The European Union and PSM in troubled democracies: a bridge too far?

1. Introduction

European institutions have shaped the audiovisual media policies of the old continent since the advent of private cable and satellite broadcasters in the 1980s. As a result, television – mostly under public ownership – was no longer merely a national and cultural matter, but an economic and European one too, since it affected free competition and the internal market. This breakdown of borders led to the approval of the European Convention on Transfrontier Television by the Council of Europe in 1989, and to the ratification of the Television without Frontiers Directive by the then European Economic Community – now the European Union (EU) – in the same year[1].

The growth in the numbers of private broadcasters in the 1990s and their complaints about unfair competition from public service television broadcasters forced the community institutions to have a closer look at the functions and funding of PSB so as not to contradict EU principles of ensuring free competition and restricting State aid to public companies, which are the cornerstones of EU economic policy. Thus, Article 119 of the Lisbon Treaty (specify of which document) stipulates the principle of free competition and Articles 107, 108 and 109 of the same Treaty regulate the restriction on State aid to companies or economic sectors.

The task of defining and delimiting the functions, aims and objectives of public service television broadcasters was resolved in 1997 with the addition of a specific Protocol on public service broadcasting to the Treaty of Amsterdam. The protocol firstly recognises and values public service broadcasting's contribution to the democratic, social and cultural needs of each society, as well its contribution to the preservation of pluralism. The protocol goes on to specify that public service broadcasting's funding, definition, commissioning and organisation are the competence of each Member State, yet underscores that such funding

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[1] Council of Europe, *European Convention on Transfrontier Television* (Strasbourg: Council of Europe, 1989) <https://rm.coe.int/168007b0d8>; Council of the European Union, *Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities* (Brussels, 1989) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31989L0552>.

should not affect competition or the market to an extent that would be contrary to the common interest[2]. Since then, over 20 years ago now, the EU's direct regulation of Public Service Media (PSM) has been limited to two European Commission Communications to make the funding of public service television broadcasters compatible with the Treaty's principles, to a specific Resolution by the European Parliament in 2010[3] and to several rulings by the Court of Justice of the European Union, which has intervened on a number of occasions to settle cases brought by private broadcasters against various aspects of the funding of public broadcasters[4]. Therefore, by ratifying the Treaties of Amsterdam and Lisbon, Member States acknowledge the legitimacy of the existence of PSM, provided public broadcasters meet cultural, democratic and social objectives and the funding they receive is both transparent and proportionate.

However, the reality of the situation shows that some EU countries with younger democracies, such as those in southern and eastern Europe, have difficulties fulfilling these objectives because of serious problems relating to political interference[5]. The challenge for the EU is, therefore, how to successfully lay down, implement and oversee the fulfilment of these broad democratic objectives in a wide variety of countries and traditions when, according to the Protocol to the Treaty of Amsterdam, it is up to each State to organise PSM. The diversity of situations and cultures makes it difficult to resolve this paradox. As in many other areas of the EU, there is a struggle between national and European interests,

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[2] Council of the European Union, *Treaty of Amsterdam*, *Official Journal of the European Communities*, 1997 <http://dx.doi.org/10.1093/oxfordhb/9780199546282.013.0010>.

[3] European Parliament, *Resolution on Public Service Broadcasting in the Digital Era: The Future of the Dual System (2010/2028(INI))*, 2010 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0438+0+DOC+XML+V0//EN&language=EN>.

[4] European Court of Justice, Judgment of the Court of First Instance (Fifth Chamber) of 26 June 2008. SIC - Sociedade Independente de Comunicação, SA v Commission of the European Communities. Case T-442/03 European Court of Justice, Judgment of the General Court (First Chamber, extended composition) of 16 December 2010. Kingdom of the Netherlands and Nederlandse Omroep Stichting (NOS) v European Commission. Cases T-231 and T-237/06.
European Court of Justice, Judgment of the General Court (Third Chamber) of 10 July 2012. Télévision française 1 (TF1), Métropole télévision (M6) and Canal + v European Commission. Case T-520/09
European Court of Justice, Judgment of the Court (First Chamber) of 10 November 2016. DTS Distribuidora de Televisión Digital, SA v European Commission. Case 449/14P.

[5] Maja Šimunjak, 'Monitoring Political Independence of Public Service Media: Comparative Analysis across 19 European Union Member States', *Journal of Media Business Studies*, 13.3 (2016), 153–69 <http://dx.doi.org/10.1080/16522354.2016.1227529>.

between the ideal and the real, between rhetoric and facts. This paper will attempt to describe these contradictions and to elaborate on the background, the adopted policies and the potential solutions available to European institutions to address the challenge that certain European governments' instrumentalisation of PSM poses to the fundamental values of the EU and to prevent a negative impact on the rights of its citizens.

2. Background: economic intervention (2001-2008)

After the Protocol to the Treaty of Amsterdam in 1997, the existence and European model of PSM in Europe was assured from the legal perspective, though their future seemed somewhat bleak, tough and marginal. There were multiple reasons for this: they suffered from significant internal management and financial problems; the commercial and legal threats from their private competitors was constant; the European Commission oversaw commercial activities and the expansion of public service television broadcasters' new media; and finally, the digital transition, which was a long way off at that time, seemed to presage their irrelevance in a sea of digital channels.

