

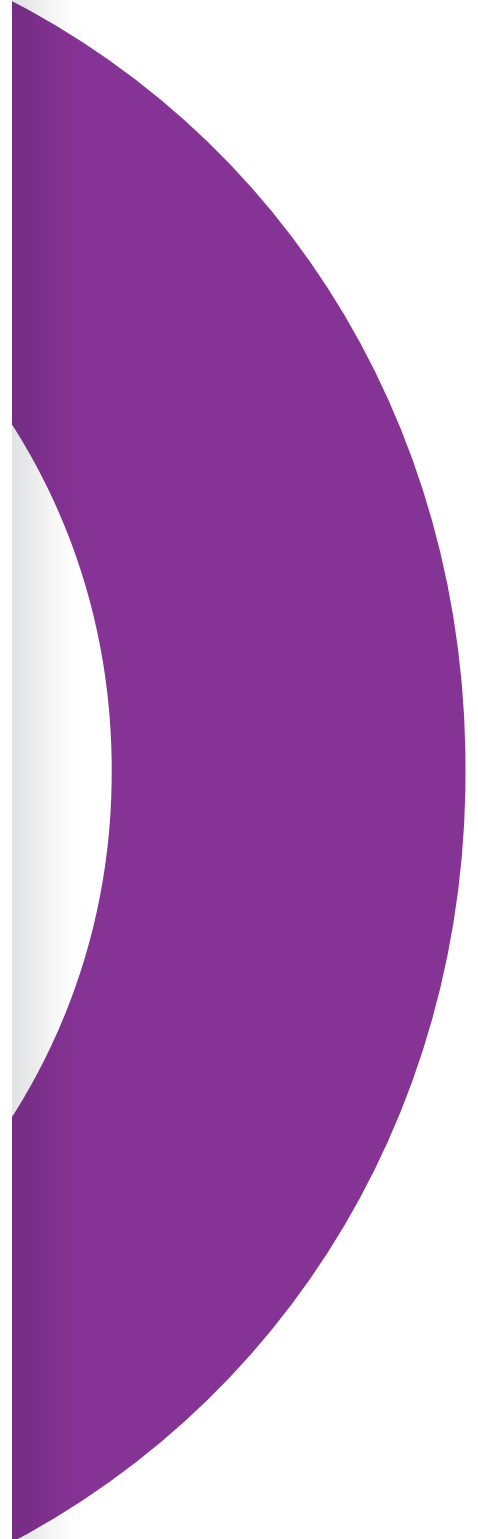
EBU

OPERATING EUROVISION AND EURORADIO

LEGAL FOCUS **PSM REMIT PRINCIPLES FOR THE DIGITAL MEDIA AGE**

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THE PRINCIPLES

BROAD

Covering a full range of content genres to deliver the PSM role to "inform, educate and entertain"

IMPARTIAL AND AMBITIOUS

Setting high standards to ensure PSM is a source of quality content and impartial information

FUTURE-PROOF

Allowing an assessment of public value whilst enabling innovation and adaptation to the market dynamics

PLATFORM NEUTRAL

Ensuring audiences can access content everywhere, any time, on all platforms

FOREWORD

Everybody has a view on what publicly funded PSM should be doing - politicians, other market players, academics, the public. But digitalisation, new market technologies and entries have raised new questions. How should PSM react to the online world? Some even suggest that society's democratic and social needs are adequately served by the vast array of media content now available to the consumer on a myriad of digital devices.

Certainly, the digital media offers society great opportunities to develop and progress. But unlimited media content from every kind of source also carries risk - the risk of a fragmenting society, where different groups of society no longer share the same values and basic understanding, and both minority and main-stream opinions can become blurred or distorted. The recent economic and migration crises lead to polarised views, and at the same time people now find themselves plugged into a single digital ecosystem that may actively filter information in a single direction. For these reasons, society more than ever requires an impartial, trusted news source; quality content reflecting national culture and all its diversity; a cohesive voice to bring communities together and to enable them space to interact. PSM exists to fulfil this role.

The EBU's Principles on the PSM Remit consider exactly this question: what publicly funded PSM should be doing in the digital media age, and how it should be doing it.

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1. INTRODUCTION

PSM as a public good

Public service media (“PSM”) contributes to society as a “public good” service. It underpins the values of democratic societies, offering a wide choice of quality content, impartial information and pluralistic views, promoting both social cohesion and cultural diversity.

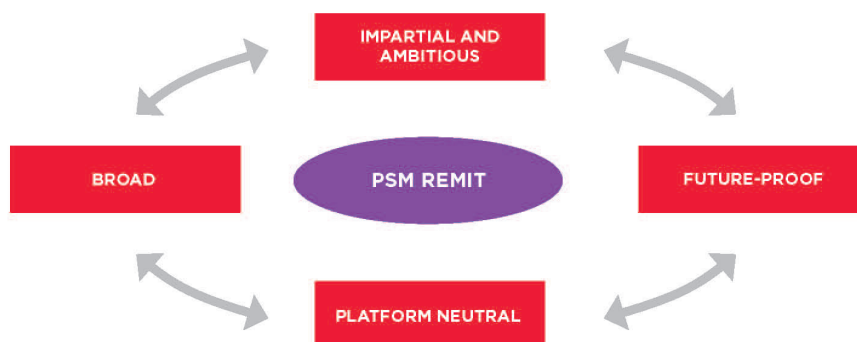
Rather than chasing viewer ratings and shareholder profit, PSM’s overriding goal is to deliver public value and to operate exclusively in the public interest. It acts as a counterbalance to the commercial offer, ensuring diverse pluralistic markets and raising programming and journalistic standards within the European audiovisual “dual system”.¹ Given the serious economic and social crises currently faced by European society, the protection and promotion of social cohesion, media pluralism and freedom of speech carried out by PSM are more important than ever.

A flexible remit allowing PSM to evolve in a changing media ecosystem

Digitalisation and the rapid development of European media markets do not affect PSM’s central mission. But they do change the way those objectives are delivered and fulfilled. The Council of Europe recognises that in order to fulfil its crucial democratic, social and cultural role in the digital media age, PSM must be accessible to everybody, on all platforms and in all forms; it must reflect and conform to the digital revolution in which it operates.² Without the means and legitimacy to adapt and react to new technologies and delivery methods, PSM could fail to reach and serve audiences in the global multimedia markets, in line with their public purposes.

It is therefore vital to ensure that the PSM remit is not only up to date, but also sufficiently flexible to allow PSM to innovate and adapt to the fast-moving digital environment and deliver value to its audiences.

Given the cultural, linguistic, constitutional and social diversity of Europe and its countries and regions, the publicly funded PSM remit definition must be addressed case by case - there is no generic definition, and the EBU does not attempt to create such a blueprint. The EBU’s PSM Remit Principles identify the key considerations that may be taken into account in defining the publicly funded PSM remit in the digital age, serving as a (non-binding) reference point to inform future debate at the national level.



