act can be found at <https://www.epra.org/news_items/poland-act-on-the-national-media-council> accessed 28 July 2020.

¹³Towarzystwo Dziennikarskie wzywa KRRiT do monitoringu mediów publicznych przed wyborami do PE, Wirtualne Media (Apr. 8, 2019) <<https://www.wirtualnemedial.pl/artykul/parlament-europejski-wybory-towarzystwo-dziennikarskie-wzywa-krrit-do-monitoringu-mediow-publicznych>> accessed 15 May 2023.

¹⁴W "Wiadomościach, nagranie z planu serialu Netflixa jako przykład terroru imigrantów, Wirtualne Media, (31 Oct. 2021) <<https://www.wirtualnemedial.pl/artykul/wiadomosci-material-imigranci-wpadka-serial-netflixa>> accessed 15 May 2023.

¹⁵Wirtualne Media supra note 13.

¹⁶OSCE Office for Democratic Institutions and Human Rights, *Polish presidential election managed well despite legal uncertainties, but intolerance and public media bias tarnished campaign, international observers say*, OSCE, (June 29, 2020) <<https://www.osce.org/odhr/elections/poland/455731>> accessed 15 May 2023.

about the government.¹⁷ The Polish Competition Authority (UOKIK) was not neutral in this regard. In February 2021, UOKIK cleared the takeover of Polska Press, a group publishing 20 regional dailies, 120 weeklies, and a free press, by Polski Koncern Naftowy Orlen, a state-owned oil refiner and petrol retailer.¹⁸ A month before, UOKIK prohibited the acquisition of a producer and broadcaster of radio programs (in January 2021), which also sold advertising time, by Agora – the head of a group operating in the press, publishing, and radio industry that is known to be critical of the Polish government.¹⁹

II. Hungary

A significant issue in Hungary is the concentration of media ownership, whereby a number of influential media groups are under the control of the government without a counterbalance of independent media. The exemption from merger control procedures exacerbated this problem by transferring more than 400 media outlets to the Central European Press and the Media Foundation (KESMA).²⁰ In 2020, a pro-government businessman took over Index.hu, which led to the dismissal of the independent editor-in-chief and the whole newsroom staff.²¹

In spite of a regulatory framework that seemingly meets formal standards of media pluralism and independence, the diversity and plurality of the media are not safeguarded in practice.²² The Media Act 2010 established the National Media and Infocommunications Authority (NMHH – Media Authority) to oversee and shape the media landscape per the law. The 2010 Act also founded the Media Council, which is responsible for enforcing regulations that relate to pluralism, editorial independence, ownership, frequency allocation, fair competition, child protection, and monitoring of the Public Service Media. The formal independence of the Media Authority is ensured by law; however, this cannot be guaranteed in practice if the government holds a two-thirds majority in Parliament.²³

The Media Pluralism Report chapter on Hungary emphasizes that, although direct political influence or control of media does not frequently occur in Hungary, the media market is characterized by indirect influence through the use of proxies, intermediaries, government-affiliated investors, and other entities. For instance, public broadcasters are used for selective coverage of important issues.²⁴ In the last elections in Hungary, public broadcasters were granted more attention to “close-to-the-government candidates” than the opposition. Outstanding

¹⁷Paweł Marcisz, *The lex tvn and the end of free media in Poland*, Verfassungsblog, (15 Aug. 2021) <<https://verfassungsblog.de/the-lex-tvn-and-the-end-of-free-media-in-poland/>> accessed 15 May 2023.

¹⁸UOKIK Decision, DKK-34/2021, PKN ORLEN / Polska Press. Judgment of the Court of Competition and Consumers Protection, XVII AmA 43/21.

¹⁹UOKIK Decision, DKK 1/2021, Agora/Eurozet. Judgment of the Court of Competition and Consumer Protection, XVII AmA 61/21.

²⁰The Centre for Media Pluralism and Media Freedom, *The Media Pluralism Monitor 2021 Report, Hungary* <https://cadmus.eui.eu/bitstream/handle/1814/71949/hungary_results_mpm_2021_cmpf.pdf?sequence=1&isAllowed=y> accessed 15 May 2023 Decree 29/2018. (XII. 5.) Korm. Rendelet a Közép-EurópaiSajtóésMédiaAlapítványáltalaz ECHO HUNGÁRIA TV Televíziózási, KommunikációsésSzolgáltatózártkörű Részvénytársaság, a Magyar Idő kKiadóKorlátoltFelelősségű Társaság, a New Wave Media Group KommunikációsésSzolgáltatóKorlátoltFelelősségű Társaság, valamintaz OPUS PRESS Zártkörű enMu” kődo” Részvénytársaság megszerzéséneknemzetstratégiaijelentő ségű vémino” sítéséro” l <<https://net.jogtar.hu/jogszabaly?1800229.KOR>> accessed 15 May 2023; Maciej bernatt, *populism and antitrust: the illiberal influence of populist government on the competition law system* (CAMBRIDGE UNIVERSITY PRESS, 2022) 161.

²¹The Centre for Media Pluralism and Media Freedom, *The Media Pluralism Monitor 2021 Report, Hungary*, supra note 20, 14.

²²Id.

²³Id.

²⁴Jennifer Rankin, Flora Garamvolgyi, *Hungary: Where editors tell reporters to disregard facts before their eyes* <<https://www.theguardian.com/world/2022/apr/02/hungary-independent-media-editors-reporters-orban>> accessed 15 May 2023, GUARDIAN.

independent outlets were often objects of smear campaigns and were susceptible to control through access to state advertising.²⁵

In 2016, a complaint concerning the role of Hungarian public service media and its funding was filed with the European Commission.²⁶ In 2019, a second complaint was filed concerning the Hungarian government's purchase of media advertisements compared to media outlets owned by private persons and business groups close to the Hungarian political establishment.²⁷ In its preliminary assessments, the Commission found that the financing system was an existing aid due to a consolidation of specific media in the first complaint. In the second complaint, no state aid was involved as advertisement payments were not selective and referred to remuneration for specific services provided by public broadcasters.