A decade later, the situation was not quite as gloomy as expected[6]. The majority of EU countries were able to turn the difficulties and challenges into opportunities, since PSM are still important and a benchmark for the television sector, albeit without the central, dominant role they had previously had. The key to this survival or reinvention has been the support that PSM have received from European governments, which have continued providing financial and legal resources to enable them to expand in exchange for internal reforms, cost-cutting and external content growth. Two events triggered this reinvention: one external and one internal to them. On the one hand, the legal and political battle in Brussels between private and public television broadcasters, the outcome of which was concluded with the Protocol to the Treaty of Amsterdam in 1997 and laid down in the 2001 European Commission Communication that set out in detail the application of the rules on State aid to public service television broadcasters[7]. This Communication recognised the rights of each State to define

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[6] Johannes Bardoel and Leen D'Haenens, 'Reinventing Public Service Broadcasting in Europe: Prospects, Promises and Problems', *Media, Culture and Society*, 30.3 (2008) <http://dx.doi.org/10.1177/0163443708088791>.

[7] European Commission, *Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting*, 2009, p. Official Journal C 320, 15/11/2001 P. 0005-0011 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC1027(01)>.

not only the scope of its public service television, but also its funding, provided it was proportionate, transparent and did not endanger free competition. Besides, the Communications states that a definition of the public service mandate should be as precise as possible. This definition 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 or not. The European Commission needs this clear identification to verify whether or not Member States respect the treaty provisions on state aid and it is also important for non-public service operators, so that they can plan their activities in a predictable environment.

At that time, the European Commission had around 20 open cases that private broadcasters had brought against European public service television broadcasters. Most of the cases were closed after the Member States in question made a commitment to rationalise and reform their public broadcasters. After the publication of the aforementioned Communication, some European States hurried to reform their public service television broadcasters. Around 2006, the United Kingdom renewed the BBC's Royal Charter and introduced an evaluation prior to the launch of new services content – the Public Value Test; in Spain, the funding, regulation and governance of Radio Televisión Española (RTVE) was reformed by Rodríguez Zapatero's socialist government in 2006; France Télévisions did the same in 2008 during President Sarkozy's term of office; and so on. The second trigger explaining the reinvention of PSM was of a technological nature: the potential to develop new services and activities through new networks and technologies. The television landscape has expanded as a result of the multiplication of platforms, devices, networks and content, which have individualised, fragmented and segmented the audience. The sector's economic and financial factors and stakeholders have also changed. On the one hand, competition between PSM and traditional private broadcasters has increased and, on the other, new competitors have emerged, such as telecommunications operators initially, thematic channels subsequently, and over-the-top broadcasters more recently (Netflix, HBO and Amazon). Moreover, the format market has become fundamental, and the value of live broadcasts of major events has risen.

The new context has therefore forced a re-think of the role and mission of public service television broadcasters. The set of theoretical and action principles underpinning them were reformulated. The most visible external change was the name given to these organisations: originally called a Public Broadcasting Service, they have since been renamed

Public Service Media (PSM) to include media that are beyond the scope of television and radio broadcasts. The underlying principles have also changed[8]. Thus, the principle of universal access has been redefined by adding new nuances. Rather than offering a universal service, it (PSM?) is about providing the means for universal services because, in a world of fragmented audiences, it is necessary to go beyond radio and television to reach all audiences everywhere. It is not a matter of gaining a big share or reach. In other words, it is not as important to be the biggest selling dish on society's media menu as it is to be the provider that offers more dishes and content in more places. Offering this new universal access is a decisive factor in public broadcasters' expansion logic, and it justifies their existence to governments and society. However, these principles – universal access on networks and to content – are applied with nuances, differences and even resistance depending on the country and the history of its PSM[9]. Within this new media context, the European Commission decided to launch a new process of consultation on the need to update the principles and norms of the 2001 Communication, and to respond to the private sector's concerns about PSM's expansion into other areas. Generally speaking, commercial broadcasters were in favour of public broadcasters supplying their traditional radio and television programmes via other media and platforms, but they were against them developing new services and content on the Internet, a position that was shared by newspaper publishers. In fact, the big issue and sticking point was not as much about the double or triple funding method – advertising/licence fee/aid – as it was about the new communication services, a basic component of PSM's survival and expansion strategy alongside the widest possible presence of digital terrestrial television. The European Commission has historically recognised the right of public service television broadcasters to develop new audiovisual media services despite the fact that they are already supplied by the market and are similar to existing commercial services such as thematic children's channels or news channels[10]. They may only do so provided they justify that the aim of such

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[8] Benedetta Brevini, *Public Service Broadcasting Online : A Comparative European Policy Study of PSB 2.0* (London: Palgrave Macmillan, 2013).

[9] Damian Tambini, 'Five Theses on Public Media and Digitization: From a 56-Country Study', *International Journal of Communication*, 9.1 (2015), 1400–1424 <http://ijoc.org/index.php/ijoc/article/view/2795/1370> [accessed 26 February 2018].

[10] European Commission, NN70/1998 Kinderkanal/Phoenix, 1999; European Commission, NN88/1998 – BBC 24 hours news channel, 1999.

new services is to meet the democratic, social and cultural needs of society, as set out in the Protocol to the Treaty of Amsterdam. However, the European Commission was more reticent about giving its approval to new Internet-related services and proposed that it should always be the commercial subsidiary of a public broadcaster that provided them. Once the consultation period had ended, a new Communication was published in November 2009 in which such ideas had been better articulated[11]. The central point of the texts was that Brussels had recognised that, in the first instance, the Member States had responsibility for the task of assessing, via a transparent, ex-ante evaluable process, whether the new services would satisfy the needs of society and add value for the audience, and what their market impact would be. This evaluation meant that systems like the Public Value Test applied to the BBC in the United Kingdom were rolled out across several countries in Europe in the following years[12]. However, some Member States like France, Finland, Austria, Estonia and the Netherlands were opposed to this particular ex-ante mechanism for new services in the public consultation before the Communication was approved. Even more so, in this document the European Commission also recognized that the majority of Member States wanted that the details of any such test should be determined by each individual Member State rather than by the European Commission[13]. In the Communication, it was also accepted that PSM could charge for audiovisual content consumption, but only under strict conditions: the price had to be reasonable, and such content should not impact on competition. The content payment model in a public broadcaster goes against the principle of universal access, but the European Commission argued that the way a service is funded does not contribute anything to its nature[14], i.e., if it meets the democratic, social and cultural needs of society. This Communication has enabled PSM to have considerable

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[11] European Commission, *Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting,* 2009.

