

The ERT case, or when a screen gone blank reveals the plight of public service in Europe: a documentary breviary to fuel the debate.

Working Paper

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1. 1. The ERT case in hindsight

Barely more than three weeks after the Greek Prime Minister ordered the closing down of Greek public broadcaster ERT on June 12, 2013, one of the first lessons to be learned from the case is that the media definitely have a short attention span. Today almost nothing remains of a dramatically exemplary episode. Despite the order given on 18 June by the Greek State Council (see decision below) to return the channel to air in one form or another, the "official" screen remains hopelessly blank.²

Over the past three weeks, we have attempted to collect and make available legal documentary evidence in support of the very existence of public service broadcasting and its continued functioning.³

The fact is that since 2010 in Greece, no one really wants to be in government. Most Greek policy makers, although they call themselves democrats (a beautiful word originating in Greece in the fifth century BC), share responsibility for the current situation.⁴ It would seem that some no longer even dare to show their faces in public, metaphorically speaking. Furthermore, the current crisis within the coalition government is not likely to make things easier.

The failed negotiations with Russian energy giant Gazprom (privatised but still very close to the Kremlin) on the privatisation of Greek public gas distribution networks would also explain, according to some,⁵ that a "gesture" was expected by the "Troika" (European

¹ With the invaluable help of Georgy MANALIS for French translation, former member of the Bars of Brussels and Athens.

² In spite of being held by some to be no more than a bunch of slackers and free-loaders, it appears that part of the ERT staff, with the technical support of the EBU (European Broadcasting Union), is attempting against all odds to keep the flame alive. In fact, since July 4, 2013, the official website is shut down (euphemistically, "under construction"). <http://www.ert.gr> However, some of the broadcaster's news programs are being streamed on www.ert-live.gr

³ Hereafter, "public service broadcasting" is to be understood as "organic" public service, that is, public service provided by a public entity. (It is indeed conceivable that private operators in the audiovisual sector may be subject to "public service obligations", or that a public service be provided by a private operator with a particular legal status (e.g. a public service concession). Such an operator could then be described as a "functional" public service entity).

⁴ The scam artists and public-money speculators at Goldman Sachs are not forgotten, nor are the other Member States and institutions of the European Union who stood by and took no action at the time. However, that is not what is at issue here, for the time being.

⁵ That, in substance is what Vangelis Demiris, former correspondent of ERT in Brussels, has declared in an interview with *La Libre Belgique* on 13 June 2013 and in the *International Herald Tribune* on the same day, ("Greece reels after closure of broadcaster").

Commission, European Central Bank and International Monetary Fund) in charge of structural fiscal reforms. In this context, Greece only retains the hypothetical sovereignty to choose which taxes to increase⁶ or, preferably, to make drastic cuts in public spending.⁷

On the face of it, one could even exempt the Troika from any criticism, since it was the European Commission that recommended reducing the size of ERT ("downsizing") while calling for the immediate privatisation of many other public organisations and enterprises.⁸

Whether or no the other parties (one on the left which had just withdrawn from the coalition, the other being the Pazok, the Socialist Party) were informed of the government's intentions does not detract from the main justification given by conservative Prime Minister Mr Samaras,⁹ about to make a decision that would cause 2,700 to lose their jobs. *"No one asked us to close down ERT. We chose to do it because it would have been a greater injustice to do nothing about those who enjoy privileges."* Mr. Samaras takes full responsibility for his actions.

ERT, with its poor audience ratings, was clearly not a model of good management. It could also be viewed as a caricature of a public entity, overrun by political minions, devoid of any strategic vision and even harbouring corruption¹⁰ to state only its most obvious faults. In spite of all, ERT was the only broadcaster serving the remoter parts of the country and maintaining links with the Greek diaspora around the world.¹¹

That being said, poor performance, extreme politicisation, lack of independence, in a word, all those malfunctions which unfortunately may beset a public entity from outside or from within, do not exonerate the entity itself, its staff, or the organising authority from their obligation to operate properly. Indeed, those in charge today also share responsibility for the "solutions" chosen to meet the demands of an insanely constraining fiscal consolidation

⁶ Granted, there would be much to say about the obvious inefficiencies of Greek tax policy and public service.

⁷ One should also keep in mind the well-known differences among the members of the Troika on just how much austerity can be borne at any given time.

⁸ http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp87_en.pdf: "The Economic Adjustment Program for Greece. Fifth review - October 2011", *European Economy - Occasional Paper* n°87, 2011, p. 47. Under the heading *"Fighting waste in public enterprises and other public entities"* the EC calls for the following: "Legislation to close, merge and downsize non-viable entities will be tabled by the government [July 2011] and adopted by Parliament. [mid-August 2011] Among other, the legislation will relate to large entities which will be closed with functions transferred accordingly, merged or substantially downsized: KED , ETA , ODDY, National Youth Institute, EOMEX , IGME, (closure), OSK , DEPANOM , THEMIS , ETHYAGE, DIMITRA (merger), ERT (downsizing)". In a heated debate with his colleague Daniel Schneidermann, media critic, Jean Quatremer, Brussels correspondent for *Libération*, made much of what could be viewed either as a moot point or a clinching argument : <http://bruxelles.blogs.liberation.fr/coulisses/2013/06/mon-week-end-avec-daniel-jaccuse-sans-preuve-schneidermann.html>.

⁹ "Samaras: "La fermeture de la ERT ouvre la voie à la réduction du secteur public" ("The closing of ERT paves the way for the shrinking of the public sector"), *Agence France Presse* and *La Libre Belgique* 16.06.2013.

¹⁰ Given the general indignation, one should also read various stakeholders' declarations as recorded by Jean Quatremer on his blog. Mr Quatremer never runs out of arguments in defence of the European Union which he believes always follows the right course but is hampered by wrong-headed Member States: <http://bruxelles.blogs.liberation.fr/coulisses/2013/06/gr%C3%A8ce-lert-%C3%A9tait-l'organisme-le-plus-corrompu-et-le-plus-dysfonctionnel-de-la-gr%C3%A8ce-.html>. In his blog, Mr Quatremer expresses his strong agreement with the metaphor used by the ineffable Claude Allègre, Minister of Education under the Jospin government in France: *"In reality, the only thing Europe demands is a drastic cutting down to size of its mammoth public administration."*

¹¹ To quote Angelica Kourounis, news correspondent in Athens, Greece: "No less than a *coup d'état*", *La Libre Belgique* 13/06/2013.

program. There is a growing trend, even among orthodox economists, towards denouncing the counter-productive nature of austerity policies).

In order to establish that a very complex legal framework prevails even in times of crisis, we should note in passing that Greece has just been targeted for various violations of rights guaranteed by the European Social Charter in several decisions taken in May and December 2012 by the European Committee of Social Rights. The motive? Social rights should not be rolled back, no matter how serious the current crisis. On the contrary, social rights are more necessary than ever in times such as these.¹²

The press release by the Vatican news agency (!), entitled "*Télévision publique grecque: le rôle ambigu de l'Union Européenne*" ("Greek Public Television: the ambiguous role of the European Union"), constitutes without a doubt one of the best summaries of these memorable events:¹³

With this case, the EU must face its contradictions, both as member of the troika calling for ever more austerity and cuts in public service, and as defender of civil liberties. Freedom of the press and freedom to inform and be informed in Greece are being curtailed by the closure of the main provider of news to the public. Pluralism, though crucial for European democracy, is also affected. The silencing of ERT also has negative consequences for Greek cultural life, already severely weakened by the economic crisis. The Greek Orthodox Church, through the Archbishop of Athens, is also opposed to the closure of ERT, which retransmits the Sunday mass.

It all comes down to what has become the essential dilemma of contemporary public management, the conflict of "fundamental rights and public services versus budgetary law."

To convey faithfully the thinking behind the Commission's position, here is the full text of its press release on the closure of ERT:¹⁴

The European Commission has taken note of the decision by the Greek authorities to close down the Hellenic Broadcasting Corporation (ERT), a decision taken in full autonomy.

The Commission has not sought the closure of ERT, but nor does the Commission question the Greek Government's mandate to manage the public sector. The decision of the Greek authorities should be seen in the context of the major and necessary efforts that the authorities are taking to modernise the Greek economy. Those include improving its efficiency and effectiveness of the public sector.

The Commission understands the difficult situation of ERT staff and expects the announced dismissals to be carried out in full accordance with the applicable legal framework.

The Commission supports the role of public broadcasting as an integral part of European democracy. The Treaty makes it clear that the governance and strategic choices on public service broadcasting lie with Member States. So while the Commission cannot prescribe Member States how to organise their public service broadcaster, we would like to highlight the role of public service broadcasters regarding European values in all economic circumstances, for the sake of media pluralism, media freedom and media quality and for the expression of cultural diversity. So we welcome the commitment of the Greek government to launch a media actor that fulfils the important role of public broadcasting and is financially sustainable.

¹² Carole Nivard, « [Second condemnation of Greek austerity measures by the European Committee of Social Rights \(in French\)](#) » [PDF] in *Lettre « Actualités Droits-Libertés »*, CREDOF, 11 May 2013. See also, published in June 2013, the focus on "The European Union, a community of values : safeguarding fundamental rights in times of crisis" in the 2012 report from the European Agency for Fundamental Rights, http://fra.europa.eu/sites/default/files/annual-report-2012_fr.pdf.

¹³ <http://www.news.va/fr/news/television-publique-grecque-le-role-ambigu-de-luni>

¹⁴ http://europa.eu/rapid/press-release_MEMO-13-545_en.htm

Jean-Paul Philippot, administrator-general of the RTBF and also president of the European Broadcasting Union (the pan-European alliance of public broadcasters¹⁵), has rightly condemned the Commission's position. Mr Philippot points out that the EC is quick to exonerate itself but expresses no regrets for an unthinkable situation, namely the abrupt cut-off of all forms of programming (television, radio and the Internet) of the ERT group.¹⁶ The following passage from Mr. Philippot's interview which appeared in *La Libre Belgique* shows what can be considered as falling under the law (European and here Belgian) which regulates at this time the existence of public service broadcasting:

Although the EU does not oblige a Member State to provide public service broadcasting (nor does the Belgian Constitution), it nevertheless allows Member States to fund such a service through an exception to the general rule laid down in a Protocol to the Treaty of Amsterdam. *"The European Parliament has also reaffirmed this recently in a report stating that the European system is based on a hybrid system combining public and private actors. This is an integral part of the European project."*

What the Commission states is certainly true, at least formally. Indeed, the Member States themselves make the strategic choices and decide how their public broadcasting service is organised. We will come back to this in the third part. Emphasising that public service media are fully relevant even during times of crisis can be considered as an important announcement. The fact remains that the EU law, taken as a whole, has become a key factor limiting national rights considered by individual Member States as regulating "public service".¹⁷ This throws a different light on the Commission's assertion.