¹ See e.g., European Parliament Report on PSB in the digital era: the future of the dual system (2010/2018(INI)).

² Recommendation of the Committee of Ministers to member states on the remit of public service media in the information society, CM/Rec(2007)3.

2. PSM REMIT: PROCEDURE

2.1 LEGAL FORM OF THE PSM REMIT

Definition of PSM remit lies within the discretion of Member States

“Public interest” is not easily defined in generic terms – people know it when they see it, but it is hard to describe in the abstract; it is always tailored to the needs of the specific society, culture and constitutional structure in question. For these reasons, EU law provides that the individual Member States retain the discretion to define and organise the PSM remit themselves at the national level:

*“The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the **public service remit as conferred, defined and organised by each Member State...**”³*

EU's role limited to checking for manifest error in the remit definition

Accordingly, the EU's role is limited merely to an assessment by the European Commission for a “manifest error” in the remit definition within the context of any State aid investigation into the public funding of the PSM, i.e. to determine that the PSM's activities do not include any service that is *manifestly not* in the public interest.⁴ In practice, this involves an assessment of the national legal instrument setting out the public service remit.

Most commonly, this legal instrument is a specific PSM law or statute and/or a (renewable) concession/agreement between the PSM and the State (e.g., a management contract or “cahier des charges”).⁵ Often, PSM have both a law setting out a general definition of the remit, and an agreement providing a more detailed list of activities. In some cases, there are also complementary rules or protocols setting out in detail how the remit should be implemented by the PSM. The key is to provide the PSM (and third parties) with sufficient clarity about the scope of the services without restricting the PSM's ability to adapt and innovate in the changing media markets (see further, below).

Legal instrument setting out the PSM remit

	INSTRUMENT	OBJECTIVE	WHERE USED
FIRST TIER	Law or equivalent	General definition of the remit	In all EU Member States ⁶
POSSIBLE SECOND TIER	Agreement with public authority, Broadcasting Council or equivalent (wide variety of instruments which are often co-regulatory)	More operational definition of the remit	In many EU Member States ⁷
POSSIBLE THIRD TIER	Self-commitments or equivalent	Detail on how the remit is fulfilled	In some EU Member States

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/PRO/09:EN:HTML>.

⁴ Broadcasting Communication, paragraph 48.

⁵ Broadcasting Communication, paragraph 50.

⁶ In Portugal, Switzerland and Turkey, the public service mission is mentioned in the Constitution.

⁷ For example, the BBC has an Agreement with the Secretary of State that sits alongside the BBC Charter and provides detail on many of the topics outlined in the Charter. The *Cahier des Charges* of France Télévisions is set by decree, following an opinion by the *Conseil Supérieur de L'Audiotvisuel* (which receives a yearly implementation report), which is then sent to Parliament. Similarly, RTBF has a *Contrat de Gestion* agreed with the Wallonian government.

2.2 ADOPTING OR AMENDING THE PSM REMIT

Subject to public scrutiny and public consultation

The procedure used for adopting (or amending) the relevant instrument defining the remit clearly varies depending not only on its form, but also on the constitutional and legal system in place in the different countries. In all cases, however, the process should allow PSM to preserve its editorial independence and to be subject to proper public scrutiny.

Transparency acts as an important safeguard in this respect, and public consultation is a crucial element of the drafting or amendment of the PSM remit. Therefore, during the legislative process (or, in the case of a management contract or similar, the administrative process), the parties concerned and the public should have the possibility to express their views on what services the PSM should provide. In some cases, specific parties, e.g. consumer groups, are actively consulted. An effective consultation on the scope of PSM activities - and an overall open debate - ensures their legitimacy and provides welcome certainty for both PSM and third parties active in the market.

In cases where the public service remit is set out or elaborated in a contract between the PSM and the State, there should be safeguards in place to ensure that the government cannot amend the public service remit unexpectedly for politically motivated reasons. Normally, PSM licences or charters are for a fixed term and/or subject to periodic review.⁸

Ensuring the PSM remit is defined objectively

Overall, the process should ensure that the remit is defined in an objective way that reflects the fulfilment of PSM's overall aim: the promotion of the democratic process and the accompanying social and cultural goals.

2.3 SUPERVISION/MONITORING OF THE PSM REMIT

Independence of the supervisory body

In view of the high standards imposed on the entrusted PSM operator by the remit, there is a need for an appropriate body or authority to monitor the fulfilment of the remit in a transparent and effective manner. The Amsterdam Protocol provides that it is for the EU Member States to organise and ensure this.⁹ However, the European Commission has indicated that: *“Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.”*¹⁰

In fact, all EU Member States have specific PSM reporting mechanisms, combined with different forms of monitoring by independent bodies. These monitoring mechanisms must be designed to guarantee fully the editorial independence and programme autonomy of public service broadcasting organisations against

⁸ For example, the BBC Charter is fixed for and reviewed every 11 years; French law provides that contracts between the State and public audiovisual organisations are concluded for a period of 3 to 5 years.

⁹ Protocol (No 29) above and Broadcasting Communication paragraph 54.

¹⁰ Broadcasting Communication, paragraph 54.

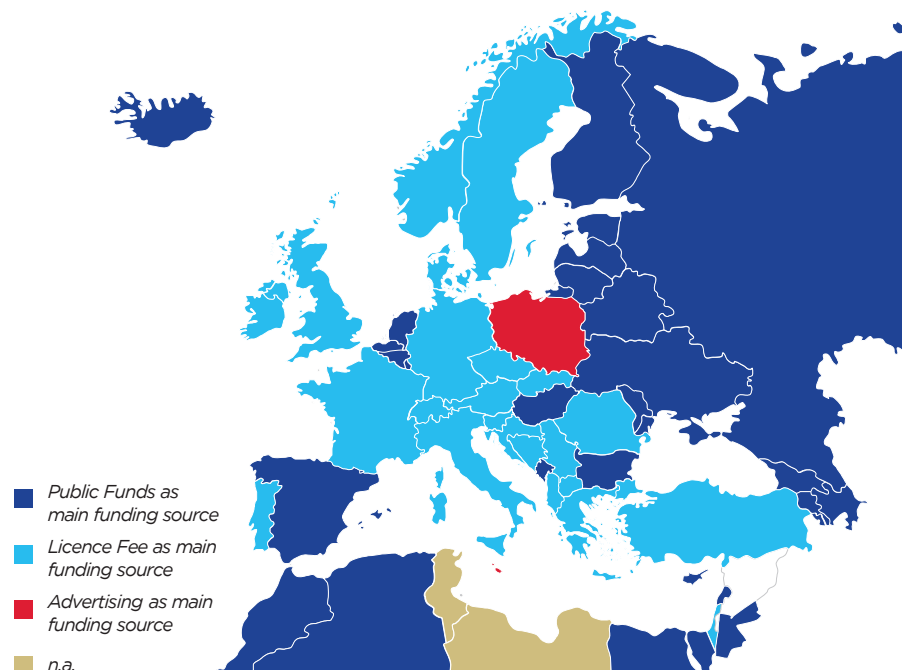
political and economic pressure. However, this requirement for the supervision to be carried out by an "authority [which] is independent from the entrusted undertaking"¹¹ should not necessarily be understood as a (legally) separate external authority. An "internal" body is also independent when it is comprised of independent members, and in a number of Member States the law provides for the participation of civil society or independent experts in internal monitoring bodies. Independence from the PSM can be ensured via independent appointment procedures and the protection of the independent status of its members (e.g. using fixed term contracts), as well as by providing the internal bodies with sufficient financial resources and their own secretariat.¹²