[12] Hallvard Moe, 'Governing Public Service Broadcasting: "Public Value Tests" in Different National Contexts', *Communication, Culture & Critique*, 3.2 (2010), 207–23 <http://dx.doi.org/10.1111/j.1753-9137.2010.01067.x>.

[13] European Commission, *Review of the Broadcasting Communication Summary of the Replies to the Public Consultation.* <ec.europa.eu/competition/state_aid/reform/comments_broadcasting/summary.pdf>, 2008.

[14] European Commission, *Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting,* 2009. Paragraph 82.

flexibility to launch new services on new networks and platforms, and even to charge for them. Consequently, PSM have had to be more transparent and to keep their accounts for commercial services and public service activities separate. However, the focus of community institutions regarding PSM began to change from that time on. Brussels' concerns about protecting the internal market and free competition have faded into the background.

More recently, it is a matter of ensuring that PSM help to effectively respect fundamental human rights such as freedoms of expression and of information through real independence from political and economic powers. The context has undeniably changed. In some southern and eastern European countries, the economic crisis that began in 2008 has driven the growth of populist political movements. The rapid expansion of the European Union to eastern Europe in the successive enlargements of 2004, 2007 and 2013 has increased the number of cases of lack of independence in the governance and funding of PSM. According to the 2017 report by the Centre for Media Pluralism and Media Freedom and associated studies[15], Cyprus, Hungary and Romania are the countries at highest risk in these areas, and Poland, Spain and Slovenia are at relatively high risk too. Other countries with longer democratic traditions as France and Italy and others as Greece and Turkey are in risk as well, as exposed in the chapters XX, XX and XX of this book. According to the aforementioned report, the problems are mainly related to the procedures for appointing board members and directors. In the above cases, they have been found to have close ties to the executive.

3. Shift towards political intervention (2008-2018)

The lack of independence of public operators from governments generally leads to other equally serious shortcomings such as the lack of independent and regular funding or the ability to programme content without political interference. Brief, the lack of independence of public broadcasters means that they lose their raison d'être by becoming a loudspeaker for the propaganda of governments and politicians. In this way, a basic tool for the construction of a public space shared by all of society is instrumentalised.

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[15] Centre for Media Pluralism and Media Freedom, 'Monitoring Media Pluralism in Europe: Application of the Media Pluralism Monitor 2016 in the European Union, Montenegro and Turkey', 2017 <http://dx.doi.org/10.2870/959900>; Šimunjak.

Given this context, the various European institutions have approached the problem of PSM's lack of independence in different ways, since they have different powers and tools at their disposal. The simplest are those that facilitate a diagnosis based on studies and reports commissioned by the European Commission; within the same group, we could frame political statements by senior European Commission representatives on situations like those of Hungary and Poland; the European Commission has also rolled out programmes to provide public service television broadcasters in EU candidate countries with support and advice. Of greater political importance, we find the Resolutions of the European Parliament and the Recommendations of the Council of Europe.

Finally, at a higher, regulatory level, the European Commission is trying to guarantee the independence of PSM by ensuring that the independent agencies that regulate audiovisual media are truly independent in the new Audiovisual Media Services Directive (AVMSD). The European Commission's logic is that "the independence of the agency safeguards that of the broadcaster", be it public or private[16] There is an ideological a priori by the European Commission: independent audiovisual regulatory bodies are a key player for the preservation of free and pluralistic media, "which are amongst the EU's most essential democratic values"[17].

Finally, the EU's most powerful tool for respecting the independence of public service television broadcasters is the application – or the threat of application – of Article 7 of the EU Treaties, which enables the EU to suspend certain political rights of a Member State if it violates fundamental rights. As freedoms of expression and of information are fundamental rights, also enshrined in the legally binding EU Charter of Fundamental Rights, and given that it could be interpreted that PSM play a fundamental role in safeguarding them according to the Protocol to the Treat of Amsterdam, Article 7 was triggered against Poland in 2016. In the following sections, each of above-mentioned tools will be analysed and there will be a discussion of the potential solutions available to European institutions to ensure the independence and proper functioning of PSM in the second decade of the 21st century.

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[16] Serge Robillard, *Television in Europe: Regulatory Bodies: Status, Functions and Powers in 35 European Countries.* (Bedfordshire, UK: University of Luton Press, 1995).

[17] European Commission, *Public Consultation on the independence of the audiovisual regulatory bodies. Consultation Results.* 16 July 2013. < https://ec.europa.eu/digital-single-market/en/news/public-consultation-independence-audiovisual-regulatory-bodies-read-contributions>.

3.1. Change in the European Commission's political position

As mentioned previously, there was a turning point on matters relating to the internal market and free competition. This occurred during Viviane Reding's term of office as European Commissioner for Information Society and Media (2004-2009), when the priority shifted away from commercial matters and instead focused on defending the fundamental rights of expression and of information. The stakeholders in the debate were no longer those involved in the public-private battle because the real problem in some countries was governmental instrumentalisation of PSM's governance and political manipulation[18].