C. Media pluralism in EU law

1. The concept of media pluralism in the case law of the ECtHR and the CJEU

The notion of media pluralism refers to the provision of information in all its forms via non-official channels of communication. While it is agreed that media pluralism constitutes a pillar of modern, liberal democracies, the concept itself is widely debated.²⁸ Due to ongoing digitalization and “platformization,” it is conceptually becoming more complex and nuanced.²⁹ It enshrines a plethora of aspects, such as diversity of ownership and variety with respect to the sources of information and the available content.³⁰ Consequently, it can be analyzed on various levels: a *macro* level related to media ownership, service structures, and entry costs; a *meso* level related to media performance and professional conduct; and a *micro* level of content.³¹ Media pluralism can also refer to internal pluralism, understood as a plurality of voices and expressed opinions within a specific media organization, or to external pluralism, understood as a plurality of media outlets in the broader context.³²

Without entering into this debate and leaving out questions related to new digital developments, I treat media pluralism as being focused on the plurality of content and

²⁵The Centre for Media Pluralism and Media Freedom, *The Media Pluralism Monitor 2021 Report, Hungary*, *supra* note 20, 15.

²⁶SA.45463 – Public service media in Hungary. Complaint 45463 from 2016 on the anti-competitive mode of funding the public broadcaster which acts as a state broadcaster; Mérték Médiaelemző Műhely, *Funding for public service media in Hungary – A form of unlawful state aid*, Mértékblog, (9 Jan. 2019) <<https://mertek.atlatszo.hu/funding-for-public-service-media-in-hungary-a-form-of-unlawful-state-aid/>> accessed 5 July 2020. According to publicly available information, it is still pending.

²⁷SA.53108 – HU – Government spending on advertisements in certain private media outlets. Complaint No. 53108 from 2019 on the abuse and discriminatory application of state advertising to starve independent outlets and reward pro-government outlets in breach of EU Article 107 TFEU, still pending.

²⁸Kari karpinen, *rethinking media pluralism* (FORDHAM UNIVERSITY PRESS, 2013) 256 <<https://www.jstor.org/stable/j.ctt13wzz1r>> accessed 15 May 2023; Elda Brogi, *The media pluralism monitor: Conceptualizing media pluralism for the online environment* (2020) 29 PROFESIONAL DE LA INFORMACIÓN, e290529 <https://doi.org/10.3145/epi.2020>. Accessed Sep. 29.

²⁹Elda brogi, roberts carlini, iva nevadi, pier luigi parcu & mario viola de azevedo: *Conceptualizing media pluralism in the era of online platforms. The experience of the media pluralism monitor* (ELGAR 2021) 17.

³⁰European Commission, Commission Staff Working Document, Media pluralism in the Member States of the European Union (SEC (2007) 32) 18.

³¹Andrea Czeppek, Melanie Hellwig & Eva Nowak (eds), *Press freedom and pluralism in europe: Concepts and conditions* (INTELLECT BOOKS LTD, 2009) 47.

³²High Level Group on Media Freedom and Pluralism, *A free and pluralistic media to sustain European democracy, Report 2013* 13. <https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf> accessed 15 May 2023; Reporters sans frontières, *Contribution to the EU public consultation on media pluralism and democracy*, (July 2016). <https://ec.europa.eu/information_society/newsroom/image/document/2016-44/reporterssansfrontiers_18792.pdf> accessed 15 May 2023.

diversity of voices. In this context, it is closely linked with freedom of expression³³ and treated as a means to ensure the right of citizens to be informed³⁴ as one of the elements of freedom of expression.³⁵

This approach to defining media pluralism is reflected in ECtHR case law. Freedom of expression “grounded in the principle of pluralism” plays a fundamental role in democratic societies, especially when it serves to “impart information and ideas of general interest, which the public is entitled to receive”.³⁶ Pursuant to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), everybody has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. Consequently, states need to act positively to guarantee effective access to the market to ensure diversity of overall program content, including content critical of the government.³⁷ This, in turn, safeguards wide-ranging content that reflects the myriad viewpoints prevalent in the society for which the programming is intended.³⁸

The ECtHR has linked the concept of media plurality to Article 10, emphasizing the state’s role as the ultimate guarantor of this principle³⁹ – which can only be restricted if it corresponds to a pressing need.⁴⁰ In *Lentia*, the plurality of the media was linked to people’s entitlement to receive diverse information, as grounded in the principle of pluralism, and to the fact that the state is the ultimate guarantor of the right to receive diverse information. Therefore, attaining true diversity and objectivity can only be achieved by providing a variety of stations and programs.⁴¹ Thus, the ECtHR confirmed the right to receive diverse information and ideas. The state is the ultimate guarantor of the principle of media pluralism, and a monopoly in the broadcasting market (private or public) is, per se, harmful to that end.⁴²

The CJEU considered the economic character of broadcasting to be a provision of services.⁴³ The CJEU recognized cultural policy objectives as related to the public interest of Member States⁴⁴ and confirmed that a cultural policy could constitute an overriding requirement relating to the general interest that justifies a restriction on the freedom to provide services⁴⁵ – provided that those prohibitions are necessary to ensure the pluralistic and non-commercial character of the audiovisual system introduced by that legislation.⁴⁶ Moreover, in *ERT*, the CJEU held that when a Member State derogates from economic freedoms, a justification for this must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the ECHR.⁴⁷

³³Freedom of expression is broader than media pluralism as it relates to special rights, protections, and responsibilities for journalists’ media activities.

³⁴High Level Group on Media Freedom and Pluralism, *supra* note 32, 21.

³⁵Charter of the Fundamental Rights, Article 11.

³⁶*Informationsverein Lentia and Others v Austria*, App no 37093/97, para. 38 (1993).

³⁷*Handyside v UK*, App. No. 5493/72, para. 49 (7 Dec. 1976).

³⁸*Centro Europa 7 SRL and Di Stefano v Italy*, App No. 38433/09, paras. 129–35 (7 June 2012).

³⁹See also, *Manole and others v Moldova*, App no 13936/02, para. 101 (17 Sep 2009); referring to Article 10 ECHR and Recommendation No (96) 10 of the Committee of Ministers to Member States on the Guarantee of the Independence of Public Service Broadcasting (Sep. 11, 1996).

⁴⁰Mario Oetheimer (ed.) *Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention of Human Rights* (Council of Europe, 2007).

⁴¹*Id.* 73; see *Informationsverein Lentia and Others v Austria*, *supra* note 36, para. 53.

⁴²Ewa Komorek *Media Pluralism and European Law* (KLUWER LAW 2012), 73.

⁴³Case C-155/73, *Sacchi v Italy*, ECLI:EU:C:1974:40, para. 6.