2.4 FUNDING THE PSM REMIT

Sustainable funding to sustain a broad remit

Finally, the PSM remit is closely linked to funding. Ideally, the amount of funding received should be driven by the scope of activities to be offered. Too often, however, it is the other way round in practice, and funding shortfalls tend to drive the remit debate (although the impact of this can be alleviated in cases where PSM is free to derive commercial revenues in addition to public funding). Ideally, the level of public funding should also be set for the same period as the public service remit it aims to finance. This avoids any sudden and unexpected funding cuts that can leave the PSM unable to fulfil its entire remit, forcing it into shock decisions about what services to drop, without proper consideration and oversight of their value for society.¹³

Main source of PSM income (2017)¹⁴



¹¹ Broadcasting Communication, paragraph 42.

¹² See further, EBU Governance Principles for PSM: http://www3.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Gov-Prin_EN.pdf.

¹³ See EBU Public Funding Principles for PSM: <https://www3.ebu.ch/contents/publications/public-funding-principles-for-ps.html>.

¹⁴ Source: EBU based on Members' data and on desk research, 2017.

3. THE ROLE OF PSM IN DEMOCRATIC SOCIETY

3.1 THE TRADITIONAL ROLE OF PSM

To promote and protect freedom of expression and media pluralism

As recognised by the European Court of Human Rights¹⁵ and in many international legal instruments and standards,¹⁶ PSM operates to promote and protect the fundamental European principles of freedom of expression and pluralism in the media.¹⁷ It is a “public good” service funded by public money to serve the public interest. Whilst other publicly funded public interest services like the medical and education sectors may have a more obvious and tangible impact for individuals and society, PSM is also an indispensable service, operating at the heart of democratic society and debate. It enables and empowers citizens to exercise fundamental rights and to participate actively in democracy and the life of their society. As explained in the Broadcasting Communication 2009:

Broadcasting Communication 2009

“Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.

“Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life.”¹⁸

Article 10 ECHR

The decision to establish a publicly funded PSM therefore represents a conscious choice by the State to actively promote freedom of expression, media pluralism and cultural diversity through the offer of information and content that is universally accessible and affordable for all. By entrusting this role to a PSM, the State is able to discharge its positive obligation under Article 10 ECHR to guarantee media pluralism,¹⁹ in a form of “positive intervention” in the market. In fact, numerous EU and international legal instruments and standards refer to the “dual system” of European broadcasting – the concept of a publicly mandated PSM operating in parallel to commercial media entities to ensure a diverse content offer, media pluralism, linguistic diversity, editorial competition and freedom of expression.²⁰

PSM as a specialised, full service institution

Nevertheless, in order to perform its role properly, PSM should be carefully organised. First, the PSM should have its own legal personality, independent of any State institution (including of course, the government). Second, the PSM remit should be entrusted to a “full service” institution, meaning that there should be a specialised organisation providing the relevant PSM service (whether radio or TV). When established in this way – as a specialised organisation rather than, for example, a series of separately tendered public interest services – PSM can benefit from editorial and production synergies and economies of scale. Equally, the administrative and (independent) regulatory supervision of its function and activities is simplified and efficient (see below). Moreover, and crucially, as a “full service” specialised institution, the PSM builds the required trusted relationship with

¹⁵ *Manole and others v. Moldova*, 17 September 2009, ECHR, No. 13936/02.

¹⁶ See e.g., Protocol (No.29) on the system of public broadcasting in the Member States, attached to the EU Treaties.

¹⁷ Freedom of expression and the freedom and pluralism of the media are fundamental values guaranteed by Article 10 of the European Convention on Human Rights and Article 11 of the EU Charter of Fundamental Rights.

¹⁸ Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C257/01), paragraphs 9 and 10.

¹⁹ See *Manole and others v. Moldova* above and the EBU Study on PSM and Article 10 ECHR: <http://www3.ebu.ch/contents/publications/public-service-media-and-article.html>.

²⁰ European Parliament Report on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI)). See also, e.g., Broadcasting Communication, paragraph 14.

citizens, operating as a single public interest brand, whose editorial independence is clearly and structurally defined. In this way, PSM is able to act as a central and continuous reference point in society.²¹

3.2 THE ROLE OF PSM IN THE DIGITAL MEDIA AGE

PSM as an impartial source of information and point of reference

The role of publicly funded PSM has not changed in the digital media environment. Of course, the digital world has released an unlimited supply of information in all forms and from all kinds of sources. This empowers citizens to hear about events and make decisions in completely new ways, but the information they receive is extremely vulnerable; it is easily manipulated, suppressed or made subject to any other kind of distortion for political or commercial reasons. In the midst of all this PSM stands as a benchmark and impartial point of reference around which diverse views and ideas can be formed, expressed and validated. PSM enables the kind of open, free and engaged debate that underpins democratic society.

Promote social cohesion and cross-cultural understanding

Moreover, PSM promotes social unity by serving all sections of society with a universally accessible and high quality service. By reflecting the full range of perspectives, traditions and interests, PSM promotes social cohesion and cross-cultural understanding. This role becomes even more vital in an era of globalisation and digitalisation, which can lead to increasingly individualised media consumption and heightened social fragmentation.

The *raison d'être* of publicly funded PSM in a digitalised society is therefore both clear and sustained. It is a role that cannot be performed by the free market, since it is not profitable for commercially funded broadcasters to produce such a broad range of content and activities reflecting the broader public interest. Moreover, media markets have a natural tendency towards consolidation and often require regulatory intervention to ensure that they produce positive external effects and an adequate contribution to democracy.

PSM fit for purpose in the digital age

Nevertheless, PSM cannot afford to stand still; it must adapt to the changing markets, consumption patterns and demands. Although the overall consumption of audiovisual content continues to increase - with traditional TV content still accounting for a large portion of daily viewing time - the way in which this content is consumed has changed. For these reasons, PSM must check and assess their own remit in order to ensure they remain fit for purpose in the digital age. Of course, PSM must continue to serve traditional audiences. But due to changing viewing habits they also need to develop new services in order in particular to connect with younger audiences and to stay relevant overall.²²

In particular, the means of distribution of PSM content needs to be constantly adapted to new technological and market developments. DTT and other linear distribution remains important, but other platforms are gaining significance quickly and online presence becomes necessary to enable adequate daily and weekly reach. The old distinction between linear and non-linear becomes less relevant and even the number of channels offered may soon no longer be a central criterion; online apps, personalised virtual playlists, VoD and media players may have an equal, and sometimes an even more important role for delivering PSM.