In her speeches on the media, Viviane Reding underscored the contribution that the EU could make and the role it could play in protecting and expanding these rights: "Even if the freedom of expression is already an indisputable part of European constitutional foundations, the EU's media policy can contribute towards encouraging the development of this freedom as well as its practical effectiveness in the European Union"[19]. In the same speech, the Commissioner highlighted the EU's contribution towards defending these rights during the EU accession negotiations with former Eastern Bloc countries. This argument, that of the EU as the guarantor of European citizens' freedoms of expression and of information has been a constant in European media policy since then. Her successor, Commissioner Neelie Kroes (2010-2014) stuck to the same political line. According to her, respect for the freedoms of information and of pluralism in the EU was not about the technical application of national and European regulation, but rather their implementation and promotion in practice[20]. However, she warned the European Parliament and NGOs concerned about the defence of such rights that this practical application was the duty of Member States and that, sometimes, expectations about what the European Commission could do about it were too high: "There is a wide gap between what the Commission can

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[18] T McGonagle, 'Public Service Media and Cultural Diversity: European Regulatory and Governance Frameworks', in *National Conversations : Public Service Media and Cultural Diversity in Europe*, ed. by Karina. et al. Horsti (Intellect Book, 2014), pp. 45–60; Mariana Lameiras and Helena Sousa, 'Portugal: Políticas de Transparencia y Reforma de Los Medios Públicos', in *Austeridad y Clientelismo*, ed. by Isabel. Fernández Alonso, 1st edn (Gedisa, 2017), pp. 51–68.

[19] Viviane Reding, 'Press Conference on the Occasion of the Conclusion of a Framework Agreement between the International Federation of Journalists and WAZ Mediengruppe. SPEECH/07/478', *9 July 2007*.

[20] Neelie Kroes, 'Defending Media Freedom, Speech /12/335', *8 May 2012*.

legally enforce and what we are often expected to do"[21]. She assured them that the European Commission would at least use tools like naming and shaming to draw attention to those countries that were not doing enough to protect these freedoms. Her successor, Günther Oettinger (2014-2016), pursued this line of overseeing and protecting fundamental rights relating to freedoms of information and of expression and their relationship with pluralism, mainly because of the challenges that certain Member States posed as a result of their legislative changes. In 2016, Oettinger stated that "we [...] will not hesitate to act as a watchdog for media freedom and pluralism, when EU law is at stake"[22]. However, these statements are more rhetorical than effective. The Commission and the Member States have not included these fundamental rights in the articles of the audiovisual directives due to lack of will and/or incapacity. There is therefore no European legislation protecting these media-related rights. As a result, the EU does not have the tools to protect pluralism and the right to information and communication now that it needs them.

Statements do not compromise and PSM continued to be recognised as important components of the European media ecosystem. The same Commissioner underscored the fact that "PSM play a fundamental and unique social and economic role"[23]. The European Commission upheld that position when defending the existence of the PSM concept after the Greek public service television broadcaster ERT closed down in 2013: "The Commission supports the role of public broadcasting as an integral part of European democracy"[24], but in practice it would go no further because it considered its closure as a matter for the Greek government, one that was related to issues of cutbacks in public spending. However, during Oettinger's term of office, the European Commission's priority was to secure the independence of regulators: "the independence of audiovisual regulators is crucial when it comes to preserving free and independent media"[25]. This line is now being followed by the

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[21] Neelie Kroes, 'A European Vision for Internet Governance', *27 June 2012*.

[22] Günther Oettinger, 'Speech at World Press Freedom Day', *3 May 2016*.

[23] Günther Oettinger, 'Keynote at the Public Broadcasters International Conference | European Commission', *10 September 2015*.

[24] European Commission, 'Statement by the European Commission on the Closure of the Hellenic Broadcasting Corporation', *12 June 2013*.

[25] Günther Oettinger, 'A New Regulatory Framework for the Digital Single Market', *27 January 2016*.

current Commissioner, Andrus Ansip (2017), who has also raised more specific issues such as the analysis of the fake news phenomenon. As a summary of this section, it is clear that the even if the European Commission identified the positive role of PSM, it did not have, nor does it have the competence to regulate or intervene directly in the most flagrant cases of lack of independence of public television broadcasters.

3.2. Indirect policies of support for the independence of PSM

Due to its inability to directly propose legislation and take political action on the independence of PSM since they are powers that belong to each Member State, the European Commission has taken an indirect approach, focusing its attention on diagnosis and oversight. Thus, it has commissioned reports to analyse this problem indirectly. If PSM are key players in strengthening pluralism and freedom of information and communication because they belong to whole society and represents it, any measure to foster them ought to contemplate an independent PSM. An early example is the report by the High-Level Group on Media Freedom and Pluralism published in 2013. The report identified two challenges for pluralism in the EU related to these policies: political influence in the make-up and selection of members of independent regulatory bodies, and political influence in the selection of members of PSM's management bodies. In its conclusions, it recommended that "any public ownership of the media should be subject to strict rules prohibiting governmental interference, guaranteeing internal pluralism and placed under the supervision of an independent body representing all stakeholders" [26].Along the same diagnostic line, the European Commission has funded the Media Pluralism Monitor since 2015, an annual report produced by the European University Institute that measures levels of pluralism in EU countries based on qualitative indicators, among which is the independence of PSM.