⁴⁴Case C-148/91, *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media*, 1993 E.C.R. ECLI:EU:C:1993:45, para. 10.

⁴⁵Case C-299/02, *Commission v Netherlands*, 2004 E.C.R. I-9761, para. 30.

⁴⁶*Id.* para. 15.

⁴⁷Case C-260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* 1991 ECLI:EU:C:1991:254, paras 42–43.

The CJEU recognized the link between maintaining pluralism and freedom of expression. It adhered to the ECtHR's definition of freedom of expression to which the protection of pluralistic media belongs.⁴⁸ The issue of freedom of expression was also brought up in the light of restrictions on advertising on *RTL Television*.⁴⁹ Moreover, the CJEU stressed "the importance of the fundamental freedom to receive information of which the recipients are end-users and which the Member States must guarantee."⁵⁰

In this paper, I focus on *the plurality of content and diversity of voices* as major features to be protected in the case of public broadcasters. It is easy to imagine a situation with many public or public-related outlets that broadcast the same favorable message for the government or other political principles. In such a case, the number of outlets is less relevant than ensuring safeguards exist to prevent government-controlled or politically motivated editorial policies.

II. EU legislative framework and media pluralism

There is no explicit competence conferred on the EU to safeguard media pluralism; however, Article 2 TEU mentions pluralism as a characteristic of a society that upholds the rule of law. Pursuant to the Treaty of Lisbon, respect for fundamental rights became a "founding value" of the EU.⁵¹ Furthermore, Article 11(2) of the Charter of Fundamental Rights of the European Union (the Charter)⁵² clearly states that "freedom and pluralism of the media shall be respected".⁵³ Article 11(1) specifies that everyone has the right to freedom of expression, including, inter alia, the freedom to receive and impart information and ideas without interference from a public authority.

At the same time, EU law looks at broadcasting from an economic perspective. Because of the economic character of European integration and the supranational character of the EU legal order, the "anxious relationship"⁵⁴ between fundamental rights in general and the economic freedoms within the internal market, media pluralism has been interpreted against the background of the principles resulting from the EU's internal market principles and "economic rationality".⁵⁵

In the 1980s, before the Charter was adopted, the European Parliament consistently tried to protect plurality and media diversity as the objective of regulatory action at the EU level.⁵⁶ These efforts were mainly focused on maintaining the plurality of media due to an increasing concentration in the media sector⁵⁷ and rapid technological developments.⁵⁸ The different efforts toward achieving EU-wide legislation were mainly hindered by the persistent reluctance of the

⁴⁸Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others*, 1991 E.C.R. I-4007, paras 23–24.

⁴⁹Case C-245/01, *RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, 2003 E.C.R. I-12489.

⁵⁰Case C-336/07, *Kabel Deutschland Vertrieb und Service*, 2008 E.C.R. I-10889, para. 33; Case C-163/10, *Patriciello*, 2011 E.C.R. I-7565, para. 31.

⁵¹Consolidated version of the Treaty on European Union [2008] OJ C115/13, Article 2 (TEU).

⁵²Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Article 6(1).

⁵³Armando Jose Garcia Pires, *Media pluralism and competition*, 43 EUROPEAN JOURNAL OF LAW AND ECONOMICS 255 (2017).

⁵⁴Sybe De Vries, 'The protection of fundamental rights within Europe's internal market after Lisbon – An endeavour for more harmony' in Sybe de Vries, Xavier Groussot, Gunnar Petursson (eds), *balancing fundamental rights with the eu treaty freedoms: The european court of justice as "Tightrope" walker* (ELEVEN INTERNATIONAL PUBLISHING, 2011) 10.

⁵⁵Daniel Augenstein, *Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law* (2013) 14 German LJ 1917, 1918; Case 112/200, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-11767 paras 64, 74, 81.

⁵⁶Komorek, *supra* note 42, 29.

⁵⁷Id. 29–30.

⁵⁸Communication from the Commission on the application of State aid rules to public service broadcasting (state aid communication), [2001] OJ C 320/04.

European Commission to endorse such legislation.⁵⁹ The Commission was of the opinion that the regulation of media plurality should, in fact, be left to the discretion of the Member States.⁶⁰

As a consequence of technological developments and case law of the CJEU on freedom of provision of services concerning the compatibility of restrictive national laws on broadcasting, retransmission of programs, and advertising under Article 56 TFEU, the “Television without Frontiers” Directive (AVMSD)⁶¹ was adopted in 1989 based on Articles 53(1) and 62 TFEU.⁶² The adoption was prompted by rapid technological progress in the audiovisual sector, although, in the beginning, it was mainly focused on broadcasting and film. Through several revisions, it gradually started to cover various types of audiovisual media services, including traditional TV broadcasts, video-on-demand services, and other online content providers. The AVMSD has thus far been the principal instrument in EU regulation of the audiovisual sector through its overarching objective of creating a level playing field for service providers. It embodies intertwined principles of free movement of services, the recognition of the country-of-origin regulatory authority, and the inclusion of several social and cultural policy objectives.⁶³ The AVMSD emphasizes, although only in the Preamble,⁶⁴ that to serve the interests of individuals and shape public opinion, it is essential that such services can inform individuals and society as completely as possible with the highest level of variety.⁶⁵

Article 15 AVMSD promotes giving public access to events of great interest. Member States are required to ensure that any broadcaster within the EU can access events of significant public interest that are transmitted exclusively by a broadcaster under their jurisdiction for the purpose of creating short news reports. This access must be granted fairly, reasonably, and non-discriminatively.⁶⁶ While analyzing the limits imposed by Article 15 in the light of the Charter, the CJEU considered that marketing on an exclusive basis of events of great interest to the public is increasing and is liable to considerably restrict the general public’s access to information relating to those events. Therefore, the CJEU held that the AVMSD seeks to safeguard the fundamental freedom to receive information, guaranteed under Article 11(1) of the Charter, and to promote pluralism of the media in the production and programming of information in the EU, as protected under Article 11(2) of the Charter. The CJEU considered that safeguarding the freedoms protected under Article 11 of the Charter constituted a legitimate general interest.⁶⁷

The AVMSD also fosters media pluralism in the form of cultural diversity through quotas for “European-made” productions. Article 16 requires broadcasters to reserve the majority of their transmission time for European productions and at least 10% of transmission time for the work of independent European producers. Cultural diversity is encouraged through these quotas.