Meanwhile, at a union's request, the Greek Council of State, through its President, took the following decision (the emergency procedure may explain the rather elliptical motivation):

Προσωρινή Διαταγή της 17ης.6.2013 του Προέδρου του Συμβουλίου της Επικρατείας, επί της από 12.6.2013 αίτηση αναστολής της ΠΟΣΠΕΡΤ.

Temporary injunction 17.06.2013 by the President of the State Council following the request for suspension of 12.06.2013 by POSPERT

ΠΡΟΣΩΡΙΝΗ ΔΙΑΤΑΓΗ	PROVISIONAL INJUNCTION
Βάσει των διατάξεων του άρθρου 52 του Π.Δ/τος 18/1989 (Α 8), όπως αντικαταστάθηκε με τις διατάξεις του άρθρου 35 του ν. 2721/1999 (Α 112) και	Under the provisions of Article 52 of Presidential Decree 18/1989 (A 8), as replaced by Article 35 of Law 2721/1999 (A 112) and

¹⁵ However it should be noted that the press release of Mr Philippot was still not available on the EBU website at the time of writing. <http://www.ebu.ch/fr/>

¹⁶ <http://www.lalibre.be/actu/international/j-p-philippot-l-arret-de-ert-un-geste-inqualifiable-51bf669de4b0ac68e0f93bad>

¹⁷ We refer here, without room to go into detail, to the combination of European standards on State aid, public procurement and public service concessions, as well as budgetary discipline.

<p>Έχοντας υπόψη</p> <p>α) Την υπ' αριθ. ΟΙΚ.02/11.6.2013 απόφαση του Υπουργού στον Πρωθυπουργό και του Υπουργού Οικονομικών "Κατάργηση της δημόσιας επιχείρησης "Ελληνική Ραδιοφωνία - Τηλεόραση, Ανώνυμη Εταιρεία (ΕΡΤ - Α.Ε.)" (B 1414), με το άρθρο 1 παρ. 2 της οποίας, ορίζεται, πλην άλλων, ότι διακόπτεται η μετάδοση ραδιοτηλεοπτικών εκπομπών και η λειτουργία διαδικτυακών ιστοτόπων της ΕΡΤ Α.Ε., με αποτέλεσμα να μην επιτελείται η προβλεπόμενη από τις διατάξεις του άρθρου 2 παρ. 1 του ν. 1730/1987 (Α 145), όπως τροποποιήθηκε με το άρθρο 19 παρ. 1 του ν. 1866/1989 (Α 222) συμβολή δημόσιου ραδιοτηλεοπτικού φορέα στην ενημέρωση, στη μόρφωση και στην ψυχαγωγία του ελληνικού λαού και της ομογένειας.</p> <p>β) Την από 12.6.2013 αίτηση αναστολής της "Πανελληνίας Ομοσπονδίας Συλλόγων Προσωπικού Επιχειρήσεων Ραδιοφωνίας - Τηλεόρασης" (ΠΟΣΠΕΡΤ) και του Παναγιώτη Καλφαγιάννη, Προέδρου του Διοικητικού Συμβουλίου της ΠΟΣΠΕΡΤ.</p> <p>γ) Τις απόψεις των πληρεξουσίων των αιτούντων και των εκπροσώπων του Δημοσίου, τις οποίες εξέθεσαν προφορικάς.</p> <p>Δ ι α τ ά σ σ ο υ μ ε</p> <p>1. Την αναστολή της εκτέλεσης της προσβαλλόμενης υπ' αριθ. ΟΙΚ.02/11.6.2013 Κοινής Υπουργικής Απόφασης αποκλειστικά ως προς το μέρος της, με το οποίο προβλέπεται α) ότι διακόπτεται η μετάδοση ραδιοτηλεοπτικών εκπομπών και η λειτουργία διαδικτυακών ιστοτόπων της ΕΡΤ Α.Ε., και β) ότι οι συχνότητες της ΕΡΤ Α.Ε. παραμένουν ανενεργές (άρθρο 2 παρ. 2 περ. β της παραπάνω Κ.Υ.Α.).</p> <p>2. Τη λήψη από τους συναρμόδιους Υπουργό Οικονομικών και Υφυπουργό στον Πρωθυπουργό των αναγκαίων οργανωτικών μέτρων για τη συνέχιση της μετάδοσης</p>	<p>Considering</p> <p>a) Ruling No ΟΙΚ.02/11.6.2013 of the Deputy Minister to the Prime Minister and the Minister of Finance "Abolition of the public company 'Greek Radio and Television - ERT Ltd '" (B 1414), and specifically, Article 1 § 2, which states, <i>inter alia</i>, that ERT radio and television broadcasting operations as well as ERT websites will close down. In consequence, the mission stated under the Article 2 § 1 of Law 1730/1987 (A 145), as amended by art. 19 § 1 of Law 1866/1989 (A 222), will no longer be fulfilled, i.e. the contribution of a public broadcaster to the information, education and entertainment of the Greek people and diaspora.</p> <p>b) The application for suspension of 12.06.2013 made by the "Panhellenic Federation of Radio and Television personnel" (POSPERT) and by Panagiotis Kalfagiannis, Chairman of the Board of POSPERT.</p> <p>c) considerations raised by representatives of the State, made verbally.</p> <p>We call for</p> <p>1. The suspension of the execution of challenged Joint Ministerial Decision No. ΟΙΚ.02/11.6.2013 only in that it rules that a) the radio and television broadcasting operations of ERT Ltd shall cease and its websites will be closed down, and that b) the frequencies of ERT SA must remain inactive (Article 2 § 2 point B of the decision above).</p> <p>2. A decision by the Minister of Finance and Deputy Prime Minister to take organisational measures necessary to the continued broadcasting and</p>
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<p>ραδιοτηλεοπτικών εκπομπών και τη λειτουργία διαδικτυακών ιστοτόπων από δημόσιο ραδιοτηλεοπτικό φορέα για το χρονικό διάστημα έως τη σύσταση και λειτουργία νέου φορέα που θα υπηρετεί το δημόσιο συμφέρον, όπως προβλέπεται από την παρ. 2 του άρθρου 1 της υπ' αριθ. ΟΙΚ.02/11.6.2013 Κοινής Υπουργικής Απόφασης.</p> <p>Αθήνα, 17 Ιουνίου 2013</p> <p>Ο Πρόεδρος του Συμβουλίου της Επικρατείας</p> <p>Κωνσταντίνος Μενουδάκος</p>	<p>operating of websites by the public service broadcaster during the period up to the establishment and launch of a new organisation in the public interest, as provided for in paragraph 2 of Article 1 of Joint Ministerial decision No ΟΙΚ.02/11.6.2013.</p> <p>Athens, June 17, 2013</p> <p>The President of the Council of State,</p> <p>Constantinos Menoudakos</p>
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The high administrative court has therefore enjoined the Greek government to suspend the decision to silence ERT and take all necessary steps to allow it to continue broadcasting, pending the adoption of a new legal framework for the organisation.

Since the essential elements of the debate are now well established - public service broadcasting, democracy, human rights, fiscal consolidation, efficient public management (Pierre Desproges would have said, "*One of these things is unlike the others*"), what can the ERT case tell us about what has become of public service generally (including public service broadcasting) within the borders of Greece and beyond?

2. The place of public broadcasting in human rights law

This is not the place to fully develop every international, European or national precedent determining the legal framework in which public service broadcasting should be carried out. There are nonetheless some guidelines which are useful to know.

If a State is under the obligation to guarantee media pluralism, it does not follow that an obligation exists to provide a public broadcasting service.

To put it bluntly, the European Court of Human Rights (hereinafter ECtHR),¹⁸ which ensures *inter alia* the compliance with Article 10 of the European Convention on Human Rights (hereinafter ECHR)¹⁹ guaranteeing freedom of expression and information, has clearly stated that this provision does not establish the obligation of States to provide public service broadcasting. Indeed, it is clear from an ECtHR ruling of 17 September 2009, No. 13936/02,

¹⁸Judgements and decisions of the ECtHR are available at <http://hudoc.echr.coe.int>.

¹⁹«10.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 10.2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary».

Manole et al. v. Moldova, challenging the monopolisation of broadcast media by the Moldovan government contrary to its obligation to uphold pluralism,²⁰ that:

100. The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the State's margin of appreciation. Thus, for example, while the Court, and previously the Commission, have recognised that a public service broadcasting system is capable of contributing to the quality and balance of programs (*Informationsverein Lentia and Others*, cited above, § 33; *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. [32240/96](#), 21 September 2000; *X. SA v. the Netherlands*, no. [21472/93](#), Commission decision of 11 January 1994, DR 76-A, p. 129), there is no obligation under Article 10 to put in place such a service, provided that some other means are used to the same end.

This most fundamental general principle establishing an obligation for a State to ensure pluralism in the audiovisual sector was also more recently upheld in a judgement by the Grand Chamber (in plenary session) of the ECtHR in *Centro Europa 7 SRL and Di Stefano v. Italy* (7 June 2012, No. 38433/09). The claimants alleged that the non-allocation of spectrum needed for broadcast television violated their freedom to impart information and ideas:

130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall program content, reflecting as far as possible the variety of opinions encountered in the society at which the programs are aimed.

131. Freedom of expression, as secured in Article 10 § 1, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress (see *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103). Freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Lingens*, cited above, §§ 41-42).