PSM remit as a robust and flexible framework

The PSM remit should therefore adapt and morph into a robust and flexible framework that enables and empowers PSM to properly fulfil its democratic, social and cultural role in the digital age.

²¹ See further on the governance and independent supervision of PSM, EBU Governance Principles for PSM: http://www3.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Gov-Prin_EN.pdf.

²² EBU MIS data shows that European youth TV viewing time declined from an average of 2:26 hours per day in 2009 to 2:11 hours in 2014, based on Eurodata TV Worldwide and EBU data.

4. PSM CENTRAL MISSION AND VALUES

Inform, educate and entertain

The Preamble to the Amsterdam Protocol on public service broadcasting confirms PSM's overall role in society: *"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."*²³ In fulfilling this role, PSM – wherever it is located and however it is organised – broadly aims to provide impartial and quality content and services that *"inform, educate and entertain"*²⁴ the citizen. This is PSM's central mission – a mission that is expressed in concrete terms by the PSM remit, i.e., the bouquet of PSM activities and services set out in the relevant legal instruments, agreements, concessions and/or accompanying protocols.

The PSM remit is normally made up of qualitative (incorporating specific PSM values) and/or quantitative criteria (such as specific types of programmes, percentage of own/commissioned programming). Concerning those broader qualitative criteria, all EBU Members signed a Declaration on the Core Values of Public Service Media in 2012:²⁵

EBU Core PSM Values

- Universality - to reach everyone, everywhere;
- Independence - to be trusted programme makers;
- Excellence - to act with integrity and professionalism;
- Diversity - to take a pluralistic approach;
- Accountability - to listen to audiences and engage in meaningful debate;
- Innovation - to be a driving force for innovation and creativity.

These express in a generic way qualitative criteria of the PSM remit to which all EBU Members are committed to adhere. They are closely aligned to the fundamental rights set out in the European Convention of Human Rights and the European values in the EU Lisbon Treaty:

European Fundamental Rights

- Respect for human rights and human dignity, freedom, democracy, equality, and the rule of law;
- Pluralism, non-discrimination, tolerance, justice, solidarity and gender equality;
- Solidarity between generations and protection of the rights of children, social cohesion and cultural and linguistic diversity.

The EBU's PSM Values form the basis for the EBU's Remit Principles, which are intended to assist debate and reflection on the concrete definition of the publicly funded PSM remit in the digital media age in each country.

²³ Protocol (No.29), above.

²⁴ The central mission of the BBC, as set down in 1931 by John Reith the BBC's first Director General.

²⁵ http://www3.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Empowering-Society_EN.pdf.

5. THE EBU PSM REMIT PRINCIPLES

Given the cultural, linguistic, constitutional and social diversity of Europe and its countries and regions, the publicly funded PSM remit definition must be addressed case by case. However, the EBU's (non-exhaustive) PSM Remit Principles aim to provide broad and non-binding guidance on how to capture the essence of "public interest" when considering the publicly funded PSM remit at the national level.

5.1 BROAD

Covering a full range of content genres to deliver the PSM role to "inform, educate and entertain"

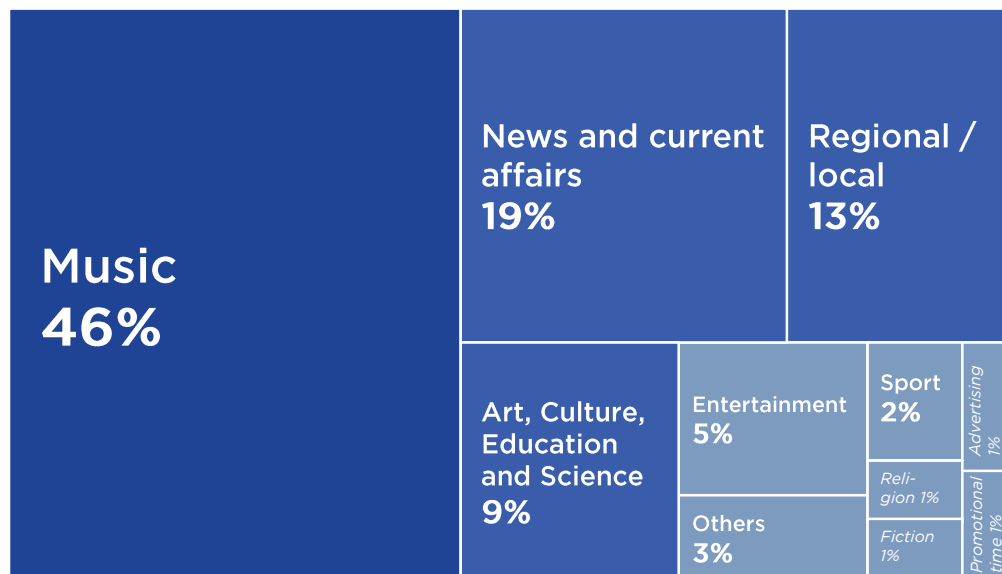
The PSM remit should incorporate a full range of distinctive quality content to fulfil its central mission: to "inform, educate, entertain" at all levels of society. This means not only that PSM should create and provide an entire bouquet of content genres, but it should also act as a key custodian of national and European identities, cultures and values.

5.1.1 PROVIDING A FULL RANGE OF CONTENT

A truly diverse offer reflecting the society it serves

With respect to content, the PSM offer should therefore be truly diverse, offering mainstream popular content, as well as niche and minority programming. Programmes should be provided for children as well as adults, and to all minority groups, whether ethnic, linguistic, cultural minorities or persons with disabilities. As a cornerstone of modern democratic society, it should reflect the social and cultural interests of every individual in society, whilst also offering them a "voice" to freely express their point of view on topical issues. By enabling and empowering diversity, PSM promotes society cohesion and encourages a better understanding among people, thus contributing to the integration of different cultures and beliefs.