In 2014, the European Commission also began to give NGOs financial support to promote pluralism and the freedoms of information and of communication through a diagnosis and a naming and shaming policy. For example, it has funded projects coordinated by the European Centre for Press and Media Freedom in Leipzig that, on the one hand, record

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[26] Vaira Vīke-Freiberga and others, *A Free and Pluralistic Media to Sustain European Democracy*, 2013 <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/hlg_final_report_20130121_web.pdf> [accessed 24 February 2018].

violations of rights to information in the EU and neighbouring countries and, on the other, tell the public and the authorities about them. A real-time online platform has been set up to record violations of these rights (mappingmediafreedom.org). In 2018, the budget allocated to these EU co-funded projects was €1 million[27]. Another European Commission initiative was the implementation of support measures in conjunction with the European Broadcasting Union in 2012 and 2014 to encourage the spread of European principles of freedom of expression and freedom of the press to the PSM of countries that have applied to join the European Union, such as Albania, Montenegro, Serbia, the Former Yugoslav Republic of Macedonia, Kosovo and Turkey. According to the Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, "The issue of freedom of expression in the media and the role of public broadcasters is a key policy area for the European Commission in the Enlargement countries as well as in the broader European neighbourhood"[28]. A similar programme was carried out in southern and eastern Europe with which a special cooperation exists, such as Tunisia, Georgia, Armenia, Ukraine, Lebanon, etc. These countries form the so-called "European Neighbourhood Region"[29]. The activities included regional congresses, workshops and regional strategic consulting services. The aim of these projects is not clear. They seem like a minimal political gesture to show that something is being done in this field. The data collected by the mapping media freedom project are barely published or promoted by European Commission Services or Member States.

3.3. European Parliament Resolutions

The European Parliament has followed in the wake of European institutions' growing concerns about respect for the fundamental rights of freedoms of expression and of

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[27] European Commission, 'Media Freedom Projects | Digital Single Market' <https://ec.europa.eu/digital-single-market/en/media-freedom-projects> [accessed 16 April 2018].

[28] European Commission, 'EC and EBU: Support for Public Media in Transformation Countries', *Press Release*, 2012, p. Brussels, 25 January 2012 <http://europa.eu/rapid/press-release_MEMO-12-46_en.htm> [accessed 28 February 2018].

[29] European Commission, 'EC and EBU: Support for Public Media in Transformation Countries'; European Commission, 'EC Announces New Cooperation with European Broadcasting Union in the Neighbourhood Region', *Press Release* <http://europa.eu/rapid/press-release_IP-14-1083_en.htm> [accessed 24 February 2018].

information. PSM are treated politically as fundamental tools for promoting these rights and they must therefore be protected from political interference.

The European Parliament had already criticised Silvio Berlusconi's excessive influence when he was Prime Minister of Italy in 2009. A motion for a European Parliament Resolution was proposed, in which concerns were expressed about "the enduring conflict of interests with reference to the Prime Minister's media ownership and political control of both major private and public media, including control over how advertising resources are allocated"[30]. Two years later, the European Parliament's 2011 Resolution on the situation of rights to information and to expression in Hungary was passed. This Resolution criticised, albeit perfunctorily, political interference in PSM and called upon the European Commission to act by proposing legislation that would ensure freedom of information for all Member States. One of the measures was aimed at ensuring independent governance of PSM[31]. In 2013, concerns were expressed once again in Resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU[32]. Point 8 of the Resolution underscored the importance of PSM and the need for their independence, free from economic and political interference. In particular, the European Parliament "recalls the important role of public service media funded by the citizens through the state to meet their needs, as well as their institutional duty to provide high-quality, accurate and reliable information for a wide range of audiences, which shall be independent of external pressures and private or political interests, while also offering space for niches that may not be profitable for private media".

In 2017 and 2018, the European Parliament has been also preparing a Resolution on media pluralism and freedom of information. The first point of the submitted proposal calls for the independence of PSM by calling "on the Member States to take adequate measures to safeguard and promote a pluralist, independent and free media landscape in the service of

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[30] Monika Flašíková Beňová, Claude Moraes and David-Maria Sassoli, 'MOTION FOR A RESOLUTION to Wind up the Debate on the Statement by the Commission Pursuant to Rule 110(2) of the Rules of Procedure on Freedom of Information and Media Pluralism in Italy and in the European Union', 2009 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B7-2009-0093+0+DOC+PDF+V0//EN> [accessed 16 April 2018].

[31] European Parliament, *Resolution on Media Law in Hungary of 10 March 2011', P7_TA(2011)0094.*

[32] European Parliament, *Resolution of 21 May 2013 on the EU Charter: Standard Settings for Media Freedom across the EU (2011/2246(INI))* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0203&language=EN&ring=A7-2013-0117>.

democratic society, including the independence and sustainability of public service media and community media, which are crucial elements of a favourable environment for freedom of expression[33]". Thus, every so often over the past 10 years, the European Parliament has issued reminders of the importance of PSM to the protection of fundamental rights. However, the legal and political value of the resolutions is very low, as MEPs only can call on the Commission to submit proposals for legislation to the Council and the European Parliament in these resolutions. They can ask as well the Member states to take action on specific areas. These requests are not binding on the states and on the European Commission. They are political demands. Therefore, the nature of such political actions is ore declarative than effective. The underlying problem is that the European Parliament does not have the legislative initiative, as this power belongs to the European Commission, which is the institution that presents the texts for approval by the Council and the European Parliament.