132. The audiovisual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages through sound and images, such media have a more immediate and powerful effect than print (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Pedersen and Baadsgaard v. Denmark [GC]*, no. [49017/99](#), § 79, ECHR 2004-XI). The function of television and radio as familiar sources of entertainment in the intimacy of the listener's or

²⁰ Where applicable, pluralism also involves the organisation of a system of government subsidies for print media: ECtHR, decision of 1 December 2005, *Vérités Santé Pratique SAEL c. France*, No. 74766/01. However, Art. 10 ECHR creates no obligation for States to resort to such measures. In cases where such aid is provided, the Court examines the conditions under which it can be accessed. Pluralism can also mean the banning of private monopolies on commercial advertising, as suggested by ECtHR judgement *VgT Verein Gegen Tierfabriken c. Switzerland*, No. 24699/94 of 28 June 2001, which states, i.a.: « 73. It is true that powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programs are often broadcast very widely».

viewer's home further reinforces their impact (see *Murphy v. Ireland*, no. [44179/98](#), § 74, ECHR 2003-IX).

133. A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. [24699/94](#), §§ 73 and 75, ECHR 2001-VI; see also *De Geillustreerde v. the Netherlands*, no. [5178/71](#), Commission decision of 6 July 1976, § 86, Decisions and Reports 8, p. 13). This is true also where the position of dominance is held by a State or public broadcaster. Thus, the Court has held that, because of its restrictive nature, a licensing regime which allows the public broadcaster a monopoly over the available frequencies cannot be justified unless it can be demonstrated that there is a pressing need for it (see *Informationsverein Lentia and Others*, cited above, § 39).

134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.

The *Centro Europa 7* case related to the very specific context of the Italian media landscape and its broadly duopolistic structure: a private group (mainly controlled by Silvio Berlusconi) on the one hand and RAI, the public broadcaster, on the other (also under control by Berlusconi when he was Prime Minister). In this case, pluralism actually went against the public channels.

Its rulings of the last twenty years show that the ECtHR believes a public media monopoly is only conceivable in cases of dire necessity. Under European human rights law, pluralism of information was initially thought, in an Austrian case, to actually lead to the opening up of the audiovisual market²¹:

38. The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, *mutatis mutandis*, the *Observer and Guardian v. the United Kingdom* judgement of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programs are often broadcast very widely.

39. Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

As a result of the technical progress made over the last decades, justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available; the Government accepted this. Secondly, for the purposes of the present case they have lost much of their *raison d'être* in view of the multiplication of foreign programs aimed at Austrian audiences and the decision of the Administrative Court to recognise the lawfulness of their retransmission by cable (see paragraph 21 above). Finally and above all, it cannot be argued that there are no equivalent less restrictive solutions; it is sufficient by way of example to cite the practice of certain countries which

²¹ We refer here to another ECtHR case, 24 November 1993, *Informationsverein Lentia et al. v. Austria*, No. 13914/88 e.a. In an eerie irony of history, one of the claimants in this case was the notorious Austrian far-right leader Jörg Haider.

either issue licences subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation.

40. The Government finally adduced an economic argument, namely that the Austrian market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of "private monopolies".

41. In the applicant's opinion, this is a pretext for a policy which, by eliminating all competition, seeks above all to guarantee to the Austrian Broadcasting Corporation advertising revenue, at the expense of the principle of free enterprise.

42. The Court is not persuaded by the Government's argument. Their assertions are contradicted by the experience of several European States, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.

It was also held that the Swiss public broadcaster SRG could not refuse without good reason to broadcast advertising upon request by an association, since the public broadcaster's programs are the only ones distributed and received throughout all of Switzerland.²²

General Comment No. 34 of the United Nations Human Rights Committee states the same thing about both private and public monopolies. Dating from 2011, it refers to Article 19 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) which guarantees in substance the freedoms of opinion and expression in a manner comparable to Article 10 ECHR.²³

40. The Committee reiterates its observation in general comment No. 10 that "because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression". The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.

41. Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisements are not employed to the effect of impeding freedom of expression. Furthermore, private media must not be put at a disadvantage compared to public media in such matters as access to means of dissemination/distribution and access to news.

In view of such a position, which for now is the joint position of the executing bodies of the ECHR and the ICCPR, it is difficult to find something there in which to ground the obligation to establish an organic public broadcasting service. Making the State the ultimate guarantor of pluralism and placing it at the heart of the very definition of freedom of expression²⁴ would

²² ECtHR, *supra*, 28 June 2001, *VgT Verein Gegen Tierfabriken c. Switzerland*.

²³ <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>. The General Comments of UN HRC, which have no equivalent under the ECHR, compile and update the guidelines on most of the rights and freedoms guaranteed by the ICCPR. These guidelines are based on reports published on a regular basis by the UN Human Rights Committee on the human rights situation in any given country. Furthermore, it publishes decisions taken in the cases of States parties to the Optional Protocol (allowing individuals under the jurisdiction of such States to submit individual "communications" to the UN HRC). The General Comments mechanism also allows for additional observations to be made on the scope of any given right.

²⁴ As an example, we refer to the abundant and consistent case law in the matter since 1976 and especially the ruling of 7 November 2006 in *Mamère v. France*, No.12697/03: « 19. (...) i. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or

not engage a State as such, but neither would it prevent such an establishment. In other words, the international law of human rights is neutral as to the existence of a public broadcasting service.

But when there is a public service broadcaster (which is the case in all States of the European Union), the ECHR does indeed apply to them.²⁵

However, according to prior rulings of the Court, in a case where the Turkish broadcasting regulator had inflicted a particularly heavy penalty (in the case in point, on an operator whose programming had displeased the powers-that-be):

73. Like the parties, the Court considers that sanctions calling for the complete cessation of broadcasts constitute an interference with the applicant's right to freedom of expression (...).²⁶

An interference however, is not a violation *per se*. A violation would be constituted if the following conventional requirements were not met: 1 / the existence of sufficiently accessible and foreseeable legislation, 2 / a legitimate and strictly stated purpose in the public interest and 3 / proportionality between the means employed and the aim pursued. This shows at least that Article 10 does apply to the case of the forced closure of ERT.

But make no mistake, the jurisprudence on the relations between budgetary constraints and fundamental human rights is not unambiguous. Certainly, with regard to the right to a fair trial, States must take the necessary steps, including budgetary measures, to ensure compliance.²⁷ With regard to other rights, such as the right to a pension in light of the respect due to property rights, the European Court has admitted that fiscal restrictions lead to reducing the amounts involved. This is due to the fact that States enjoy a wider margin of appreciation within the context of their socio-economic policies:²⁸

13. The Court recalls that while Article 1 of Protocol No. 1 guarantees the payment of benefits to people who have paid into an insurance fund, this can not be construed as giving the right to a pension of a specified amount (see in particular *Skorkiewicz v. Poland* (ruling), no 39860/98, 1 June 1999, *Jankovic v. Croatia* (ruling), no 43440/98, ECHR 2000-X, *Kuna v. Germany* (ruling), no 52449/99, ECHR-2001, *Blanco Callejas v. Spain* (ruling), no 64100/00, 18 June 2002, and *Maggio et al. v. Italy*, Nos. 46286/09, 52851/08, 53727/08, 54486 / 08 and 56001/08, § 55, 31 May 2011).

14. The Court also notes that States Parties to the Convention may exercise fairly broad discretion when it comes to regulating their social policy. As the adoption of legislation to create a balance between government income and expenditure normally involves regular reviewing of political, economic and social matters, the Court considers that national authorities are in principle better placed to determine the most appropriate means to achieve this end. Therefore, it respects their choices, unless these were

"ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions which, however, must be narrowly interpreted and the necessity for any exceptions must be convincingly established.»

²⁵ Thus, the Belgian French-speaking public channel RTBF also enjoys the right to freedom of expression, as induced from an important ruling that found against Belgium because of the vagueness of the law and precedent in the case of a prior legal ban on the broadcasting of a certain television report: ECtHR, judgement of 29 March 2011, *RTBF v. Belgium*, No. 50084/06.

²⁶ ECtHR, decision of 30 March 2006, *Ozgur Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim AS v. Turkey* (n°1), n° 64178/00 e.a.

²⁷ ECtHR, decision of 14 April 2009, *SC Ghepardul SRL v.. Romania*, n°29268/03, § 59 ; ruling of 15 January 2009, *Burdov v.. Russia* (n°2), n°33509/04, § 70.

²⁸ ECtHR, decision of 15 May 2012, *Abaluta et al v. Romania*, n°.

manifestly made without reasonable grounds (*Mihaieş and Senteş v. Romania* (ruling), nos. 44232/11 and 44605/11, Dec. 6, 2011).

15. In the case at hand, the Court notes that the reform of pension systems had been carried out for objective reasons, namely the economic context and the desire to correct inequalities among the various systems (paragraph 4 above).

16. In this regard, the Court finds that the alleged reduction to the pensions of applicants was a way to integrate these pensions into the general scheme under Act No. 263/2010. The Court believes that the grounds on which this law was adopted may not be considered unreasonable or disproportionate.

The case hinges therefore on the nature of the fundamental right in question. However, freedom of expression and freedom of the press doubtless occupy an essential and central place in law in general and within the European model of human rights.

The jurisprudential obstacle might be circumvented in part by the need to ensure editorial independence in the public broadcasting sector as well.

As the law does not seem to directly recognise the obligation of public service broadcasting, Article 10 ECHR may uphold such an obligation through other, mediated means. Indeed, Article 10 guarantees editorial independence in relation to the organising public entity, and even primarily in relation to it. This includes the right to challenge it by broadcasting verified news but also satirical programs. A decision on admissibility in a 2003 case involving the public broadcaster *Radio France* highlighted the fact that journalists, wherever they work, even on public channels, should be granted full independence:²⁹

19. At the 573rd meeting of the Ministers' Deputies on 11 September 1996, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting, whose recitals reiterate that "the independence of the media, including broadcasting, is essential for the functioning of a democratic society" and stress "the importance which [the Committee of Ministers] attaches to respect for media independence, especially by governments".

The Committee of Ministers recommends that the governments of Member States "include in their domestic law or in instruments governing public service broadcasting organisations provisions guaranteeing their independence" in accordance with a set of appended guidelines. The guidelines specify among other things that the legal framework governing public service broadcasters should clearly stipulate their editorial independence and institutional autonomy, especially in areas such as: the definition of program schedules; the development and production of programs; the editing and presentation of news and current affairs programs; the organisation of the activities of the service; recruitment, employment and staff management within the service; the purchase, hire, sale and use of goods and services; the management of financial resources; the preparation and implementation of the budget; the negotiation, preparation and signature of legal documents relating to the operation of the service; and the representation of the service in legal proceedings and vis-à-vis third parties. They provide in particular that "the programming activities of public service broadcasting organisations shall not be subject to any form of censorship" and that "no a priori control of the activities of public service broadcasting organisations shall be exercised by external persons or bodies except in exceptional cases provided for by law".