EBU Members offer a diverse range of radio content²⁶



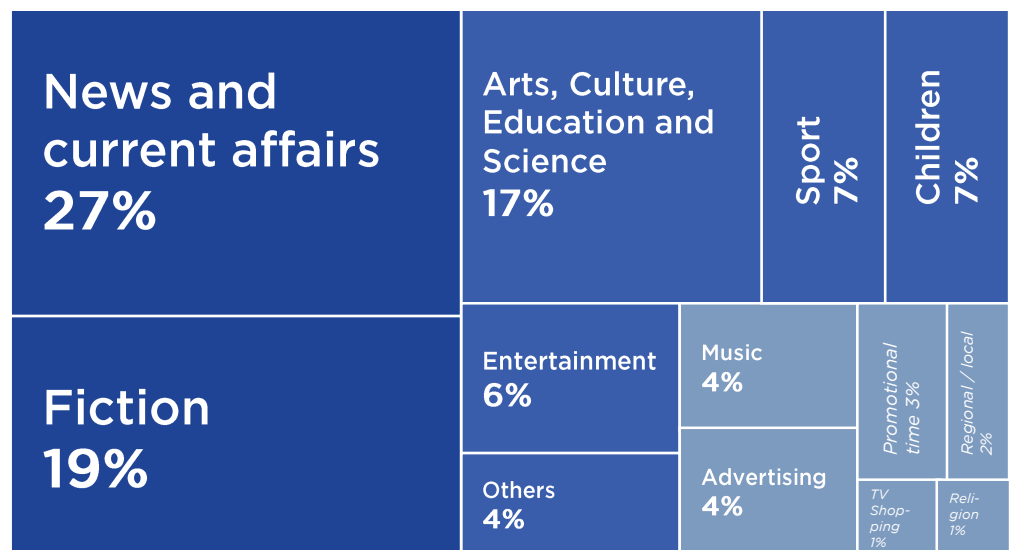
²⁶ Source: EBU MIS, based on 33 EBU PSM organizations, Members' data, 2017.

It is the ability to offer a full and balanced spectrum of content that makes PSM a distinctive public good, as recognised in numerous international texts, and also by the EU General Court when assessing PSM funding under the EU State aid rules:

*"Member States could legitimately define such a Service of General Economic Interest so as to cover the broadcasting of the full spectrum of programming ... In addition, when Member States stated in the Amsterdam Protocol 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, they were making direct reference to public service broadcasting systems introduced by them and entrusted with broadcasting full-spectrum television programmes for the benefit of the entire population of those States."*²⁷

In spite of this, some argue for a narrower PSM remit, in extreme cases limited only to cultural and information content, to fill in the "gap" left by the commercial offer. Such "market failure" arguments miss the purpose of PSM, which is to provide content for all parts of society and political and cultural taste. In order to fulfil its public interest role - and in particular the pursuit of social cohesion through diversity - PSM cannot be restricted to a niche "high culture" audience. It must appeal and be relevant to all in order to connect people to the world around them, and to contribute to building a community of shared values and culture.

EBU Members offer a diverse range of TV content²⁸



²⁷ Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2/Denmark v. Commission, 22 October 2008, paragraphs 103-4. See also, Broadcasting Communication 2009 on the application of the EU State aid rules to public service broadcasting: "given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2) [Article 106(2) TFEU]." See also, Resolution of the EU Council, 25 January 1999 concerning public service broadcasting, OJ C030, 5 February 1999, p.1.

²⁸ Source: EBU MIS, based on 36 EBU PSM organizations, Members' data, 2017.

5.1.2 LIVE EVENTS AND ENTERTAINMENT CONTENT

Social cohesion via national sporting events

Sports content has long been an integral part of the PSM offer. Free-to-air sports enable citizens from every social strata to enjoy sport and for nations to unite behind international events such as the football World Cup and the Olympics. Indeed, such events are often listed by EU Member States as “events of national importance” that must always be (in whole or part) available free-to-air for citizens.²⁹ PSM plays a key role not only in show-casing such events, but also in “telling the story” behind different athletes and creating national “heroes”, broadcasting many hours of related content leading up to the event. This helps Federations to build and sustain the sports event and encourages an interest in sport throughout the year, whilst strongly promoting the overall spirit of social cohesion.

PSM also supports minority sports, launching interest in new activities and events that otherwise might not secure any exposure or funding. In addition, PSM coverage of sports, including in particular the surrounding programming and factual documentaries, has a positive social element for society in promoting the active participation of citizens in sports all year round.

Attractive popular content to draw in audiences

PSM has a long tradition in offering the full spectrum of entertainment content, and many Members have “entertainment” content expressly mentioned in their public service remit.³⁰ As well as ensuring that PSM programming is balanced and attractive across the whole spectrum of viewers, popular content can perform an important “lean-in” effect of drawing in audiences to more factual or topical content that follows. It can also promote social cohesion, bringing together people of all ages, walks of life and cultures: *“giving rise to shared experiences that are increasingly rare in today’s fragmented society and all the more important for this very reason.”*³¹

In this respect, the EU General Court has confirmed, *“The possibility open to Member States to define broadcasting SGEIs broadly, so as to cover the broadcasting of full-spectrum programming, cannot be called into question ... it is wrong ... to claim that the broadcasting SGEI should be limited, at least where the public service broadcaster is dual funded, to the broadcasting of non-profitable programming.”*³²

Correspondingly, the European Commission has consistently held the inclusion of entertainment content within the public service remit to be legitimate.³³ Many forms of entertainment can in any case be considered as cultural and/or linked to national identity. These include, for example, comedy, satire and parody, which may relate to political, economic and social life (thereby, contributing to a better understanding of different society phenomena), whilst at the same time simply “making people laugh”.

²⁹ See Article 14, Audiovisual Media Services Directive (AVMSD) 2010/13/EU.

³⁰ Some PSM have express quotas with respect to entertainment and some have certain conditions for the type of entertainment they can show (e.g., in terms of quality or social value).

³¹ <http://www.srgssr.ch/en/public-service/entertainment/>.

³² Paragraphs 107 and 109 of the Case.

³³ Commission Decision C 27/09 on the budgetary grant for France Télévisions of 20 July 2010, par. 14. See also, Council of Europe Recommendation on the remit of PSM in the information society (2007)3 of 31 January 2007; and European Parliament Resolution on the role of public service television in a multi-media society, OJ C320, 28 October 1996, p.180.

According to the Swiss PSM, SRG SSR, entertainment *"is as varied as its audience's tastes ... entertainment reflects cultural values and forms part of the nation's cultural identity. What could have more lasting worth than a programme that entertains while at the same giving food for thought, fostering dialogue and perhaps even sparking social policy debate in other formats and media? This shows that there are no absolute dividing lines between information, education and entertainment ... The range of programmes offered has to be geared to the audience's diverse needs, covering a broad spectrum of genres, formats and content ..."*³⁴

The "infotainment" genre (which involves the use of entertainment formats to convey relevant factual information) is a good illustration of this. Entertainment and other related genres are in fact an important way of exercising editorial independence and freedom of expression that are protected under Article 10 ECHR.

5.1.3 PROMOTING NATIONAL AND EUROPEAN CULTURAL HERITAGE

In a globalised media world, offering seemingly unlimited (though often homogenous) content from everywhere, PSM remains dedicated to the promotion (and protection) of national and European cultural heritage. Indeed, with the digital media revolution, PSM's role in promoting society cohesion and common European and national values becomes even more important.