In the 2016 amendments to the AVMSD, the Commission proposed strengthening the role of audiovisual regulators (NRA) by ensuring that they are legally distinct from their governments

⁵⁹Komorek, *supra* note 42, 47.

⁶⁰See, in this respect, Commission, ‘Services of General Interest (White Paper)’ COM (2004) 374 final, 22, 45 and 83 and Commission, ‘Services of General Interest (Green Paper)’ COM (2003) 270 final, 2; Komorek, *supra* note 42, 43; Protocol (No 29) on the system of public broadcasting in the Member States [2012] OJ C326/312.

⁶¹Council Directive 89/552/EEC of October 3, 1989, on coordinating certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23.

⁶²Catherine barnard, *the substantive law of the eu, the four freedoms* (OUP 2019) 441.

⁶³Perry keller, *european and international media law* (OUP 2011) 121.

⁶⁴It is established that the Preamble to a general Act should indicate the general situation that led to its adoption, on the one hand, and the general objectives that it is intended to achieve, on the other; see Case C-342/03, *Spain v Council*, 2005 E.C.R. I-1975, para. 55.

⁶⁵Audiovisual Media Services Directive, *supra* note 5, Recital 54.

⁶⁶Kristina Irion and Peggy Valcke, *Cultural diversity in the digital age: EU competences, policies and regulations for diverse audiovisual and online content*, in E. Psychogiopoulou (ed.), *Cultural governance and the European Union* (PALGRAVE MACMILLAN 2014).

⁶⁷Case-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, 2013 ECLI:EU:C:2013:28, para. 52.

and functionally independent of any other public or private body.⁶⁸ This is a significant development; the amended Article 30 requires functional independence.

However, even though most Member States transposed the amendment,⁶⁹ the Commission is silent on whether the functional independence criterion has been fulfilled. In 2020, for instance, the Polish government indicated that the current Broadcasting Act⁷⁰ implements almost all of the provisions of Article 30 of the AVMSD, which means that modifications from 2016, namely the termination of the appointment of previous members and the appointment of new members, are considered to be the implementation of the independence [sic!] of the regulators.

Of course, the focus and scope of the AVMSD is broad; it does not specifically cover public broadcasters. Nevertheless, respect for media pluralism is directly mentioned in Article 30 as a value NRAs should respect. The activities of public broadcasters that undermine media pluralism should be monitored by an independent authority. The employment of the AVMSD triggers the application of the Charter, which verifies whether the independent NRA becomes an indirect but powerful instrument at the Commission's disposal to tackle issues related to the distortion of citizens' rights to be informed. Nevertheless, the Commission has not consistently applied the requirement of an independent supervising authority.⁷¹ Establishing an independent and efficient NRA can also balance the potential risk of EU content censorship and lead to a balanced multilevel system in which cultural and national diversity is maintained.

The development of internal market case law and the subsequent adoption of the AVMSD is an attempt to reconcile media regulation with economic integration principles. It can serve as a background for analyzing the EU legal framework applicable to public broadcasters, especially their public remit, for which they receive significant sums of money from governments. However, as discussed in Section B, current events linked with curtailing media pluralism in some Member States led to the European Media Freedom Act (MFA) proposal designed to safeguard media pluralism. The MFA acknowledges that media companies cannot be treated in the same way as other businesses and that their independence must be protected at the EU level. One of its objectives is to facilitate the provision of quality media services by mitigating the risk of undue public and private interference in editorial freedom. Another objective is to improve the regulatory cooperation framework and provide a well-functioning market for media services. The European Board for Media Services replaces the European Regulators Group for AV Media Services (ERGA). The rights of recipients of media services and the rights of media service providers in the internal market are included in Chapter II of the MFA. It also sets out safeguards for the independent functioning of public service media and the duties of media service providers in the internal market. It establishes new requirements for the allocation of state advertising.

Finally, in Section 6, the MFA attempts to deal with the transparent and fair allocation of economic resources by specifying the framework for audience measurement, which is important in light of the discussion on the allocation of state advertising.

According to the proposed rules, public funds or benefits offered by public authorities to media service providers for advertising purposes must be distributed using transparent, objective, and fair criteria, using open and unbiased procedures that are proportional and non-discriminatory. National, federal, or regional governments; regulatory bodies; state-owned enterprises; and other state-controlled entities at the regional or national levels; and local governments of territorial entities with more than one million inhabitants must provide transparent and comprehensive

⁶⁸Audiovisual Media Services Directive, *supra* note 5, Article 30.

⁶⁹22 out of 27 Member States <<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32018L1808>> accessed 15 May 2023.

⁷⁰Justification to the 2020 amendments to Broadcasting Act available at <<https://legislacja.rcl.gov.pl/projekt/12337952/katalog/12716719#12716719>> accessed 15 May 2023.

⁷¹Konstantina Bania, *The Role of Media Pluralism in the Enforcement of EU Competition Law*, PhD thesis, (2015) 313. For example, *Radio Teilifis Éireann (RTÉ) and Teilifis na Gaeilge (TG4)* (Case E4/2005) Commission decision [2008] OJ L121/5, para. 54; *Financing of public service broadcasters in Germany* (Case E3/2005) Commission decision [2007] OJ C185/1.

information about their advertising spending on media service providers annually. This information should include the legal names of media service providers who received the advertising services, the total amount spent, and the specific amount spent on each provider. The information should be accurate, detailed, and easy to understand. The MFA also provides that national regulatory bodies must monitor the distribution of state advertising in media markets. These bodies may request additional information from the entities responsible for providing information on state advertising. The allocation of state resources to media service providers to purchase goods or services other than state advertising must adhere to these guidelines. These rules do not affect the application of state aid rules, which remain intact and will be discussed in Section D.

The MFA is an interesting proposal, though it relies on effective and independent supervision from the Member States, which is already problematic. It also seems to be fragmentary because it does not include any sanctions in the case of a violation of the proposed rules. Finally, the relationship between state aid rules and the new approach to distributing public funds for advertisement is vague. The MFA does not change state aid provisions; it seems to be a relatively toothless instrument instead of a powerful tool.