Another example is the case mentioned above, *Manole et al. v. Moldova* in which the Court, in its own words, "takes as its starting point the fundamental truth that there is no democracy without pluralism". On this occasion, it stated, moreover, that

²⁹ ECtHR decision, 23 September 2003, *Radio France et al. v. France*, No. 53984/00. In its judgement on the merits of the case issued on 30 March 2004, the Court held that Article 10 ECHR had not been violated in this case by the condemnation of public radio for defamation.

101. Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.

102. In this connection, the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe (see paragraphs 51-54 above) provide guidance as to the approach which should be taken to interpreting Article 10 in this field. The Court notes that in "Resolution No. 1 on The Future of Public Service Broadcasting" (1994), the participating States undertook "to guarantee the independence of public service broadcasters against political and economic interference". Furthermore, in the Appendix to Recommendation no. R(96)10 on "The Guarantee of the Independence of Public Service Broadcasting" (1996), the Committee of Ministers adopted a number of detailed guidelines aimed at ensuring the independence of public service broadcasters. These included the recommendation that "the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy", with reference in particular to a number of key areas of activity, including the editing and presentation of news and current affairs programs and the recruitment, employment and management of staff. The Guidelines also emphasised that the rules governing the status and appointment of the members of the boards of management and the supervisory bodies of public service broadcasters should be defined in a way which avoids any risk of political or other interference.

In its General Comment No. 34 above, the UN Human Rights Committee calls for the same thing, while emphasising a key point:

16. States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

The Strasbourg Court has adopted a similar position, making public funding a prerequisite for the editorial independence of public service broadcasting by referring, in its own decision in the *Radio France* case, to the recommendations issued in 1996 by the Council of Europe's Committee of Ministers:

19. (...) The "guidelines" further provide, among other things, that the rules governing the status of the boards of management and supervisory bodies of public service broadcasters should be defined in a manner which avoids placing the boards at risk of any political or other interference.

They also state that the rules governing the funding of public service broadcasters should be based on the principle that member States undertake to maintain and, where necessary, establish an appropriate, secure and transparent funding framework that guarantees public service broadcasters the means necessary to accomplish their missions. They specify that, where the funding is based either entirely or in part on a regular or exceptional contribution from the State budget or on a licence fee, the decision-making power of authorities external to the public service broadcaster in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence or institutional autonomy of the broadcaster.

However, international instruments for the protection of rights and freedoms are limited by the fact that they primarily establish so-called "subjective rights" (rights conferred on individuals as "subjects"). This has therefore clearly not yet led to the formulation of positive obligations of the State (according to contemporary jurisprudence, the State must not only refrain from interfering unduly in the enjoyment of rights and freedoms) to the point where the State would be under obligation to provide a public broadcasting service.

In any event, and from another angle, there are individuals - whether they work in public service or not makes no difference - who are in a position to invoke freedom of expression and information, to their own benefit. These individuals are obviously the journalists. A recent case also considered by the ECtHR provides some interesting points of comparison, although it cannot be fully transposed to the ERT case. In the case in point, the Romanian State had not complied with a court order requiring access to the premises of a radio station to be given again to journalists so that they could pursue their professional activities.³⁰ On the general principles applicable to the case, the Court clearly stated that the obligations of a State may not be limited to simply abstaining from negatively interfering with the exercise of freedom of information. States are also held to a positive obligation, namely to adopt such measures as are requisite for effective protection:

54. The Court reiterated the crucial importance of freedom of expression, which is one of the prerequisites for the proper functioning of democracy. The real and effective exercise of this freedom does not depend merely on the duty of the State to abstain from interference, but may require positive measures of protection, even as to relations between individuals. Thus, in the case of *Appleby et al. v. United Kingdom* (no. 44306/98, § 47, ECtHR 2003-VI), the Court considered the obligations of the United Kingdom in relation to the refusal by a private company owning a shopping centre to allow the applicants to set up a stand there to distribute leaflets. The purpose of the applicants was to call attention to the local officials' construction plans that would encroach on an existing playground and thus deprive their children of green spaces in which to play. The Court ruled that when denial of access to the property has the effect of preventing any effective exercise of freedom of expression, or when it can be considered that the very essence of such right is denied, the State may be under a positive obligation to protect the enjoyment of rights under the Convention by regulating the right to property.

55. The Court then recalls that, in determining whether there is a positive obligation, a fair balance between public interest and the interests of the individual must be taken into account. This concern underlies the Convention as a whole. The extent of this obligation will inevitably vary according to the diversity of situations in the Contracting States and to the choices to be made in terms of priorities and resources. Furthermore, such an obligation should not be construed as imposing a disproportionate burden on government (see, i.a., *Özgür Gündem v. Turkey*, no. 23144/93, § 43, ECtHR 2000-III). Finally, in determining the existence of a positive obligation within the scope of Article 10 of the Convention, the Court took into account the nature of the freedom of expression in question, its ability to contribute to public debate, the nature and scope of the restrictions on freedom of expression, the existence of alternatives within the exercise of this freedom and the respective weight of the countervailing rights of others or of the general public (*Appleby* cited above, §§ 42-43 and 47-49).

In the ERT case, the matter at hand is clearly not one of access to private property, but more likely, access to a property under public ownership.³¹ Nevertheless, in comparing both cases, journalists, even though they may from time to time express their views in print media, should not be denied access to the technical means which they need to carry out their trade. The Strasbourg Court is especially clear in its opinion, in view of the lack of alternatives open to journalists:

63. The Court then observed that this case is not about the inability to communicate information or ideas to third parties. It is about the means of exercising a profession recognised by the Court to play an essential role in a democratic society, namely that of "watchdog" (see recent case *Von Hannover v. Germany* (no. 2) [GC], nos 40660/08 and 60641/08, § 102, 7 February 2012). In conclusion, an essential element of freedom of expression, namely the means to exercise such freedom, was at stake here for the applicants. Moreover, it is clear that this was not just a call for the exercise of such a right. Indeed, the applicants did have access to technical means for broadcasting radio programs. The Court

³⁰ ECtHR judgement, 10 May 2012, *Frasila and Ciocirlan v. Romania*, No. 25329/03.

³¹ It is not clear whether, under Greek law, the public domain is mentioned. This, however, is a moot point in view of the principles developed in this case.

notes that it appears from the evidence attached to the case file that the applicants were able to publish a few articles in the national and local printed press during 2002 and 2003 (see paragraphs 33-34 above). However, the Court recognises that being able to write articles in newspapers does not replace the free choice of mode of expression by journalists. According to the Court's precedent, in addition to the substance of the ideas and information expressed, Article 10 of the Convention also protects the form of such expression (*Jersild v. Denmark*, 23 September 1994, § 31, Series A No. 298, *News Verlags GmbH & Co. KG v. Austria*, No. 31457/96, §§ 39-40, judgement of 11 January 2000, and *Vérités Santé Pratique SARL, supra*). Indeed, it is not for the Court, or for national courts, to replace the press in prescribing what technique of reporting journalists must adopt (*Jersild*, cited above, § 31). Account should also be taken of the potential impact of the channel through which opinions are expressed. This is of some importance when it comes to freedom of expression because it is widely acknowledged that audiovisual media often exercise a more immediate and powerful impact than print (Purcell and others cited above). Accordingly, the Court cannot accept the argument of the Government which stated that the applicants had other alternatives available to them for exercising their freedom of expression.

Finally, even if this relates mainly to the specific circumstances of the Romanian case, the particular role played by the State in ensuring pluralism in the face of pressure (both political and economic) has been put forward:

64. In addition, the Court observes that the State is the ultimate guarantor of pluralism, especially in relation to the audiovisual media which usually broadcast their programs very widely (*Informationsverein Lentia et al. v. Austria*, 24 November 1993, § 38, Series A No. 276). This role becomes even more crucial when the independence of the press suffers from external pressures on the part of politicians and those who hold economic power. Therefore, we must pay particular attention to the press freedom context in Romania at the time of the facts. According to reports by several national and international organisations, the situation of the press in Romania during the period 2002-2004 does not appear satisfactory (see paragraphs 39-43 above). These reports show in particular that the local press was directly or indirectly under the control of the region's political and economic leaders. The Court cannot ignore that in the case at hand, the applicant claims to have suffered political and economic pressures that led to the sale of part of its stake in a television company (see paragraphs 10-12 above). Under such conditions, any measures that the State would have been expected to take, given its role as guarantor of pluralism and independence of the press, are of true importance.

The country-specific context may be such as to shape the positive obligations incumbent on the State. However, by aggregating two newer elements of precedent and international practice, one can reasonably uphold that if a State has an established public service broadcasting system, then such a system would comprise at least one central element (i.e., a public news and information service) requiring a minimum of human, technical and financial means (to be made available by the competent authority) for the service to be validly provided. The first such obligation, formulated in particular by the UN Human Rights Committee, is that editorial independence in a public media requires public funding to a level that will guarantee it. The ECtHR seems to follow this reasoning when it refers to the resolutions of the Council of Europe's Committee of Ministers. This is also what we can infer from the recent Romanian court case in Strasbourg, namely that a broadcast journalist should have access to a minimum of technical means (which implies that at least a few technicians should be available as well³²).

Finally, on a more political level, the Declaration of the Council of Europe Committee of Ministers on the governance of public service media, adopted 15 February 2012,³³ took into

³² Cameraman, sound person, editor, translator, broadcast engineer or technician, etc. are functions that a single person cannot be expected to master, even in times when smartphone technology is turning everyone into a would-be journalist.

³³ <https://wcd.coe.int/ViewDoc.jsp?id=1908253&Site=CM>. To say things clearly, let us also recall that all EU Member States are members of the Council of Europe as well. Consequently, they are represented in both international organisations by their diplomatic representatives and their Ministers.

account the question of the absolute necessity of providing public service broadcasting at all times. This is evidenced by a selection of excerpts:

(...) 3. The primary mission of public service media is to support general interest objectives such as social progress, public awareness of democratic processes, intercultural understanding and societal integration, and to achieve this through a varied and high-quality mix of content. As an important public source of unbiased information and diverse political opinions, public service media must remain independent from political or economic interference and achieve high editorial standards of impartiality, objectivity and fairness.