Supporting national creative industries

The Audiovisual Media Services Directive stipulates that broadcasters reserve a majority proportion of their transmission time for European works (excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping). It also sets out a minimum standard of 10% of broadcasters' transmission time (excluding the abovementioned allotted time) to be reserved for European works created by producers independent of the broadcaster,³⁵ or alternatively at least 10 % of their programming budget.³⁶ In practice, PSM allocates a far greater proportion of its air time to European works and a number of Member States have included higher ratios for the support of European independent producers.

Serving minority cultures and languages

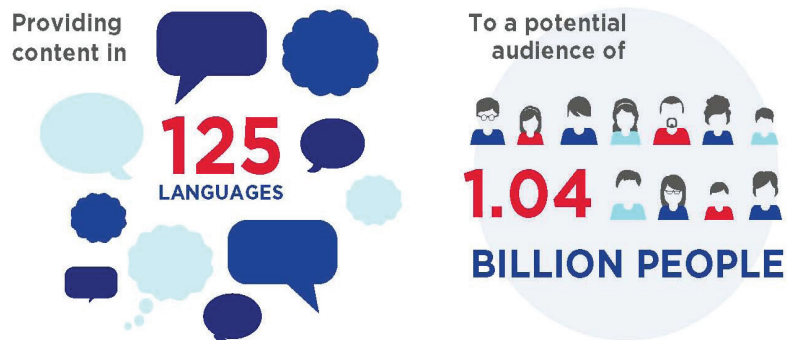
Moreover, in federations or confederations of States, and in countries with multiple national languages, PSM often set up at least one programme service per area. For countries which are more centralised, PSM often include in its programmes broadcasts in minority languages, in proportions which depend on the official nature of the language and the size of the population speaking it. Some groups of countries, such as the Nordic countries, that have common cultural and historical links, are obliged to maintain relations in terms of programming and services. It is also in the interests of preserving local characteristics that almost all PSM programme services are obliged to place particular emphasis on regional programming.

³⁴ <http://www.srgssr.ch/en/public-service/entertainment/>.

³⁵ As defined in Article 1 AVMS Directive.

³⁶ Articles 16 and 17 AVMS Directive.

**The EBU's
73 Members in
56 countries are
broadcasting in
125 languages to a
potential audience of
1.04 bn people³⁷**



In this way, PSM not only produce content dealing with local issues and culture, but also support and sustain the local economy and arts industry. Linked to this, PSM also play a key role in the preservation of the national cultural heritage as the curators of the national audiovisual archives, which should be digitised and opened up where this is technically possible and cost effective.

5.1.4 EDUCATION AND MEDIA LITERACY

PSM activities should also play a central role in education and media literacy, actively contributing to the creation of an informed and educated society at all levels, for all genders and generations. PSM should be a key contributor to the knowledge society, offering informative content on, for example, consumer issues, education, lifestyle, youth interests, nature and the environment. PSM should reach out and provide a rich source of new information and learning to citizens that wish to know more about the world in which they live.

**Educating the public
and allowing them to
connect and engage
on different media
platforms**

In carrying out this mission, PSM should also ensure that the flow of information is two-way - that citizens are able to enter into a dialogue and interact with both the PSM and other citizens on the relevant issues. PSM should foster and encourage media literacy in society through awareness programmes that teach audiences to watch content objectively, and to connect and engage with different media platforms in order fully to benefit from the universal PSM service.³⁸ Online tools may be used to establish a framework for people to experiment with the latest media technology or simply to learn. PSM may also develop specific online programmes for children, for example, that combine the potential for personal development with simple entertainment.

Overall, PSM programming should be balanced: *"...While it is important for public service broadcasters to offer entertainment programmes and to seek to reach wide audiences, the distinctiveness of public service content as a whole, vis-à-vis commercial output, must also be ensured."*³⁹ In general, the presence of PSM in the market drives up the quality of the commercial offer.

The EBU has published its EBU Principles on media literacy.⁴⁰

With tivi, logo, Kika or Thommi, ARD and ZDF are proactive in educating parents and children, by offering programmes that are suitable for children and engage children in a dialog, notably with new services such as games and apps.

³⁷ Source: EBU MIS, based on Member data.

³⁸ https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Viewpoint-Media-Lit_EN.pdf

³⁹ Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, 27 September 2006.

⁴⁰ https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Viewpoint-Media-Lit_EN.pdf

5.2 IMPARTIAL AND AMBITIOUS

Setting high standards to ensure PSM is a source of quality content and impartial information

In offering a full comprehensive range of content (see above), PSM should ensure that it is a source of quality content, in every kind of genre. It should set high standards for itself and (by example) for the market.

Trustworthy and objective source of information

Trust is also at the heart of PSM, and the PSM remit must reflect that. Citizens must consider PSM as the go-to source for objective information and commentary on the important political issues of the day. In the digital age, this role becomes ever more essential given the huge variety of information available on every platform, often from unknown sources.

The way PSM carries out its activities is of course important, and the more interactive it is with its audience – the more the audience has a voice that can be heard in connection with what the PSM is doing and showing – the more citizens feel engaged and able to trust the organisation. Even more fundamental however, is to grow trust via the actual content that is delivered. The remit should stipulate that all PSM news, current affairs and political content – whether at the national, European or international level – is to be presented in an impartial and balanced way to ensure that a full range of views is presented. Naturally, PSM should not be linked to any political party, religion or economic entity or group. In certain countries, PSM information programmes are required to clearly separate facts from editorial comment.⁴¹

Independent and quality content reflecting highest ethical standards

Moreover, journalism and investigative reporting should satisfy the highest ethical and quality standards, whilst taking advantage of all new digital technologies and innovations available. PSM journalists adhere to strict editorial guidelines and codes of conduct in order to achieve this.⁴²

Given their particular sensitivity, the coverage of political elections (regional, national and international) needs particular care, and some PSM have in addition specific election guidelines to ensure fair and balanced reporting.⁴³ In addition, the BBC, for example, has specific guidelines on financial journalism, imposing particularly high standards of conduct to ensure that commercial or financial interests do not influence BBC coverage (and that individual journalists do not have any conflict of interest).

The EBU has published its EBU Principles for Election Coverage in New and Emerging Democracies.⁴⁴ This document provides extensive examples from countries such as Ireland, Malta and Switzerland.

⁴¹ Article 3b ARD Grundsätze.

⁴² See further on editorial guidelines and the use of ombudsmen, EBU Governance Principles for PSM, p.25: http://www3.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Gov-Prin_EN.pdf.

⁴³ EBU Principles for Election Coverage in New and Developing Democracies: <https://www3.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Election-Principles.pdf>.

⁴⁴ Idem.