Finally, the most recent infringement proceedings initiated by the Commission against Hungary show an attempt to reconcile internal market principles with the values enshrined in the Charter, including freedom of expression and information, which are enshrined in the Charter and the common values provided by Article 2 TEU. It concerns several violations of EU law by Hungarian legislation that discriminates against people based on their sexual orientation and gender identity.⁷² The Commission considers that Hungarian legislation violates, inter alia, the AVMSD rules on standards for audio-visual content and the fee provision for cross-border audiovisual media services by putting in place unjustified and disproportionate restrictions that discriminate against people based on their sexual orientation and gender identity.⁷³ This case will be closely monitored, and a possible direction of interpretation will be set for including media-related issues in the internal market context.

D. Public broadcasters and EU law

I. Public broadcasters and Treaty framework

Regarding public broadcasters, Articles 14 TFEU and 106(2) on services of general economic interest (SGEI) and the Amsterdam Protocol constitutes the interpretative framework for limits on the competence of the EU when Member States provide funding for public broadcasting. The Amsterdam Protocol emphasizes that the system of public broadcasting in the Member States is directly related to the democratic, social, and cultural needs of each society and the need to preserve media pluralism. While its redaction shows Member States' concerns about maintaining control over the funding of public service broadcasting, it also makes its application quite complex. First of all, as a rule, the Amsterdam Protocol excludes the competence of Member States to provide for the funding of public service broadcasting from the application of the Treaty. Second, it makes this specific competence subject to the requirement that such funding is granted to broadcasting organizations to fulfill the public service remit as conferred, defined, and organized by each Member State. Third, and finally, such funding should not affect trading conditions and competition within the EU to the extent that it would be contrary to the common interest while considering the fulfillment of the remit of that public service.

⁷²Case C-769/22, Action brought on 19 December 2022, *European Commission v Hungary*; European Commission, *Commission refers HUNGARY to the Court of Justice of the EU over violation of LGBTIQ rights* (Press Release 15 July 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2689> accessed 15 May 2023.

⁷³*Id.*

The application of TFEU provisions to public broadcasters is complex. State aid to public service broadcasters is provided in the form of compensation for the fulfillment of the public service mandate.⁷⁴ Compensation for the SGEI does not constitute an advantage under Article 107 (1) TFEU if it fulfills the four cumulative *Altmark* criteria.⁷⁵ If some or all of the *Altmark* conditions are not met, the specific measure can still receive immunity under Article 106 (2) TFEU and be compatible with the internal market.

The purpose of Article 106(2) TFEU is, first, to ensure that EU citizens have access to services that require direct democratic legitimacy and control by the state, even if they could be provided through a free market mechanism, in order to ensure equal access to those goods and services for everyone. Second, it aims to provide services the free market may not be able to reliably produce or produce at the level necessary for the common good. Finally, Article 106(2) TFEU also aims to provide services the free-market mechanism may not be able to supply to citizens who need them, mainly due to their low purchasing power.⁷⁶

At the same time, the EU's competence to apply state aid rules to public broadcasters is directly limited by the Amsterdam Protocol.

Therefore, the following analysis is twofold. I start with Article 106 (2) TFEU since it provides a safe harbor from general competition and state aid provisions if the application of state aid and competition rules obstruct the tasks assigned to the SGEI provider. Then, the analysis focuses on the EU framework for public broadcasters and, more specifically, on the definition and entrustment of SGEI. Finally, the focus moves to applying Article 107 (1) TFEU.

II. Definition and entrustment of SGEI

An SGEI mission as a legal, regulatory concept is not defined in the TFEU; thus, the conditions that Member States must fulfill in order to invoke the existence and protection of an SGEI mission properly are unclear.⁷⁷ The very concept of SGEI is a dynamic notion that reflects societal needs, such as the needs of citizens and political preferences in the concerned Member States.⁷⁸ In its 2000 Communication, the Commission defined SGEI as “market services which the Member States subject to specific public service obligations by virtue of a general interest criterion”.⁷⁹ It stems from this that two features are important for this qualification: a commercial character and the carrying out of public interests. The public interest justifies the exemption of SGEI from competition rules.

⁷⁴Communication from the Commission on the application of state aid rules to public service broadcasting, [2001] OJ C 320/04, para. 40.

⁷⁵Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (Altmark), 2003 E.C.R. I-7747. These criteria are: (i) the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined; (ii) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner; (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; (iv) where the undertaking that discharges public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation required must be determined on the basis of an analysis of the costs that a well-run typical undertaking incurs, which is adequately provided with the means to meet the necessary public service requirements incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

⁷⁶Marek Szydło, Comment to Article 106, in Andrzej Wróbel, Krystyna Kowalik-Bańczyk, Monika Szwarc – Kuczer (eds.) *Traktat o funkcjonowaniu unii europejskiej* (WOLTERS KLUWER 2012), 372.

⁷⁷Case T-289/03, *BUPA and Others*, ECLI:EU:T:2008:29, para. 165.

⁷⁸Case C-179/90, *Merci convenzionali porto di Genova*, 1991 ECR I-5889, para. 27; Case C-266/96, *Corsica Ferries France SA*, 1998, E.C.R. I-3949, para. 45.

⁷⁹Communication from the Commission, Services of General Interest in Europe, COM(2000) 580 final, Annex II.

Due to applying a general interest criterion, specific obligations can be attached to such services by either Member States or the EU.⁸⁰ It is underlined in the Communication on the application of the EU state aid rules that compensation granted for the provision of SGEI that services be “classified as SGEIs must be addressed to citizens or be in the interest of society as a whole.”⁸¹ The public interest element is crucial in the case of public broadcasters. As was highlighted by the General Court, the qualification of public broadcasting as an SGEI is better understood through its actual impact on the broadcasting industry, which is characterized by competition and commerce rather than through any supposed commercial aspect of broadcasting.⁸²

Member States enjoy broad discretion in defining what they regard as SGEI,⁸³ which means a public service remit for public broadcasters. Nevertheless, there must be an “official act” of entrustment to the recipient of the relevant state support that specifies the precise nature of the public service obligations, conditions for providing compensation, and arrangements for avoiding and repaying overcompensation.⁸⁴ Moreover, the definition should be as precise as possible as it permits derogation from TFEU rules.⁸⁵ It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit. This definition can be formulated as *qualitative*,⁸⁶ as these are qualitative requirements that justify the existence of broadcasting SGEI.⁸⁷

The CJEU underlined the importance of the enjoyment by a public service broadcaster of editorial independence from political authority in the choice of the programs it provides and, of course, the importance of the qualitative requirements to which it is subject as an operator responsible for providing television SGEI as a condition of the maintenance of freedom of expression.⁸⁸ The CJEU emphasized that, as the Commission does not have the competence to verify quality standards, it should make sure that there is a “mechanism for the monitoring by an independent body of compliance by the broadcaster with its public service remit” in the Member State.⁸⁹ In this respect, the State Aid Notice provides the following conditions: a well-defined public service, formal entrustment, and actual service provision, as stipulated in the formal agreement. An appropriate authority should monitor the implementation of these conditions transparently and efficiently.⁹⁰

III. The need for effective and independent monitoring of public service obligations

The power of Member States to define SGEI should not be unlimited and arbitrary. As was emphasized by the CJEU, for a service to qualify as an SGEI, there must be a general economic

⁸⁰Id.