4. Public service media should be subject to constant public scrutiny and be accountable and transparent when performing their functions as they have the obligation to serve the public in all its diversity, including minority communities that would not be served in a purely commercial market. Public service media must also take into account the gender equality perspective in terms of both content and staff.

5. Editorially independent public service media help counterbalance the risk of misuse of power in a situation of excessive concentration of media, services and platforms. (...)

6. For some public service media organisations, the transition from State broadcaster to public service media has yet to be completed. The challenge is both to secure independence from the State and also to earn the trust of the audience by using that independence to exercise genuine editorial autonomy. For all public service media, new skills and approaches will be needed to complement, or in some cases replace, long-established ways of functioning.

7. The Committee of Ministers has always provided unfaltering support for public service media, calling on Member States to secure the necessary legal, political and organisational conditions for their independence and to provide adequate means for their functioning. In keeping with this, it has adopted Recommendation [Rec\(96\)10](#) on the guarantee of the independence of public service broadcasting and Recommendation [CM/Rec\(2007\)3](#) on the remit of public service media in the information society, as well as the Declaration on protecting the role of the media in democracy in the context of media concentration (31 January 2007), and has expressed its support for Parliamentary Assembly Recommendation 1878 (2009) on "The funding of public service broadcasting" (reply of 26 April 2010).

Among its conclusions, the Committee of Ministers reiterates

Member States' commitment to firmly support the remit, funding, editorial and organisational independence of public service media operating on any relevant platform, and underlines the importance of this support which has not always been uniformly thorough and sufficiently timely;

All this may give the impression that we are beating around the bush. It would be illogical, however, based on the elements just provided, that the obligation to ensure pluralism in broadcast media, initially promulgated in order to counter an undue public monopoly, did not entail the obligation to provide a public broadcasting service, itself held to a robust and permanent obligation to ensure pluralism and objectivity of information. What should be avoided is a situation where pluralism turns completely against public service, to the point where the very existence of public media were threatened. The early decisions of the ECtHR might lead to believe that such was the case, were these decisions not envisaged in the context of the evolving reasoning of the Court.³⁴

In the case before us, it is to be recalled that many Greek private channels are in fact controlled by shipowners (which, like the Orthodox Church, enjoy significant tax privileges

³⁴ As shown in the case of *Radio France*, the Court now commonly refers to recommendations and resolutions of the Council of Europe's Committee of Ministers in its interpretation and application of the ECHR as a "living instrument".

enshrined in the Greek Constitution) or by businessmen on good terms with the powers-that-be³⁵... Since the early 80s, the dominant paradigm of economic policy - and of the accompanying legislation - is undoubtedly mistrust of the State and its various entities, held to be at the root of all evil. The beginnings of a reversal in this trend can be detected within the various bodies of the Council of Europe. Can the same be said of the European Union institutions?

3. Public service broadcasting partly protected against competition

The law of the European Union does not favour monopolies,³⁶ and certainly not public broadcasting monopolies. The Court of Justice of the EU (hereinafter ECJ)³⁷ has rightly underscored this in 1991 in connection with ERT.³⁸

In general competition law, public service broadcasting is also held to an obligation of pluralism.

The Court did not challenge the existence of a monopoly as such but pointed out that public undertakings are also in principle subject to competition rules. After expressing initial potential reserves in connection with the free movement of goods, it took a critical view of the monopoly on spectrum from the angle of freedom to provide services. The Court pointed out that ERT was not using all of the spectrum it had been allocated and, furthermore, that it was enjoying a monopoly both in broadcasting and in retransmission (to the detriment of foreign programs).

22. As the Commission has observed, the concentration of the monopolies to broadcast and retransmit in the hands of a single undertaking gives that undertaking the possibility both to broadcast its own programs and to restrict the retransmissions of programs from other Member States. That possibility, in the absence of any guarantee concerning the retransmission of programs from other Member States, may lead the undertaking to favour its own programs to the detriment of foreign programs. Under such a system equality of opportunity as between broadcasts of its own programs and the retransmission of programs from other Member States is therefore liable to be seriously compromised.

24. It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers. It follows from Article 56, which must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health.

³⁵ See article by Alain Salles, « *L'audiovisuel grec privé tout aussi lié que le public au pouvoir politique* » ("Like public broadcasters, Greek private channels are also linked to political power", *Le Monde* (online) 14/06/2013: http://www.lemonde.fr/europe/article/2013/06/14/l-audiovisuel-grec-prive-tout-aussi-lie-que-le-public-au-pouvoir-politique_3430210_3214.html)

³⁶ The fact that the Flemish Community has seen fit to grant an exclusive right to broadcast commercial advertising to a single private television company was condemned by the European Commission with the approval of the EU Court of First Instance: ECFI, 8 July 1999, *Flemish Television Company NV*, T-266/97.

³⁷ Community case law is accessible on <http://curia.europa.eu/juris/recherche.jsf?language=fr>.

³⁸ ECJ 18 June 1991, *ERT*, C-260/89, preliminary ruling pursuant to a question referred by a Greek court.

25. It is apparent from the observations submitted to the Court that the sole objective of the rules in question was to avoid disturbances due to the restricted number of channels available. Such an objective cannot however constitute justification for those rules for the purposes of Article 56 of the Treaty, where the undertaking in question uses only a limited number of the available channels.

Although the monopoly was not prohibited as such, its abuse was condemnable because ERT was in a position to favour its own programs without actually doing so, due to the applicable Greek legislation at the time (according to the so-called theory of automatic abuse of dominant position).

32. Although Article 86 of the Treaty does not prohibit monopolies as such, it nevertheless prohibits their abuse. For that purpose Article 86 lists a number of abusive practices by way of example.

33. In that regard it should be observed that, according to Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition so long as it is not shown that the application of those rules is incompatible with the performance of their particular task (see in particular, the judgement in *Sacchi*, cited above, paragraph 15).

35. As regards State measures, and more specifically the grant of exclusive rights, it should be pointed out that while Articles 85 and 86 are directed exclusively to undertakings, the Treaty none the less requires the Member States not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness (see the judgement in *Case C-13/77 INNO v ATAB* [1977] ECR 2115, paragraphs 31 and 32).

37 In that respect it should be observed that Article 90(1) of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programs.

Finally, the ECJ took the opportunity to establish that Article 10 ECHR was also intended to apply as a general principle of Community law.³⁹

43. In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions

³⁹ Regardless of the ongoing negotiations on the accession of the European Union itself to the ECHR, since the Lisbon Treaty entered into force in December 2009, both the EU and its Member States, when implementing Community law, are required to comply with the EU Charter of Fundamental Rights. Article 11 EUCFR on freedom of expression and information reads as follows: « 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected. ». Under the fiscal consolidation program imposed and supervised by the EU, Greece seems indeed bound by the provisions on freedom of expression and information, especially as guaranteed by Article 10 ECHR. This clause was the inspiration for a similar standard in the Charter, which it mirrors.

provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.

44. It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.

In short, to paraphrase the Court, Community law does not preclude the granting of a television monopoly if such a monopoly is in the public interest and of a non-economic nature. However, the organisational arrangements and the exercise of such a monopoly should not violate the provisions of the Treaty on the free movement of goods and services or the rules on competition.

Though it is not theoretically forbidden under the general rules of competition and freedom of movement within the internal market, public monopoly has become even more inconceivable following the adoption in 1989 of the "Television without Frontiers" directive (which did not apply to the facts of the ERT case)⁴⁰. This Directive established the principle that Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual programs broadcast by other Member States. Technological change obviously explains much, in this case.

The contours of the specificity of public service broadcasting in Community law

This Directive was replaced by 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 (known as the AVMS Directive, or "Audiovisual Media Services Directive").⁴¹ In this Directive, public service broadcasting is not treated differently, which means that it is held to the same rights and obligations as the private media, and vice versa.

Public service broadcasting only makes a discreet appearance in recital 13 (a non-normative clause) of the AVMS Directive as a marker of a certain European idea of the co-existence of public and private sectors:

The resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting [8], reaffirmed that the fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.

The concept of "public service" appears also in the seventh recital in the AVMS Directive, with a substantially different and broader political meaning relating to what is commonly called the "cultural exception". This last concept may signal differences between the EU

⁴⁰ 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.

⁴¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010L0013:EN:NOT>

Member States and others, in particular the USA, as to a possible complete opening up of the market for audiovisual services, from a global or transatlantic standpoint:

(7) In its resolutions of 1 December 2005 [4] and 4 April 2006 [5] on the Doha Round and on the WTO Ministerial Conferences, the European Parliament called for basic public services, such as audiovisual services, to be excluded from liberalisation under the General Agreement on Trade in Services (GATS) negotiations. In its resolution of 27 April 2006 [6], the European Parliament supported the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value". Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [7] approved the UNESCO Convention on behalf of the Community. The Convention entered into force on 18 March 2007. This Directive respects the principles of that Convention.

However, the EU treaties themselves contain a clause exclusively intended for public broadcasting and which it may therefore invoke. This clause came about in reaction in particular to the ERT ruling of 1991 (States having nevertheless adopted the 1989 European Council TVWF Directive), but more generally in reaction to the wave of rulings by the ECJ in the early 1990s, making it legitimate to doubt whether public service in general would still be treated specifically. Countries with a strong tradition of public service, such as France or Belgium (and even the UK with its famous BBC) have managed to have the following language inserted in the 1997 Protocol on public broadcasting in the Member States (introduced by the Amsterdam Treaty and attached with the same legal value to the current TEU and TFEU):

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

This is explicitly justified by the following:

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.

Public service broadcasting involves a specific remit that must comply with the democratic, social and cultural rights of a given society and guarantee pluralism, including cultural and linguistic diversity.

No confusion should be made, however, between public service broadcasting (organic, such as discussed herein) and the so-called "must carry" obligation for distributors to retransmit the programs of public service broadcasters. The Belgian Council of State examined the question as to whether this requirement could extend to programs of non-public service channels attached (as in Belgium) to a Community (to one of the two communities in the territory of the Brussels-Capital Region, where the Federal State is in charge of enforcing the "must

carry" obligation)⁴². Yet a "public service obligation" which can be executed by a Member State (but is not mandatory) for the broadcasting of programs of an organic public service should not be confused with a "must carry" obligation.