A dynamic forum for public debate

As a cornerstone of modern democratic society, PSM strives to engage and inform its citizens about political life. In order to achieve this, journalism and news reporting should be accurate, impartial and reflective. And it should be dynamic - continuously updated in real time, with items providing greater context and deeper analysis of relevant issues. PSM should be a forum for public discussion about political and topical issues, allowing for all sections of the community to have a voice and to be heard, whether directly (e.g. in a programme service) or indirectly (e.g. via social media). Indeed, in all its activities, PSM should foster dialogue and interaction with citizens, moving from a more traditional closed institution to one that is open and connected to networks of people, communities, cultural organisations and civic society.

PSM journalism as a public watchdog

In order to assist in the wider process of keeping government accountable at all levels (regional, national and international), PSM journalism should probe, question and seek out the truth. It should test the transparency and accountability of State departments. Indeed, PSM acts as a public watchdog in all areas of society. Nevertheless, the State and the government often retain the possibility to require air-time to communicate urgent messages of general interest or public safety. Such messages might be carried out by official communiqué or by constitutional bodies, but always in line with very clear and limited conditions setting out when this power can be exercised.

Rigorous quality standards do not mean that PSM content should be “elitist”. As set out above, content must be comprehensive and cater for all members of society. Quality, which is in any case highly subjective, does not refer to the type of content offered, but rather to certain goals and safeguards to which the content must adhere, for example with respect to ethics, privacy, the protection of minors and the protection of participants in shows, documentaries, factual discussions or any other kind of format from exploitation. A certain overall “distinctiveness” in content may be expected, but this should always be measured and assessed across a service as a whole, not programme by programme. Overall, any assessment should focus on outcomes, evaluating the overall end product, rather than delving into specific components.

5.3 FUTURE-PROOF

Ensuring the promotion of public value and enabling innovation and adaptation to market dynamics

As explained above, the PSM remit is defined and organised by individual States. However, according to EU State aid law the PSM remit must be sufficiently “clear and precise” to enable the Commission to assess whether there is a manifest error in the definition of the public service remit, i.e. whether activities that are manifestly not in the public interest have been included.⁴⁵

Third party market players also often seek a clear demarcation of publicly funded PSM activities, in order to better plan and arrange their own services.⁴⁶ Indeed, clarity of the remit in the PSM law, licence or equivalent legal instrument may reduce the risk of third party complaints and ultimately provide a welcome degree of certainty for all.

⁴⁵ See above.

⁴⁶ See also Broadcasting Communication, paragraphs 45 and 46.

However, in fast-moving media markets it is imperative not to straight-jacket PSM with a narrow set of services that cannot be independently adapted or updated. If a PSM has to wait for a periodical agreement or licence renewal (or, in the case of a PSM law, the completion of a legislative process) before it can launch innovative new services, it will not be able to meet its public purposes effectively.

Flexibility to allow for innovation

The Council of Europe has emphasized the importance of balancing the need for clarity in the legal instrument defining the PSM remit with sufficient operational flexibility: *"To reconcile the need for a clear definition of the remit with the need to respect editorial independence and programme autonomy and to allow for flexibility to adapt public service activities rapidly to new developments, member states should find appropriate solutions, involving, if needed, the public service media, in line with their legal traditions."*⁴⁷

A balance must therefore be struck between sufficient (abstract) clarity of PSM's scope of activity, and sufficient (practical) flexibility for PSM to innovate and adapt to the new market place. As explained, the legal instrument used varies, and there is no one instrument objectively better than the other. Equally, the form of the remit varies, with some being more detailed and others broader, leaving more discretion to the PSM and in particular their supervisory and advisory bodies. The guiding principle is always the overriding objective for which PSM was created – the democratic, social and cultural goals, against which all PSM activities can be measured.

Partly addressing these concerns, the Broadcasting Communication 2009 advocated the implementation of a public value test at the national level to assess the legitimacy of significant new PSM media services before their launch.⁴⁸ Under this test, significant new publicly funded services are assessed, on the one hand for their public value, and on the other hand for their impact on competition. Where public value is identified, the service may be launched unless it makes it "impossible or excessively difficult" for a third party to carry out its activities.⁴⁹

Great care must be taken not to place an undue administrative and financial burden on the PSM attempting to innovate and stay relevant in the global digital markets. Indeed, in an era of fierce global competition driven by mighty media conglomerates, it is legitimate to ask whether a public value test makes any sense at all, given the constraints in terms of launch time, expense and confidentiality it places on PSM.⁵⁰ In practice, other procedures might be considered just as effective in ensuring that new media PSM services conform to the overall remit values, for example the normal legislative procedure or the procedure to amend the Management Contract or other relevant instrument (involving public consultation).

Applying the public value test in a proportionate way

If a public value test is deemed necessary, it should always be defined and applied in a proportionate way, relative to the size of the PSM, the market and the new service itself. This can be achieved via various mechanisms, for example by defining "substantial" in a reasonable way,⁵¹ limiting the length and complexity of procedures (whilst allowing sufficient time for stakeholder comment), and permitting the launch of pilot services prior to any test to gauge the actual interest of the viewers.

⁴⁷ Recommendation (2007)3, paragraph 27.

⁴⁸ The Communication is not legally binding, but it provides highly persuasive guidance to Member States on how the European Commission will approach EU State aid cases.

⁴⁹ Case T-533/10 *DTS Distribuidora de Televisión Digital v Commission*, 11 July 2014.

⁵⁰ See Burnley, *Public value test: fit for purpose?* in: IRIS Special - Online activities of public service media: remit and financing IRIS, 14 September 2015.

⁵¹ For example, as a percentage of the annual PSM budget.

Freedom to innovate

Overall, it is vital that the remit is drafted in a “future-proof” way, without any arbitrary limits on PSM innovation. This is crucial to sustain PSM’s relevance in the digital media age, in particular in relation to younger audiences. There is, for example, no justification to limit the availability of PSM VoD (including content from third parties) to particular time limits (e.g., 7 or 30 days). An extra day of availability does not make it “impossible or excessively difficult” for a third party to carry out its competing activity. The emphasis should always be on the public interest of the service (in line with the objectives set out in the Amsterdam Protocol), taking into account the global nature of competition in the digital media markets.

The EBU’s *Generation What?* is a transmedia online survey dealing with questions about life, love and work aimed at young people aged 18-34 with an interactive website, web videos, TV documentaries and radio and newspaper content.⁵²

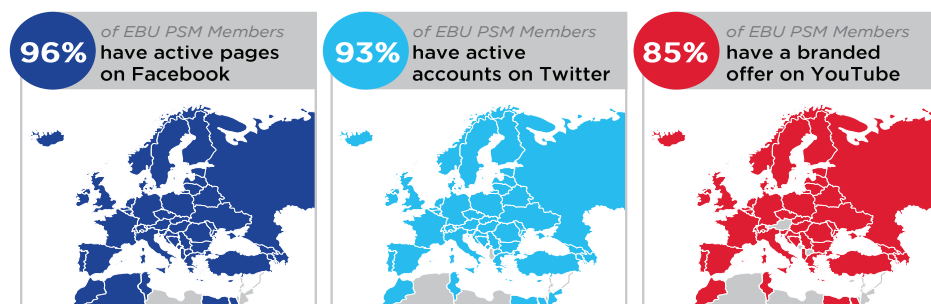
5.4 PLATFORM NEUTRAL

Ensuring content is available everywhere, any time, on all platforms

PSM is about social inclusion, integrating all communities, social groups, genders and generations. A constant feature of the public service remit is therefore the principle of universality, which should be understood not only in terms of the content offered, but also in technical terms.