⁸¹Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest, (2012) C 8/2, para. 50.

⁸²Case T-442/03, *SIC v Commission*, 2008 E.C.R. II-1161, para. 153.

⁸³Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest *supra* note 81, para. 2. Case T-17/02, *Olsen v Commission*, 2005 E.C.R. II-2031, para. 216; Konstantina Bania, *supra* note 72, 300. Case T-289/03, *BUPA and Others*, *supra* note 77, paras 166–69 and 172.

⁸⁴Kevin Bacon, *European Union law of state aid* (OUP 2017) 314; Case N37/2003, Commission decision *BBC Digital Curriculum* 2003 O.J. C271/47, para. 41.

⁸⁵Communication from the Commission on the application of state aid rules to public service broadcasting, *supra* note 76; Case C-280/00, *Altmark*, *supra* note 77, para. 87; Case C-127/73, *BRT v SABAM*, 1974 E.C.R. 313, para. 21.

⁸⁶State aid Communication, *supra* note 59, section 6.1; Case T-442/03, *SIC*, *supra* note 84, para. 211.

⁸⁷Id., para. 211.

⁸⁸Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV 2/Danmark A/S and Others v Commission of the European Communities*, 2008 ECR II-2935; Case T-442/03, *SIC*, *supra* note 84, para. 211.

⁸⁹State aid Communication, *supra* note 59, paras 53–54; Bacon *supra* note 86, 314; Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV 2/Denmark*, *supra* note 90; Commission Decision 2011/839/EU [2011] OJ L340/1, paras 176–77.

⁹⁰State aid Communication, *supra* note 59.

interest that has specific characteristics compared with other activities of economic life.⁹¹ However, the competence of the Commission to check those characteristics is limited. The Commission can question the definition of such services by a Member State but only in the event of a *manifest error* (that is, evidently wrong).⁹²

Therefore, an efficient SGEI monitoring system is essential. The Commission is not competent to assess quality standards relative to SGEI. It must be able to rely on appropriate supervision by the Member States, which should be carried out by a body, *independent from the management of the public service broadcaster*, that has the power, capacity, and resources to carry out regular supervision,⁹³ which will lead to the imposition of appropriate remedies insofar as it is necessary to ensure respect of the public service obligations.⁹⁴

The appointment of an independent body resonates with the recent amendments to the AVMSD, although the scope of the AVMSD does not specifically concern the mission of public broadcasters. In the state aid area, the Commission's decision concerning the Irish system has already applied the requirement of effective supervision,⁹⁵ in which the Commission assessed the Irish supervision mechanism positively. Therefore, under the current framework, the Commission can also assess the effectiveness of supervision over national public broadcasters with regard to state aid.

In addition, the scope of the Amsterdam Protocol that leaves public broadcasters within national control is broad; it also makes it a condition that Member States' discretion to define the public service remit is governed by the *common interest* related to trading conditions and competition in the EU, its relation to the needs of each society, and the need to preserve media pluralism.⁹⁶ The Preamble to the Amsterdam Protocol links the Member States' public broadcasting system with the need to preserve media pluralism. Therefore, it can be argued that media pluralism should also be considered in any assessment of manifest error.

Thus, it can be argued that the current framework allows the balancing of the Member States' prerogatives with respect to media freedom and content with the risk of EU-imposed censure. However, the framework adopts a procedural fairness test that limits the Commission to checking only those elements that do not concern political aspects of the media.

Consequently, under currently applicable principles, the Commission should verify the existence of an effective mechanism for monitoring compliance by the public broadcaster with its public service remit. At the same time, there should be an independent national body competent to verify the *quality* of the public service remit covered by Article 106 (2) TFEU. It is only in such a case that public broadcasters' activities can be considered SGEI. If they are not SGEI, it is necessary to consider whether they constitute state aid and verify their compatibility with the internal market.

IV. State aid and public broadcasters

During the 1990s, a number of complaints were made to the European Commission regarding state aid for public service broadcasters.⁹⁷ The state aid Communication outlined the outcome of

⁹¹Case C-179/09, *Merci convenzionali porto di Genova*, *supra* note 80, para. 27; Case C-242/95, *GT-Link*, ECR I-4449, para 53. Case T-295/12, *Germany v Commission*, 2014 ECLI:EU:T:2014:675, para. 46.

⁹²"[A]s conferred, defined and organized by each Member State": Case T-17/02, *Olsen v Commission*, 2005 ECR II-2031, para. 216.

⁹³Czarny-Drożdziejko, *Ustawa o radiofonii i telewizji. Komentarz* (LexisNexis 2014), Comment to Article 21.

⁹⁴Communication from the Commission on the application of state aid rules to public service broadcasting, *supra* note 76, paras 53–4.

⁹⁵State Aid SA.39346 (2014/FC) – Ireland Implementation of Commission Decision in Case E 4/2005 – State financing of Radio Teilifís Éireann (RTÉ) and Teilifís na Gaeilge (TG4).

⁹⁶The Protocol's preamble reads: "Considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism," Amsterdam Protocol *supra* note 75.

⁹⁷Craufurd Smith, *supra* note 1, 6; Donders, *supra* note 3, 71.

those decisions and subsequent judgments.⁹⁸ The Commission refined this by applying state aid rules to public service broadcasting,⁹⁹ which currently establishes the framework governing public funding of public service broadcasting. The Commission's abundant decisions¹⁰⁰ indicate how it interprets the "near autonomous" competence of Member States to define the public service remit of services. This definition has become especially important with respect to discussions about the online presence of public broadcasters and their activities in new media.¹⁰¹ In addition, the financial transparency requirements concerning public undertakings are regulated by the Transparency Directive.¹⁰² An analysis of the extent to which the curtailing of media pluralism by Member States could be addressed through state aid rules follows, bearing in mind the delicate balance provided by the Amsterdam Protocol.