3.4. Council of Europe Recommendations

As an institution, the Council of Europe is more extensive than the EU. The Council of Europe has 47 Member States and has historically defended human rights in Europe, especially through the European Court of Human Rights. The roles of its committees and assemblies, such as the Committee of Ministers and the Parliamentary Assembly are more secondary. Its binding power lies in international treaties called 'Conventions', which signatory Member States must observe. In countries belonging to the EU, the importance of Conventions derives from the fact that they often accompany or precede community action by providing principles or political solutions, as in the case of the 1989 Convention on Transfrontier Television, which had many similarities with and impact on the EU Television without Frontiers Directive of the same year. Moreover, they have historically played a very important and useful role by offering the EU a regulatory foundation of principles that has enabled the conditions and requirements placed upon candidate countries for EU accession to be set[34].As the Council of Europe's deliberative bodies have fewer legal restrictions and

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[33] European Parliament, 'Motion for a European Parliament Resolution on Media Pluralism and Media Freedom in the European Union. (2017/2209(INI))'.

[34] Beata Klimkiewicz, 'Between Norms and Accomplishment : Lessons for EU Media Policy from EU Enlargements', in *European Media Policy for the Twenty-First Century Assessing the Past, Setting Agendas for the Future*, ed. by Seamus Simpson, Manuel Puppis, and Hilde van den Bulck (Routledge, 2016), pp. 207–30 <http://dx.doi.org/10.4324/9781315719597-18>.

powers than the EU's institutions, they take a firmer stance more often on democratic problems and European fundamental rights issues, although their impact is very limited if there is no convention associated. Thus, with regard to public broadcasters, the various bodies of the Council of Europe have been expressing their concerns about political interference for years, but always through low-profile legal figure of the recommendation or resolutions, which are not binding on states[35]. The 1996 Recommendation on the guarantee of the independence of public service broadcasting was the first example of an official document setting out the need for the independence of public service television broadcasters, which had to be laid down by law. In addition, it suggested that public service television broadcasters should have a board of management and a supervisory body that are separate and protected from any political interference[36]. Why did the EU not follow that line of thinking and include that provision into its directives? The answer is complicated. The fact is that the Commission tried during the 1990s to restrict public television and to eliminate its most commercial content. It focused on content and not on structure. Following the Amsterdam Protocol, imposed by the states, the Commission lost the ability to regulate public television directly. But as it was a defeat it also lost the political will to intervene. It was and is a very thorny issue, because you are facing the states, the Council, which consider PSM an internal affair.

In 2008, there was insistence again, with Resolution 1636 (2008), on "indicators for media in a democracy" by defending that "public service broadcasters must be protected against political interference in their daily management and their editorial work; senior management positions should be refused to people with clear party political affiliations; public service broadcasters should establish in-house codes of conduct for journalistic work and editorial independence from political influence".

In its Resolution 1920 (2013) on the state of media freedom in Europe, the Parliamentary Assembly expressed its concerns about reports it had received regarding political pressure

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[35] Evangelia Psychogiopoulou and others, 'The Freedom and Independence of Public Service Media in Europe: International Standards and Their Domestic Implementation', *International Journal of Communication*, 11.0 (2017), 20 <http://ijoc.org/index.php/ijoc/article/view/5965/2017> [accessed 26 February 2018].

[36] Council of Europe, *Recommendation No. R (96) 10 of the Committee of Ministers to Member States on the Guarantee of the Independence of Public Service Broadcasting*, 1996.

in the PSM of Hungary, Italy, Romania, Serbia, Spain and Ukraine[37]. Again, in June 2017, the Parliamentary Assembly adopted a Resolution on political influence over the media, which, besides greater transparency over media ownership, called for the preservation of the independence of PSM and urged Member States to strengthen their pluralism[38] . This Resolution defines in considerable detail the procedure for appointing PSM managers, which ensures: a qualified majority in parliament; clear, merit-based selection criteria that are neutral with regard to political views; a specific term, which can only be shortened in a limited number of legally defined circumstances, and; respect for gender parity. In addition, the Resolution considers it very important to have independent, regular and sufficient funding of PSM to avoid editorial influence based on controlling the PSM's revenue system. The impact of such resolutions by the Parliamentary Assembly of the Council of Europe is very limited. The same applies to the recommendations. If they do not in any way become conventions, they are nearly useless (They can be used as arguments by the European Court of Human Rights or as political weapon for opposition parties in countries with a lack of PSM independence). States are not obliged to follow these resolutions or recommendations. At the moment, there is no convention that deals indirectly with Public Service Media. However, it is true that they provide countries with a detailed example of what regulation should be like to achieve independent PSM. For European countries reforming their laws or making benchmarking they are very useful tools as they are so discussed and detailed.

3.5. European Commission pressure: Hungary and Poland

Besides the studies, support programmes and speeches, the European Commission has political power stemming from its independence from Member States and its role as the guardian of the Treaties. It is not surprising, therefore, that Brussels' intervention in the crises of compliance with community principles relating to rights to information and to expression in Hungary and Poland were initially cautious and then forceful. However, the

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[37] Council of Europe, *The State of Media Freedom in Europe* (Parliamentary Assembly) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19474&lang=en> [accessed 11 April 2018].

[38] Council of Europe, *Resolution 2179 (2017) Political Influence over Independent Media and Journalists* (Parliamentary Assembly, 2017) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23989&lang=en>.

European Commission did not have adequate tools at its disposal to preserve the independence of the PSM of these countries. It should be remembered that the successive directives that have regulated the audiovisual sector in the EU do not mention public service broadcasting in their enacting terms.