Once again, recalling what has been said above about the rulings of the European Court of Human Rights, all this does not imply that States are obliged to establish a public broadcasting service. They may do so, if only because Article 345 TFEU (which exists since 1957) continues to postulate in theory that

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

Arguably, a similar result is achieved by what one could read between the lines of Article 106 § 1 TFEU which all but legitimises the existence of public undertakings, by requiring that public undertakings and undertakings to which Member States grant exclusive and special rights are also in principle subject to competition law. However, where a State has established a public service broadcaster by giving it institutional form, like any organic public service carrying out a business activity or like any partially or totally public undertaking, it will normally be bound by the rules of competition and freedom of movement.⁴³

One would search in vain in section 36 of the EU Charter of Fundamental Rights, entitled "Access to services of general economic interest", for language that would constitute an obligation to establish a public service broadcasting system:

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Furthermore, the Protocol on Services of General Interest attached to the TEU and the TFEU since the Treaty of Lisbon (a pale and incomplete copy of what the concept of "public service" may cover in the laws of some States)⁴⁴ should not lead us to believe that States which have established a public service broadcaster would escape all control.⁴⁵

⁴² Following preliminary questions by EC No. 158928 of 17 May 2006, *SA United Pan-Europe Communications Belgium (UPC Belgium) et al.* (which considered in particular that TV5, a limited French company in which the French Community holds a "simple" share, cannot be considered as held to the "must-carry" obligation due to the absence of specifically organised obligations which would justify this), and following also the answers given by ECJ, 13 December 2007, *SA United Pan-Europe Communications Belgium (UPC Belgium) et al.*, C-250/06, the Belgian Council of State has finally determined that the compelling public interest purpose required in order to restrict the freedom to provide services was fulfilled (i.e., to maintain the pluralist nature of the television program offer in the bilingual Brussels-Capital region. The Court of Justice has recognised this). However, the Court rejected a portion of the contentious arrangement on the grounds that the procedure for selecting the programs that could benefit from the must-carry obligation was potentially discriminatory due to the broad discretionary powers conferred on the relevant Minister and the lack of prior information on the selection criteria (EC No. 185399, July 14, 2008, *SA United Pan-Europe Communications Belgium (UPC Belgium) succeeded by Telenet NV Belgium (and others)*, and also EC No. 185398, 14 July, 2008, *Société intercommunale pour la diffusion de la télévision (Brutélé)*).

⁴³ Unless the operator can invoke, according to the strict conditions laid down by Article 106 § 2 TFEU, the waiving of competition rules that would undermine the provision of what treaties call a "service of general economic interest" (about which nothing would lead us to assume that it is to be provided by a public entity, since Community law only addresses the specificity of the mission, not the organic status of the entity which performs it).

⁴⁴ Article 2 of said Protocol (« The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest. ») would not

However, the SGI protocol refers to another provision, Article 14 TFEU (also originating with the Amsterdam Treaty and partly rewritten in Lisbon), which does not make it mandatory to establish a public broadcasting service (or any other organic public service). Yet it reinforces the obligation to provide the necessary means to operate any public service:

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

In relation to the EC's position cited above on the closing of ERT, it is all too easy for the Commission to release itself from responsibility by considering the organising of public service broadcasting as falling under the laws of the Member States. Some hypocrisy is manifest here, since there is a general trend in European law towards the shrinking of organic public service (in broadcasting and elsewhere). Moreover, the Troika's roadmap calls for a drastic reduction of public expenditure, and the downsizing of ERT is a step in that direction.

For that matter, the "specificity" of the Protocol on public broadcasting is of very little help since it only recognises the possibility (and not the obligation) to provide, under certain conditions, public funding to public broadcasting organisations. Furthermore, such funding is monitored by the Commission under its Communication of 2 July 2009 on the application of rules on State aid to public service broadcasting.⁴⁶ However, this does not exempt from giving the Commission advance notification of the existence of aid schemes, which is a prerequisite for their validity ; as long as there is no notification, compensation cannot be paid (although it can be done on a multi-year basis, e.g. when a management contract covers several years). It is also true that such aid schemes can be declared compatible with the internal market by the Commission.⁴⁷ However, they cannot benefit from the more favourable treatment initiated in 2005 and remodelled in 2011 granted to "small" public services, such as services connecting remote territories, or certain social services.⁴⁸

apply, since broadcasting, even in the "general interest", is an "economic" activity (although it is also described as "cultural" in the preliminary recitals of the AVMS Directive).

⁴⁵ Despite the first indent of Article 1 of the SGI Protocol ("the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users"), one should not forget that the broad discretionary powers conferred on States are kept somewhat in check by the so-called "manifest error of assessment" control carried out by the Commission and the Community jurisdictions.

⁴⁶ Since 2003, four strict conditions must be fulfilled for public service compensation not to be considered as State aid. These however are difficult to meet ; therefore, compensation generally qualifies as State aid, which may nevertheless be justified under Article 106 § 2 TFEU. A case where the Court of First Instance of the European Union considered that the provision of a service of general economic interest by French public channels France 2 and France 3 justified such compensation: General Court, 11 March 2009, *Télévision française 1 SA (TF1)*, T354/05.

⁴⁷ Either under Article 107 § 3 d) TFEU (support to culture) or Article 106 § 2 (providing a service of general economic interest).

⁴⁸ Subject to conditions, the decision of the Commission of 20 December 2011 on the application of Article 106, paragraph 2 of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L7, 11.01.2012), does indeed exempt a clearly listed number of services from the prior notification

Government subsidies become legitimate and lawful when, assigned exclusively to public service missions, they do not violate the prohibition of cross-subsidisation. This principle prohibits the transfer of public money to any other business or competitive activities that the same organisation could carry out. On the other hand, a transfer in the other direction, from the competitive sector to public service to cover all or part of the costs thereof, is frequently encountered today in contemporary public management, precisely in order to diminish the need for public funding.⁴⁹

According to the ruling on the new funding model for the French public television group France Télévisions, unsuccessfully challenged by TF1, a government grant, on prior notification, will be validly declared compatible if it is proportionate to, or lower than the cost of delivering the public service mission and does not involve cross-subsidisation.⁵⁰

However, to challenge the decisions of the European Commission in relation to State aid in the public broadcasting sector, it is not enough to put forward, as unions would do, a "simple" social aspect of the case.⁵¹

On the issue of funding and on general operating conditions of "services of general economic interest" (a phrase which may refer, in competition law, to the public service mission of a public broadcasting organisation), one would stand to gain by activating the following

requirement of and establishes a presumption of compatibility. These are mainly social services and air and sea links with remote territories. Such a decision comes into play in cases where public service compensation qualifies as State aid, i.e. where conditions established by the general jurisprudence are not met for compensation to not be considered as such.

⁴⁹ See also Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

⁵⁰ ECJ 9 June 2011 *Télévision française 1 SA (TF1)*, C451/10 P, on appeal against the judgement of the General Court, 1 July 2010, *Métropole Télévision (M6) and Télévision française 1 (TF1) v. Commission*, Joined Cases T-568/08 and T-573/08. The case concerned the new funding system applied to France Télévisions following the gradual phasing out of commercial advertising in its programs (to the delight of the private channels, starting with TF1). See also, on full financing by State endowment: General Court 10 July 2012, *Télévision Française 1 (TF1), Métropole Télévision (M6) and Canal +*, T520/09, which recalled: "117. Indeed, it appears from the Amsterdam protocol that Member States are free to choose the mode of public service broadcasting funding that they consider most appropriate, provided that this does not affect trading conditions and competition in the Union to an extent contrary to the common interest. 118. Hence they may in particular, subject to the reserve formulated in the preceding paragraph, opt for a mixed funding arrangement for public service broadcasting, combining public funds and revenues from commercial activities such as the sale of advertising space or of programs (see in this sense, General Court judgement of 1 July 2010, M6/Commission, T-568/08 and T-573/08, Rec. p. II-3397, item 105). The above-mentioned judgement of the Court also states that although the Commission, if it considers that compensation does not constitute State aid, must verify whether the public service has been adjudicated by public procurement, this in no way constitutes a validity requirement of the State aid itself when compensation is State aid: « 153. On the other hand, such a circumstance could have been invoked if the appeal had been brought against a decision finding that the contested grant did not constitute State aid, which was not the case here. Indeed, according to the fourth Altmark criterion, when in a specific case, the selection of the undertaking charged with carrying out public service obligations does not follow a public procurement procedure in order to select the candidate best able to provide those services at the lowest cost to the community, the level of compensation must be determined based on an analysis of the costs which a typical undertaking, well run and adequately equipped to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues as well as and a reasonable profit in return for discharging those obligations (see item 19 above). 154. In other words, the argument mentioned under item 149 above stems from a confusion between, on the one hand, the criteria used to determine whether a public service compensation constitutes State aid and, on the other hand, those used to verify whether it is compatible with the common market."

⁵¹ ECJ 23 May 2000, *Comité d'entreprise de la Société française de production e.a.*, C-106/98 P.

language of Article 14 TFEU, a provision that is only very rarely invoked in the rulings of the Court of Justice and the decisions of the Commission: "the Union and its Member States, each within their respective powers and within the scope of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions".

The decision of the Greek government, suspended by the Greek Council of State, does not refer in any way to the aforementioned provision, nor does the position of the Commission (item 1 above). Regardless of what Greek national law provides, it does not seem incongruous to argue that the primary aim of this provision is to hold a State responsible for the proper functioning of the SGEI it has chosen to establish.⁵²

If the primary responsibility lies with a national government, then one could not say that the Commission, which never hesitates to get involved in most aspects of the life of national public services, referred to Article 14 TFEU to pinpoint Greece's shortcomings in the matter at hand. The Commission's entreaty ("So while the Commission cannot prescribe Member States how to organise their public service broadcaster, we would like to highlight the role of public service broadcasters regarding European values in all economic circumstances, for the sake of media pluralism, media freedom and media quality and for the expression of cultural diversity"), recalling that public service is essential in times of crisis also, essentially introduces the final sentence of the statement ("So we welcome the commitment of the Greek government to launch a media actor that fulfils the important role of public broadcasting and is financially sustainable "). It is hardly a legally documented reminder of the obligation of Greece, as a Member State, to take all necessary measures to ensure that the public service continue to be provided, even while awaiting the organisational and financially sustainable reforms the Commission is calling for.