Under general rules, the aim of state aid needs to be well-defined to achieve efficiency or equity goals. The first goal is linked to correcting market failures, whereas the second goal is more closely linked to a need for action on a specific social issue, not economics.¹⁰³ Nevertheless, state aid analysis thus far has been focused on market failures. However, as state aid under Article 107(1), TFEU is always verified on a case-by-case basis, a review could include non-economic interests, such as the right of EU citizens to be informed.¹⁰⁴

Once financing is considered state aid, the Commission must review the existing aid schemes to ensure the internal market is not distorted. The main objectives of state aid control are to safeguard a level playing field within the internal market and to prevent competition distortions that lead to market inefficiencies. It is also used for other purposes, such as exercising control over the budget discipline of Member States,¹⁰⁵ or for goals related to sustainability, such as climate change.¹⁰⁶

The classification of state aid financing is intended to compensate for the costs of public service obligations. It quantifies whether the consideration exceeds the net supplementary cost of meeting the public service obligation. If the financing fulfills the *Altmark* criteria, it is not considered state aid. This means that it must be *reasonable* in relation to the net cost of the public service remit,¹⁰⁷ which, in turn, means that the public broadcaster has not been granted a real advantage over its competitors.¹⁰⁸ Thus, the benchmark of "reasonableness" of financing is not set very high; it implies only a marginal review by the Commission.

At the same time, Member States must provide appropriate mechanisms to ensure no overcompensation. They must ensure regular and effective control of the use of public funding to prevent overcompensation and cross-subsidization and scrutinize the level and use of "public service reserves".¹⁰⁹ The most important tool for preventing overcompensation is the transparency requirement related to public funding.

⁹⁸State aid communication, *supra* note 59.

⁹⁹Communication from the Commission on the application of state aid rules to public service broadcasting, *supra* note 76, para. 14.

¹⁰⁰Almost 30 decisions were issued on the basis of the 2001 Communication, State aid communication, *supra* note 59; Donders, *supra* note 3, 69.

¹⁰¹Donders, *supra* note 3, 70.

¹⁰²Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L318/17.

¹⁰³Tim Maxian Rusche, Claire Micheau, Henri Piffaut & Koen Van de Castele, in Jonathan Faull & Ali Nikpay (eds) *The eu law of competition* (OUP 2014) 1963.

¹⁰⁴Craufurd Smith, *supra* note 1, 91.

¹⁰⁵Bacon, *supra* note 86, 10–11.

¹⁰⁶Bacon, *supra* note 86, 4; Case T-356/15, *Austria v Commission*, 2020 ECLI:EU:T:2018:439.

¹⁰⁷Joined Cases T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TF1)*, 2010 E.C.R. II-3397, para. 140; Case T-275/11, *Télévision française 1 (TF1) v European Commission*, ECLI:EU:T:2013:535, para. 132.

¹⁰⁸Joined Cases T-568/08 and T-573/08, *supra* note 134, para. 141; Case C-53/00, *Ferring*, 2001, E.C.R. I-9067, para. 27.

¹⁰⁹Communication from the Commission on the application of state aid rules to public service broadcasting, *supra* note 76, para. 103; Case E2/2008, Commission decision Financing of the Austrian public service broadcaster, 2009 ORF OJ C 309/1, paras 53 and 173.

The Transparency Directive¹¹⁰ is an instrument that aims to guarantee transparency in financial dealings between EU member countries and state-owned corporations to promote fair competition with, and no discrimination against, private companies. Independent of this objective, this instrument could help disclose and monitor financial transfers to public broadcasters and how they are utilized.

Pursuant to Article 4 of the Transparency Directive, there must be a separation of accounts. This requirement concerns internal accounts relating to different activities. All costs and revenues must be correctly assigned or allocated based on consistently applied and objectively justifiable cost accounting principles.¹¹¹ This clear separation of accounts could provide a tool for examining alleged cross-subsidization. The state aid Communication also enumerates transparency requirements, including that of internal accounts, which should relate to different activities; that is, public service and non-public service activities must be separate; all costs and revenues must be correctly assigned or allocated based on consistently applied and objectively justifiable cost accounting principles; and the cost accounting principles that separate accounts must be clearly established and maintained.

Of course, in cases of a Member State curtailing media pluralism, the question is whether the public financing of broadcasters can be accepted if it infringes citizens' right to be informed.

Article 1 (5) of Regulation 651/2014 (GBER)¹¹² clearly indicates that the regulation does not apply to state measures that entail non-severable violations of EU law. The CJEU stated that state aid contravenes provisions or general principles of EU law, which cannot be declared compatible with the internal market.¹¹³

In one of the Hungarian cases¹¹⁴ concerning the financing of the public media service, which is pending before the European Commission, the Commission, in its primary opinion, indicated that a violation of Article 11 of the Charter goes beyond state aid control; therefore, the assessment of the Commission will only concern the application of Articles 106 and 107 TFEU. Preliminarily, the Commission is of the opinion that the system of financing is an existing aid and is excluded from scrutiny, even though the Commission has identified certain shortcomings in the organization of Hungarian public service broadcasting. Moreover, the Commission considered the "public value test" and the financial control mechanism inappropriate, but it was satisfied with the changes introduced by Hungary. At the same time, the Commission stated it had discretionary powers under Article 108(1) TFEU to propose appropriate measures to a Member State. This is an example of the flaws and lack of consistency in the Commission's approach; the assessment of the Commission should be holistic and foster citizens' rights to be informed under Article 11 of the Charter.

E. Reconciling Article 106 TFEU with the Charter – The Public Value Test

The pivotal question is how to include citizens' right to be informed and media pluralism within the state aid test. One of the examples that could be followed and applied is the test concerning significant new audiovisual services envisaged by public service broadcasters included in state aid Communication, "i.e. whether they serve the democratic, social and cultural needs of the society,

¹¹⁰Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L/318/17, Article 4.

¹¹¹Communication from the Commission on the application of state aid rules to public service broadcasting, *supra* note 76, para 6.4.

¹¹²Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ (2014) L 187/1.