In 2010, the Hungarian law on the press and media was reformed by the parliament dominated by Vicktor Orban's party. Among the changes was the reform of the independent regulatory authority of the media, which entailed the government's direct political control over that body and indirect control over public and private media. The European Commission warned that it was a direct challenge to the spirit of community legislation on audiovisual media, but that room for manoeuvre under the AVMSD to bring Hungarian legislators into line was very limited. Commissioner Neelie Kroes therefore had to use direct political pressure, supported by the European Parliament's Resolution on the media situation in Hungary. She had many meetings with the Hungarian authorities and threatened to use Article 7 of the Treaties, which enables the suspension of a Member State's political rights if it repeatedly violates the values contained in Article 2, in which the rights and principles on which the EU is founded are defined[39]: respect for human dignity, freedom, democracy, equality, the rule of law and human rights. As a result of that pressure, the Hungarian authorities accepted amendments to their law in February 2011. The amendments, however, were cosmetic and on non-critical issues as balanced coverage limited to broadcasting or foreign media could not be affected by Hungarian laws. The core of the problem —freedom of expression, pluralism, PSM, minority rights, were not addressed by EU. The Hungarian case demonstrated that, other than political pressure, European institutions lacked the necessary tools to compel Member States to respect media pluralism and freedom of information[40].

This case and other similar cases in other areas led the European Commission to approve, in 2014, a mechanism to use the threat of Article 7 application in a regulated way and, by so

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[39] Andreea Madalina Costache and Carles Llorens, 'A Bridge Too Far? Analysis of the European Commission's New Developments on Media Policy and Media Freedoms through the Concept of Soft Regulation', *International Journal of Media and Cultural Politics*, 11.2 (2015), 165–82 <http://dx.doi.org/10.1386/macp.11.2.165_1 U6>.

[40] Carles Llorens and Andreea Madalina Costache, 'European Union Media Policy and Independent Regulatory Authorities: A New Tool to Protect European Media Pluralism?', *Journal of Information Policy*, 4 (2014) <http://dx.doi.org/10.5471/jip.v4i0.189>.

doing, to safeguard the rule of law and human rights in an EU country where the government of a Member State had undermined them. The mechanism is called 'the rule of law framework'[41]. According to the process, the first stage is to gather information to check whether there are any concrete events or facts demonstrating that European citizens' rights have been violated; if confirmed, the second stage involves entering into conversation with the State and, only if there is an unsatisfactory response, the European Commission can propose to other Members States that Article 7 of the Treaty of the European Union should be applied. This process was applied for the very first time to Poland. It all started in 2015. The Polish government, dominated by the conservative Law and Justice party, promulgated laws to control the judiciary, the constitutional court and PSM[42]. In the case of the latter, the intended law would have enabled the Ministry of Economy and Finance to directly appoint members of the Polish PSM's board of management. These laws set all the alarm bells ringing in Brussels, and the EU exerted considerable pressure to get them reformulated in line with the EU's democratic values by threatening to apply the rule of law framework and Article 7 if Brussels' demands were not heeded. The Polish government immediately amended the Public Broadcasting Service Act and clarified the powers to appoint members of the PSM's board of management. The new law established the National Media Council and delegated powers to appoint the executives of the PSM to the Council, which has five members. Three of them are chosen by the parliament and two by the President of Poland from the candidates put forward by the largest opposition parliamentary groups. As a result of the amendment, the European Commission dropped the public media issue but maintained the rule of law mechanism because certain aspects of the news powers permitting the government to dismiss supreme court judges, give too much power to the executive, endangering the division of powers enshrined in Article 2 of the EU Treaty.

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[41] European Commission, *Communication - A New EU Framework to Strengthen the Rule of Law (COM(2014) 158 Final/2)*, 2014, p. COM (2014) 158 final/2 <http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf>.

[42] Beata Klimkiewicz, 'State, Media and Pluralism: Tracing Roots and Consequences of Media Policy Change in Poland', *Publizistik*, 62.2 (2017), 197–213 <http://dx.doi.org/10.1007/s11616-017-0337-5>.

4. An indirect approach: audiovisual and media services regulation

In the regulatory area, the EU has treated PSM and private broadcasters equally. Harmonisation of the internal audiovisual media market has been a priority. The AVMSD approved in 2010 is the main regulatory instrument of the European television and audiovisual media system and is applied equally to private and public broadcasters. In fact, there is no direct reference to PSM in the substantive part of the Directive. The only mention can be found in point 13 of the recitals, which, based on a 1999 Resolution of the Council, emphasises that the "fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress" and concludes that "the co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market"[43]. During the process of review of the Directive, which ran from 2015 to 2018, some scholars asked for a text to be included in it to recognise the role of PSM in European cultural and economic integration[44]. However, this stance was not echoed by the European Parliament, the Council or the European Commission, which opted for an indirect policy: to protect and strengthen the effective independence of regulatory authorities of the audiovisual media sector so that they are able to contribute to the independence of public and private media. In fact, independent regulatory authorities play a key role in the planning and organisation of the media ecosystem because they intervene in access to the audiovisual media market by granting, renewing and authorising licences, guaranteeing competition and users' rights, monitoring content after the fact, ensuring compliance with licence conditions and, in most cases, overseeing the fulfilment the public service mission of public broadcasters[45]. One of the main objectives is to safeguard broadcasters from control and influence exerted by political,

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[43] European Union, *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services*, *Official Journal of the European Union*, 2016, CLXVII, 1–24.

[44] Karen Donders, 'Public Service Media and the European Internal Market: Friends or Allies?', *Communications & Strategies*, 1.101 (2016), 41–61 <https://ideas.repec.org/a/idt/journl/dwej10102.html> [accessed 26 February 2018].