However, if we turn to the recent European Parliament resolution of 21 May 2013, entitled "The EU Charter: a set of standards for media freedom across the EU,"⁵³ we will find in it a number of premonitory passages (especially under item 12) on the financial safeguarding of public service broadcasting, in times of crisis as well:

1. Calls on the Member States and the European Union to respect, guarantee, protect and promote the fundamental right to freedom of expression and information, as well as media freedom and pluralism, and hence to refrain from exerting, and to develop or support mechanisms to impede, threats to media freedom such as trying to unduly and politically influence or pressure and impose partisan control and censorship on the media, limit or wrongfully restrict the freedom and independence of the mass media in the service of private or political interests, or threaten public service broadcasters financially;
8. Underlines the fundamental role of a genuinely balanced European dual system, in which private and public service media play their respective roles and which shall be preserved, as requested by Parliament, the Commission and the Council of Europe; notes that in a multimedia society in which there are now greater numbers of commercially-driven global market players, public service media are essential; 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; stresses that the private media have similar duties in relation to information, in particular that of an institutional and political nature, e.g. in such contexts as elections, referendums, etc.; underlines the

⁵² One may add that it is doubtful (but this matter should be clarified further by a Greek-speaking friend) that an act of Government may in effect abolish what a legislative act has created (in any case, under Belgian law it would not be so easy).

⁵³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0203+0+DOC+XML+V0//FR&language=EN>

need to guarantee the professional independence of national news agencies and avoid the creation of news monopolies; (...)

10. Recalls the specific and distinctive role of public service media, as stated in the Amsterdam Protocol on the system of public broadcasting in the Member States;

11. Recalls that Protocol 29 to the Treaties recognises 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; consequently foresees that Member States can fund public service broadcasting only insofar as this is provided for the fulfilment of the public service remit, and without affecting trading conditions and competition in the Union to an extent which would be contrary to the common interest;

12. Stresses the importance of appropriate, proportionate and stable funding for public service media in order to guarantee their political and economic independence so that they may fulfil their full remit - including their social, educational, cultural and democratic roles - and can adapt to digital change and contribute to an inclusive information and knowledge society in which representative, high-quality media are available to all; expresses its concern over the current trend in some Member States to apply budget cuts or scale down the activities of public service media, since this reduces their ability to fulfil their mission; urges Member States to reverse this trend and ensure that public service media receive stable, sustainable, adequate and predictable funding;

43. Emphasises that according to the European Court of Human Rights jurisprudence authorities have positive obligations under Article 10 ECHR to protect freedom of expression as one of the preconditions for a functioning democracy, since the 'genuine effective exercise of certain freedoms does not depend merely on the State's duty not to interfere, but may require positive measures of protection;

In addition to the new elements that may be detected above in the jurisprudence of the European Court of Human Rights, the resolute practice of the Council of Europe or the observations of the UN Human Rights Committee, EU law appears as a complement to the rights and obligations that Member States are free to choose to translate into their own national law (or in the laws adopted by their federated entities where they have jurisdiction in the field of broadcasting).

If public broadcasting is recognised as a hallmark of the European model and if such a model allows at least for the specificity of its public funding (even with checks and balances), and if Article 14 TFEU requires that both States and EU institutions operate existing public services under acceptable conditions, it would be rather unreasonable not to take this line of thought to its logical conclusion.

Indeed, media pluralism, both in that it stems from international and European human rights law and proceeds from competition law adapted to the audiovisual sector, should be considered as contrary to the unwarranted idea of a public monopoly (which at any rate would be technologically difficult to sustain). However, media pluralism should imply at least an obligation to provide a public broadcasting service in the news area.

ERT's blank screens go sharply against such a trend, in both fields of European law.

4. The situation of public service broadcasting in Belgium (a brief summary)

Would all of this be unthinkable in our own green pastures?

In theory yes, given that the three communities (French, Flemish and German speaking) each have a well established cultural public organisation under management contract with their

respective community government. Although the legal scope of the management contract remains difficult to ascertain, it lays down on a multi-annual basis the respective obligations of the "parties", including financial transfers to cover those public service missions described in detail in the contract.

Moreover, when a body is in charge of carrying out a public service mission, it must ensure the continuous and regular unfolding thereof (the so-called "continuity of public service," a general principle of law so essential that it does not even need to be stated in writing). However, this obligation is imposed equally on the competent authorities, whatever the failures of the providers which they legally controls (through guardianship, shareholder control, etc.).

Regarding the the Flemish Community, public service seems to appear between the lines of the decree of 27 March 2009 on radio and television, in a provision relating to the power of expropriation vested in the *VRT (Vlaamse Radio-en Televisieomroep)*, a public limited company (all its shares, owned by the Flemish Community are legally registered and non-transferable). Its Article 6 § 3 states the following:

For the fulfilment of its public service broadcasting remit, referred to in § 2, the Flemish Government may authorise VRT to expropriate buildings in the public interest.

In its Article 6 § 2, the Flemish decree defines the above-mentioned remit⁵⁴ justifying the existence of the power of expropriation vested in VRT as "public broadcasting operator":

§ 2. As a public broadcaster, VRT's remit is to reach as many media users as possible by offering a wide variety of quality programs of interest to media users and meeting their requirements.

VRT provides a quality offer in the areas of news, culture, education and entertainment. VRT's priority is to offer news and cultural programs geared towards its viewers and listeners. In addition to this, VRT offers sports, contemporary educational programs, self-produced drama, and entertainment. All VRT programs are characterised by the greatest possible quality, both in respect of content, form and use of language. In all its programming, VRT strives for the greatest possible quality, professionalism, creativity and originality, with attention to new talents and innovative concepts. Specific programs are appropriately targeted at various population and age groups, particularly among children and young people.

VRT's programs contribute towards the further development of the Flemish cultural identity and diversity and a democratic and tolerant society. VRT contributes through its programs towards an independent, objective, and pluralist public opinion in Flanders. To this effect, it seeks to maintain a leading role in the fields of information and culture.

In order to attract the greatest possible number of Flemish media users to VRT and to secure its credibility as public broadcaster, a substantial number of programs are aimed at a wide and general audience. Beside such generalist programs, other programs are broadcast to meet specific needs and interests of viewers and listeners. These target groups must be large enough and effectively be reached by such programs.

VRT keeps abreast of technological developments so that programs may also be offered by way of new media, if required and desirable.

The public remit of VRT also includes any activity that directly or indirectly contributes to the fulfilment of its corporate purpose.

On the French side, RTBF was established as the Belgian Radio and Television of the French Community, by a decree of 14 July 1997 which is somewhat more forthcoming on the concept of public service:⁵⁵

⁵⁴ In Dutch, mention is made of "taken van openbare dienst" under Article 6 § 3 of the Flemish decree.

Art. 2. The company provides public radio and television services to the French Community of Belgium.

Art. 3. This public service remit is primarily carried out through offering to the public, including all of French speaking Belgium, radio and television programs by terrestrial, cable, satellite or other comparable technical means, giving access to all general and specific programs offered by the organisation under its public service remit, under conditions respecting the principle of equality among users.

RTBF selects its program offerings according to a categorisation of programs aiming at ensuring diversity, including current affairs programs, international, European, federal, community, regional news and information programs, cultural development and continuing education programs, entertainment and youth programs. In its program offering, RTBF also showcases the works of writers, producers, distributors, composers and performers of the French Community.

RTBF in selecting its program offerings, ensures that the quality and diversity of programming brings together the widest possible audience, contributes to social cohesion while meeting the expectations of socio-cultural minorities and helps to reflect the various trends in society, without cultural, racial, sexual, ideological, philosophical or religious discrimination or social segregation. Its programming aims at provoking debate, clarifying the issues of a democratic society, contributing to the strengthening of social values, in particular by displaying human and civil rights based ethics and promoting the integration and inclusion of people of foreign origin living in the French Community.

RTBF makes significant creative efforts in promoting original productions and in showcasing the heritage of the French Community of Belgium as well as its regional specificities. Its program offer is organised primarily around its own productions.

RTBF also endeavours to promote exchanges and co-productions with other primarily public European and francophone radio and television broadcasters, and to create and maintain synergies with all stakeholders in the communications and cultural sectors of the French Community.

Generally speaking, RTBF strives to be a reference in terms of innovation and technical, professional, artistic and cultural quality. RTBF further provides regional and local news and information and promotes cultural and community activities.

To regulate the modalities of its public service remit, RTBF has signed with the French Community a management contract defining the rights and obligations of each party.

Art. 6. (...) § 3. The public service remit of the company in the area of news and information and, in particular, the editorial responsibility for news programs cannot be entrusted to a subsidiary or a third-party company. RTBF may allow companies in which it holds a share to broadcast news or reproduce its news programs.(...)

That said, in both cases, it appears that, in addition to the setting up of an organic public service (in which case the public nature of the organisation partly overlaps with its public service mission, since it can also perform fully competitive activities), obligations relating to public service may also be imposed on private operators (such as minimum access for the hearing impaired). Furthermore, it was seen earlier that broadcasters were also held to a so-called *must carry* public service obligation (not to be confused with organic public service).

Public service entails general constraints, otherwise known as the three laws of public service, namely continuity, mutability and equality. The competent legislator may also impose specific constraints on the audiovisual sector, foremost among which an obligation to provide a variety of programs to meet the diversity of audiences' requirements (another variant of pluralism often mentioned here) as well as the permanent and objective coverage of news.