The participation in democratic public debate and the reception of quality PSM content should not be limited by mode (e.g., linear or online), means of distribution (e.g., DTT, satellite, cable, online, OTT) or form (e.g., word or picture). The PSM remit typically requires that the entire population have access to its programming on equal terms.⁵³

EBU Members’ presence on social media⁵⁴



⁵² <http://www.generation-what.eu/en/#>.

⁵³ This may be achieved either by reference to the territory or to the population.

⁵⁴ Source: EBU MIS, based on 69 EBU PSM organizations, Members’ data and desk research, 2017.

Universality in a changing media landscape

Clearly, this universality principle must evolve to reflect the new dynamics in the media markets. Citizens now expect their PSM content to be available not just in their homes but anywhere, anytime; to access what they want, when they want. Therefore the scope of the remit should not constrain PSM in reaching its audience - it should be enabled to fulfil democratic, cultural and social objectives in the new platform and content environment: PSM must *“occupy a visible place in the new media landscape.”*⁵⁵ PSM is only able to fulfil its purpose in the digital media environment by *“developing a range of new services which would enable them to reach more households, to produce more quality contents, responding to the expectations of the public, and to keep pace with developments in the digital environment.”*⁵⁶

Arguments made against PSM online services appear to ignore the EU principle of technological and platform neutrality - there is no reason to limit PSM news coverage, for example, to “traditional” distribution platforms only. PSM should offer impartial and high quality news (incorporating moving images and sound as well as text) online, acting as a benchmark that raises the standards of the commercial sector, and combining with it to provide a truly pluralistic media offer on all platforms. Recent market studies in Norway and Sweden demonstrate that PSM has no material impact on competitors, and indeed the print press industry is under pressure globally due to the growth of online advertising, whether or not PSM is present online.⁵⁷

Text-only output is not a new feature for PSM

PSM has long had a tradition of text-only news with its use of teletext. Whilst teletext was for technical reasons limited in length, it would be contrary to the principles of freedom of expression to limit PSM journalists to an arbitrary article length. Moreover, and for the same reason, there is no justification for insisting that PSM online content be linked to existing (linear) broadcasting services.⁵⁸ It is noted that the written press tends to include increasing numbers of moving images in its online reports, and there is to a large extent market convergence in two directions. It is open for the written press to develop new business models to attract the online consumer. And it should be open also for PSM and the print sector to cooperate together and, for example, to provide hyperlinks to articles on similar topics on each other’s websites. After all, media organisations now operate in a global (digitalised) market. National media disputes become self-defeating in the face of vast conglomerates with global economies of scale and financial resources.

Public/private media partnerships for the benefit of society

In recognition of this need to sustain European media, private and public media organisations are now finding ways of cooperating together in many European countries. This enables them to pool their expertise and resources to offer combined services that allow them to compete on a level playing field with their global counterparts. Forging partnerships with other companies and organisations in the cultural and media space is at the heart of what many PSMs are being

⁵⁵ Council of Europe Recommendation (2007)2 of the Committee of Ministers on media pluralism and diversity of media content, paragraph 3.1.

⁵⁶ Recommendation 2007(3), paragraph 28.

⁵⁷ BBC Study showing relative decline of US newspaper advertising market.

⁵⁸ Recently included in RTBF commitments to EU Commission.

asked to achieve; competition and State aid law should take into account this requirement which is integral to the PSM mission. Specifically, competition law and other regulatory measures must be applied taking into account global competition, rather than the competitive dynamics in narrower local markets that can lead to exaggerated market shares and the prohibition of public/private partnerships that could actually be of significant benefit to the European consumer.⁵⁹

Flemish PSM, VRT, joined forces with commercial broadcasters Mediaaan and De Vijver Media to create Stievie, an OTT service that allows viewers to watch the content from each of the broadcasters over the internet.⁶⁰

In the UK, the BBC, Global Radio, Guardian Media Group, Absolute Radio and RadioCentre created Radioplayer to make radio content available on the same internet player (now including over 400 channels).⁶¹

Mediapolis is a Finnish centre and network for content production and digital industries, incorporating over 30 companies and organisations. The single largest group consists of production companies, while the largest individual organisations include the Finnish Broadcasting Company (Yle), as well as two educational institutions providing media programmes.⁶²

Portability of media services

More recently, PSM universality has become not just a national question but also an EU one. The European Commission has launched a number of initiatives to promote the portability of audiovisual media services within the EU. The focus of these EU initiatives is primarily on pay services for the reason that there is a direct contract with the consumer in a subscription service. The legal principle does not fit so easily to PSM services because they are funded nationally on the basis of a public obligation (e.g., a licence fee), with the objective of fulfilling a national remit defined at the discretion of the Member State under the Amsterdam Protocol. Nevertheless, it is right for EU legislation to enable PSM free services to opt-in to providing (temporary) portability of the national service in order to appeal, in particular, to a more mobile younger generation of viewers, where this is technically feasible and cost effective.

⁵⁹ E.g., the joint VoD platform Project Kangaroo between the BBC, Channel 4 and ITV was blocked by the UK Office of Fair Trading on competition law grounds; the proposed joint VoD platform, Project Gold, between ARD, ZDF and a number of independent producers and distributors was blocked by the German competition authority.

⁶⁰ <http://www.vrt.be/nieuws/2013/02/stievie-tv-kijken-app>.

⁶¹ <http://www.radioplayer.co.uk/>.

⁶² <http://mediapolis.fi/en/>.



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Richard Burnley joined the EBU in 2010 and was appointed Legal Director in 2016.

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ABOUT THE EUROPEAN BROADCASTING UNION

The EBU is the world's foremost alliance of public service media organisations, with Members in 56 countries in Europe and beyond.

The EBU's mission is to defend the interests of public service media and to promote their indispensable contribution to modern society. It is the point of reference for industry knowledge and expertise.

The EBU operates Eurovision and Euroradio.

ABOUT THE EBU LEGAL DEPARTMENT

In a fast-changing technological, political and regulatory environment, we advise our Members on specific legal issues, offering practical solutions in the fields of EU and national competition, copyright and media law that are specific to their needs. We analyse proposals, explore the implications with legislators and promote a legal framework which allows our Members to operate with optimum efficiency whilst continuing to contribute to the democratic, social and cultural needs of society. We also manage EBU membership and statutory matters and advise on all EBU contracts, including the Eurovision Song Contest, sports, news and networks.

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