[45] Ana Fernández Viso, 'La Autoridad Estatal Reguladora Del Audiovisual: El Largo Camino Hacia La CNMC... y Su Incierto Futuro', in *Austeridad y Clientelismo*, ed. by Isabel Fernández-Alonso (Barcelona: Gedisa, 2017), pp. 121–48.

governmental or any other type of interests. Guaranteeing the economic and political independence of the regulator is key to the independence of public and private broadcasters. That is how the representatives of the Member States understood it at a meeting of the Council: "The independence of regulatory bodies from governmental influence is a vital condition for free and independent media to flourish […] [NRAs] should be free from direct political influence and should have a positive obligation to protect human rights, including freedom of expression."[46]This independence is somewhat disguised in the current version of the 2010 Directive. Recital 94 does include the fact that these authorities should be independent, but the mention is merely accidental: Member States "are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent **independent** regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently". In contrast, Article 30 of the new proposal for the AVMSD requires that Member States ensure such independence in a very detailed and explicit way in Article 30.1: "Each Member State shall designate one or more independent national regulatory authorities. Member States shall ensure that they are legally distinct and functionally independent of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors"[47]. In the subsequent paragraphs of the same Article, a whole set of rules to make such independence concrete is established: the exercise of functions must be impartial and transparent; they should not receive instructions from other bodies; their competences and sanctioning powers must be regulated by law, as must the dismissal of their members; and they must be adequately funded and properly staffed. Finally, the Directive was approved by the European Parliament and the Council in October 2018 and published in the Official Journal of the European Union on November 28th, 2018 (European Commission, 2018). The final text of the directive incorporates in its article 30 the measures mentioned above that

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[46] Council of the European Union, 'EU Human Rights Guidelines on Freedom of Expression Online and Offline FOREIGN AFFAIRS Council Meeting Brussels, 12 May 2014', 2014 <https://eeas.europa.eu/sites/eeas/files/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf>.

[47] European Commission, *Proposal for an Audiovisual Media Services Directive*, 2016, 0151 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0287&from=EN>.

should ensure the independence of the regulatory authorities. Once published, "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 19 September 2020. They shall notify the text of those provisions to the Commission", according to Article 2 of the Directive. As always, the challenge will be how it is implemented and what definition of independence each member state will use.

5. Conclusions

The EU often has difficulties reconciling democratic and cultural aspects with economic, industrial and international trade ones. There are some contradictions in the Treaties themselves, which defend a social Europe and a competitive economy. The EU is also pulled in different directions by two very powerful forces: globalisation and the Member States, which exert effective control over many of their own policies. It is not surprising, therefore, to find that these contradictions are also reflected in the EU's media policies. In addition, the EU is confronted by the multi-faceted nature of audiovisual content, which is not only symbolic, economic and cultural, but also a matter of identity. This aspect of audiovisual media policy stirs debate among many stakeholders, who claim the audiovisual media terrain as their own[48]. As described in the previous sections, the EU has taken a varied and often reactive approach to PSM. In the first stage, the focus was on the economic and competition aspects because of complaints made by the private sector. In the second stage, concerns about the political instrumentalisation of PSM grew and decisions were taken to intervene at several levels. First, through expert studies and reports such as the Media Pluralism Monitor. Second, through European Parliament Resolutions or naming and shaming policies. The nature of such political actions is more declarative than effective. Nevertheless, they do highlight or identify the problem. However, from a political viewpoint, the EU has demonstrated that it does have tools at its disposal in the most serious of cases. Political pressure and the threat of Article 7 application in the Hungarian and Polish cases have been used to safeguard the independence – on paper at least – of those countries' public broadcasters and independent regulatory authorities. But, the reality is that the EU

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[48] Hilde Van den Bulck and Karen Donders, 'Analyzing European Media Policy: Stakeholders and Advocacy Coalitions', in *The Palgrave Handbook of European Media Policy*, ed. by Karen Donders, Caroline Pauwels, and Jan Loisen (London: Palgrave Macmillan UK, 2014), pp. 19–35 <http://dx.doi.org/10.1057/9781137032195_2>.

intervention has not solve the problem as described later on this book. Besides, in other less resounding cases in southern and eastern Europe, the EU has not intervened to change political interference in public broadcasters. The last resort cannot always be used.

At regulatory level, the independence of PSM has not been incorporated into the revised AVMSD. For some authors, this was considered a great opportunity not only to recognise their role in European democracies, but also to lay down legal and institutional measures to safeguard their independence[49]. It has not been the case, possibly because a clear definition of PSM independence is difficult to achieve by the EU 28 member states with different media traditions, as is its implementation and oversight. The huge underlying barrier is, however, the Protocol to the Treaty of Amsterdam: each Members State has the right to organise and define its PSM, which is a de facto impediment to European harmonisation. To achieve the social, democratic and cultural objectives that the Protocol to the Treaty of Amsterdam, adequate governance processes are required to protect PSM from political and economic interference, but States are not prepared to cede control to the EU[50]. In the end, while European and international institutions like the Council of Europe may recognise the legitimacy and positive contribution of PSM, a State's intervention is needed to make that a reality[51]. The European Commission's services have placed greater emphasis on the independence of independent regulatory authorities. An indirect and perhaps more appropriate system of protecting a freer media system. If the EU becomes the guardian of regulatory authorities' independence, as set out in the Commission's Directive proposal, European intervention will have tools at its disposal that are more useful than mere political threats or naming and shaming. Finally, Article 30 sets a precedent for PSM. The political independence of a non-governmental public body is guaranteed by a Directive. In the future, it could be applied to PSM, which are also non-governmental institutions that are key to a democratic media system.

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[49] Donders; Psychogiopoulou and others.

[50] Llorens and Costache.

[51] Psychogiopoulou and others.

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