The obligations attached to public service may also bring some benefits to its providers, according to a ruling of the Constitutional Court in a matter of preferential allocation of

⁵⁵ For more details on the public service remit of RTBF and its financing, see new management contract 2013-2017 with the Government of the French Community: http://csa.be/system/documents_files/1703/original/GVT_20121226_RTBF_contratgestion.pdf?1359040419.

terrestrial broadcasting channels. In its judgement No. 13/2000 delivered on 2 February 2000, the Court agreed that public service radio should have privileged access to the terrestrial broadcasting network because of its country-wide, objective news providing remit.⁵⁶

B.4.3. (...) According to Article 86, paragraph 2 [now Art. 106, § 2 TFEU], undertakings entrusted with the operation of services of general economic interest remain subject to competition rules, as long as it is not shown that such prohibitions are incompatible with the exercise of their specific mission (Court of Justice, 30 April 1974, *Sacchi* 155/73, Rec. ECJ 1974, p. 430, recitals 14 and 15; Court of Justice, 3 October 1985 *CBEM / CLT and IPB*, 311/94, Rec. ECJ, 1985, p. 3275, recital 17; Court of Justice, 23 April 1991, *Höfner and Elser*, C-41/90, Rec. ECJ 1991, I-2017, recital 24; Court of Justice, 18 June 1991, *ERT*, C-260/89, Rec. ECJ, 1991, I-2957-2961, recitals 10 and 33).

Nothing in the Treaty precludes Member States, for non-economic general interest reasons, from protecting radio and television broadcasts, including cable programming, against competition by conferring exclusive rights to one or more undertakings. More specifically, undertakings responsible for the management of services of general economic interest may be exempted from Treaty rules on competition, insofar as restrictions on competition - or even protection against all competition from other economic operators - are necessary to ensure the performance of the particular tasks assigned to them (Court of Justice, 19 May 1993, *Corbeau*, C-320/91, Rec. ECJ 1993, I-2533, recital 14; Court of Justice, 27 April 1994, *Almelo*, Rec. ECJ, 1994, C-393/92, I-1520, recital 46).

B.4.4. It must be admitted here that the choice of the legislative authority to entrust national terrestrial broadcasting to the public service only was dictated by general interest motives of a non-economic nature, and especially by concerns for the safeguarding of the mission of public service broadcasting, as set out in Articles 8, 23, 27, 27bis, 27ter and 27quater of the decrees on radio and television, coordinated on 25 January 1995, and as more explicitly defined in the management agreement referred to in Article 16 of these decrees. The legislator considered it necessary to exclude the public broadcaster from competition from national commercial radios broadcast over the air, so that VRT could properly perform its specific mission of general interest.

It does not appear that this approach is based on a manifest error of assessment. Reference should be made on this point to Article 16 (formerly Article 7D) of the Treaty, and more specifically to Protocol No. 32 of 2 October 1997 on the system of public broadcasting in the Member States.

In addition to what RTBF's management contract provides in terms of audiovisual content diversity (Belgian and European production quotas, distribution quotas, respect for the diversity of audiences, etc.), it also provides, in Article 90, that "without prejudice to the right to strike, RTBF and the Government agree to negotiate with representative trade union organisations the rules relating to minimum programming, and to determine the equipment to be kept permanently in working order." All things being equal, it is precisely a minimum news and information service of this order that the Greek Government has now jeopardised.

⁵⁶ It is worth noting that this is one of the few court decisions to refer positively to current Article 14 TFEU (formerly 14 and 7D).

5. The persistent weakness of public service

At first glance, it would seem that except for that which can be provided by the law of each State (or its relevant subdivisions), neither European human rights law or EU law impose on States the obligation to provide a public broadcasting service. On closer look, however, this observation should be nuanced by what can be described as the need to "give practical effect to pluralism."

The seriousness of the Greek situation had certainly been made apparent in a case relating to the inability to recover State aid unlawfully paid to farmers:⁵⁷

48. As to the risk of perturbation of public order if the payments at issue are recovered immediately from the Greek agricultural sector, it is common ground that a deterioration of confidence in the public authorities, generalised discontent and a feeling of injustice are features of the current social climate in Greece. In particular, as the Hellenic Republic has stated without being contradicted by the Commission, violent demonstrations against the draconian austerity measures adopted by the Greek public authorities are constantly increasing. At the hearing the Hellenic Republic also drew attention to the marked advance of certain parties on the extreme right and the extreme left in the most recent parliamentary elections in Greece.

49. In those circumstances the risk, invoked by the Hellenic Republic, that immediate recovery of the payments at issue in the agricultural sector may trigger demonstrations liable to degenerate into violence appears neither purely hypothetical nor theoretical or uncertain. The possibility cannot be ignored that the operation to recover the payments at issue will be publicly used, by certain circles, as an example of the injustice to which the agricultural community is subject and that, in the current situation laden with intense emotions, such public rhetoric will trigger some violent demonstration or other, whilst it is immaterial what category of the population could be at the origin of violence necessitating ever greater deployment of the police force. It is evident that the perturbation of public order that is brought about by such demonstrations and by the excesses to which, as recent dramatic events have shown, they may give rise would cause serious and irreparable harm, which the Hellenic Republic may legitimately invoke.

In this case, however, a clear difference with the ERT case, the clause of serious disturbance to the economy and its impact on public order had been successfully invoked by Greece to obtain a temporary stay of execution of the European Commission's decision ordering Greece to stop paying the aid in question.

The Greek authorities could be criticised in this matter (regardless of what degree of actual pressure was exerted by the Troika), because, although public service broadcasting may be organised differently from one country to another, one can nevertheless reasonably infer that PSBs possess an intangible core which extends beyond diversity of programming: that core is public service news, which comes with an obligation to ensure maximum territorial coverage. Of course, any public news service needs to be pluralistic itself. But there is also another form of pluralism, relating to the general structure of each (sub)national audiovisual landscape.

It is understandable that the European Court of Human Rights may be reluctant to establish an obligation of public service under Article 10 ECHR (indeed, it is not easy to overcome the "subjectivist" character of said article). However, recognising that there is an obligation to provide such a service, minimal after all, through a public body, would only confer on freedom of information an indispensable effectiveness directly derived from the laws on pluralism. This would be even more the case where the State concerned is an EU Member, since EU law entails a more resolute protection of public service broadcasting.

⁵⁷ ECFI September 19, 2012 c Hellenic Republic. Commission, T-52/12.

Yet even the interpretation proposed here calls to mind the weaknesses inherent in the European legal framework generally applicable to public service. The obligation of a public broadcasting news service is actually a potential specificity in this sector, a so-called privileged status which all public services in a multitude of other areas are far from enjoying. Despite the minimum standards which have just been recalled, it is clear that

- public service (in general) is certainly recognised by Community law and that some of its manifestations even enjoy a special status, particularly in terms of public funding. However, it has not been made mandatory for all that, and the European Commission has hypocritically recalled this ;
- public service is certainly not incompatible with the European Convention on Human Rights, but the jurisprudence, though it seems to prohibit the return to a public monopoly situation, still does not (yet) make it a positive State obligation as such ;
- public service is therefore *a priori* better protected by national law where it refers to the two components of European law.
- However, with respect to certain fundamental rights, public service remains dependent on budgetary constraints.

What the ERT case reveals, beyond the dramatic signal sent to the Greek population, is the indisputable weakness of the European model of public service. Despite what Article 14 TFEU or the Protocol on services of general interest may indicate on the one hand, and the Broadcasting Protocol on the other hand, some of the positions taken by the institutions of the European Union and the Council of Europe on the desirability of such a model amount in the end to legal posturing or "soft law". In other words, they are non-binding.

Moreover, if the national law in question is too poorly armed, only private media will remain. Some of these may provide quality, no doubt, and some may even feel bound to deliver relative diversity, but essentially all are motivated by profit and cost-efficiency. Profitability, though certainly not to be overlooked by organic public service broadcasting, cannot become a purpose in and of itself. Although ERT is likely to be reformed, it is now paying a price for the very guilty conscience of the successive Greek governments who let it become what it is.

Meanwhile, one can only speculate on whether it is France or only French artists that the President of the European Commission was blaming for their "reactionary" defence of the "cultural exception"⁵⁸ during the final phase of negotiations on the new free trade agreement between the European Union and the United States.⁵⁹ As it stands, the Court of Justice of the EU has recognised the validity of quotas for the broadcasting of national and European works.⁶⁰ Depending on one's point of view, one could also fear that this "victory" (attributed to

⁵⁸ http://www.liberation.fr/monde/2013/06/17/hollande-incredule-face-aux-propos-de-barroso-sur-une-france-reactionnaire_911503

⁵⁹ Best known by its English acronyms, the Transatlantic Free Trade Area (TAFTA) or Transatlantic Trade and Investment Partnership (TTIP) is already a sign of things to come.

⁶⁰ According to ECJ 5 March 2009, *Unión de Televisiones Comerciales Asociadas (UTECA)*, C-222/07, the former 1989 TVWF Directive did not prohibit a Member State from requiring television operators to allocate 5% of their operating revenue to the pre-funding of European cinematographic and television films and, more specifically, 60% of that 5% to works whose original language is one of the official languages of that Member State. Nor does such a measure constitute State aid.

France, although France was not alone in defending this position) will have to be paid for dearly in other areas, including public services in general.

Nevertheless, one should reflect on the following highly instructive passage taken from Belgium's defence in an old case decided in 1939 by the former Permanent Court of International Justice, in which Belgium took up the cause of a Belgian company challenging recalcitrant Greece to pay what it owed under a railway construction contract.⁶¹

In a scholarly study on the issue of *force majeure* in relation to the obligations of States, Mr. Youpis (Greek council) explained yesterday that a State is not required to pay its debts if, by paying, it would compromise its essential public services. The Belgian government would most likely agree with the principle thus stated. But regarding the application of this principle and before any consideration of the payment capacity of the State concerned, one must determine whether the failure to pay is dictated solely by factual considerations related to the inability to pay, or whether there are other reasons in support of such failure, connected to an alleged right or the challenging of a right.

The ERT case expresses exactly the opposite: a public service (even essential) does not carry much weight against the discharge of debt. If this is to be the outcome of the ongoing European construction, then the time has come to begin again from scratch, right down to the fundamentals. There can be no rights or freedoms without financial means, and for the most part, without public services to ensure their respect and their practical and effective enjoyment, even in times of crisis.

⁶¹ PCIJ *Société commerciale de Belgique*, judgement of 15 June 1939, A/B, No. 78, p.177. This passage of the defendant's argument is one of the founding elements of the recognition of a certain state of necessity in international law. For more information, D. YERNAULT, *L'Etat et la propriété. Le droit public économique par son histoire (1830-2012)*, Bruxelles, Bruylant, 2013, pp. 1174-1179.