¹¹³Case C-390/06, *Nuova Agricast*, 2008 EU:C:2008:224, paras 50 and 51; Case C-113/00, *Spain v Commission*, 2002 E.C.R. I-7601, para. 78

¹¹⁴SA.45463 - Public service media in Hungary.

while duly taking into account its potential effects on trading conditions and competition”.¹¹⁵ This test could also serve as an inspiration to include media activities in influencing citizens’ right to be informed and to reconcile Article 106 TFEU with Article 11(2) of the Charter.

An example of such a public value test is the one incorporated into the BBC’s operating agreement with the UK government. Under this test, an independent body determines whether the market impact is balanced with the value of the service to society.¹¹⁶ The crucial element in deciding whether any change to the BBC services is material. A material change is defined as either a new UK public service or a change that may significantly adversely impact competition. The process is complex but includes a detailed dialogue between the Office of Communications (Ofcom) and the BBC.¹¹⁷

Another interesting approach, especially for new media services, is presented in an agreement dated 18 December 2008 between Germany’s *Länder*, which implements appropriate measures under the terms of a Commission Decision of April 2007.¹¹⁸ The key element of the approach is a clear definition of the public service mission and a proper entrustment process. As proposed by Germany, new media offers should contribute to “editorial competition.” In order to verify this contribution, a three-step test was established, which requires that each public service broadcaster assess, with respect to a new and significant offer, whether it “(1) serves the democratic, social, and cultural needs of German society and (2) contributes in a qualitative way to ‘editorial competition’ (*publizistischer Wettbewerb*) and (3) specifies the financial impact of such offers.” The system also includes an effective dispute resolution system.¹¹⁹ In both cases, the service’s value to society is considered, and bodies exist to supervise the application of those tests.

The pending case concerning the Hungarian system shows that the Commission avoids using its discretionary powers to foster the rights of citizens to be informed; for example, by enforcing a public value test in an assessment standard in such a way that the creation of a merger conglomerate combined with a specific advertisement policy could be assessed. In the Commission’s assessment, the Commission should also consider the role of public media in Hungary, its reorganization, and the fact that many foreign investors have left Hungary.

In the state aid Communication, greater emphasis was put on creating a level playing field for public and private operators rather than on values such as media pluralism. Therefore, the Communication must be amended to provide a public value test that considers citizens’ rights to be informed, together with an efficient appeal mechanism. This could follow the German or the BBC example.

As discussed in Section C, the right of citizens to be informed is linked with effective access to the market to guarantee the diversity of overall program content. Otherwise, public funding could be used to manipulate citizens’ voting choices. Because the powers of the European Commission concerning public broadcasters are limited, this is especially the case if there is no independent supervisory body to verify the public remit or supervise the provision of audiovisual services provided by the AVMSD. There is no information regarding whether the Commission intends to start infringement procedures against Poland or Hungary because they failed to implement the AVMSD, leading to the lack of an independent monitoring body.

¹¹⁵Communication from the Commission on the application of state aid rules to public service broadcasting, *supra* note 76, paras 84–89. Rachael Craufurd Smith, *State Support for Public Service Broadcasting: The Position Under European Community Law*, (2001) 28(1) LEGAL ISSUES OF ECONOMIC INTEGRATION 75.

¹¹⁶*Id.* 87.

¹¹⁷Webinar *How Ofcom regulates the BBC. Public Broadcasting in the Digital Economy*, Digital News Competition Research Project, available at <<https://www.youtube.com/watch?v=KPhE17mzzeE>> accessed 15 May 2023.

¹¹⁸Commission Decision of 24 April 2007, E 3/2005 (IP 07/543). Lukas Repa and Nóra Tosics, “Commission and Germany agree on better control for the use of state aid in the broadcasting sector” (2009) 1 Competition Policy Newsletter 97.

¹¹⁹Repa and Tosics, *supra* note 120, 97.

F. Conclusion

This Article aims to demonstrate the possibility that the European Commission can act under state aid rules in cases of violation of EU values, such as pluralism, by public broadcasters while maintaining a delicate balance of power between Member States and the EU.

The significant role of public service broadcasters has been duly acknowledged in the Commission's state aid Communication. However, it is imperative to note that failure on the part of public service broadcasters to support a diverse range of views could lead to non-compliance with the established jurisprudence of the ECtHR and the CJEU, as well as the AVMSD and the MFA. In this regard, it becomes apparent that an additional measure is necessary to ensure that public service broadcasters meet the requirement of supporting pluralism.

Preserving media pluralism is a complex goal that requires various instruments. This analysis illustrates that safeguarding media pluralism resembles a "Jenga Tower" in which some blocks can be removed. Still, it is not possible to predict how long it will stand or when it will collapse. Therefore, ensuring that a system of checks and balances is implemented in all Member States becomes important. State aid rules should also be treated as building blocks of this "Tower."

The analysis shows that there are provisions the European Commission could apply. One of these provisions is the requirement that Member States establish effective (independent) supervision over the activities of public broadcasters. This requirement, combined with rules on SGEI and state aid, could provide a specific legal basis for action by the European Commission to safeguard media pluralism as enshrined in Article 11 of the Charter.

Implementing a public value test might be instrumental in linking state aid with promoting diverse viewpoints. This would ensure that public service broadcasters remain true to their purpose of providing their audiences with a wide range of perspectives. Such a public value test should be robustly addressed in the state aid framework, especially in cases where there is *prima facie* doubt about the manipulation of citizens' right to be informed. So far, the Commission, in executing its prerogatives in state aid control in the area of public broadcasting, has emphasized the element of market distortion. However, decisions were issued in a specific context of tensions between the expansion of new media and incumbent public broadcasters with a mission that was defined some time ago. The political parties of Member States have never used the public media (and public funding) as an instrument for political purposes to the extent that has occurred in Poland and Hungary.

State aid control and other internal market instruments are not a *panacea* for all problems arising in relation to the rule of law crisis; however, those instruments do provide the European Commission with the competence to act with respect to government actions aimed at limiting media pluralism. Instead of adopting new toothless measures such as Article 7 TEU, the Commission should act in pending cases concerning state aid to media broadcasters, such as the Hungarian cases, and apply the existing rules. The MFA is an interesting proposal, though it relies on effective national supervision the Commission does not verify.

It is a political decision whether the Commission uses state aid rules. However, as a guardian of the Treaties under Article 17 TEU, the Commission should be obligated to do so.

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