CHANGING CHANNELS: THE REDEFINITION OF PUBLIC SERVICE 
BROADCASTING FOR THE DIGITAL AGE


Workshop 24: "Regulating Communications in the Multimedia Age"

Jeanette Steemers
Department of Media Arts
Faculty of Humanities
University of Luton
75 Castle Street
Luton LU1 3AJ

Introduction

The link between the apparent 'commercialisation' of public service broadcasting and its future role in a digital communications environment is obvious. The transition towards digital technology and the implementation of new services is costly, and public service broadcasters everywhere need to consider how they will fund that transition beyond traditional, but stagnating sources of public funding at a time of rising costs for talent and rights. Yet their attempts to tap into or increase commercial sources of funding (from advertising, sponsorship, subscription and the marketing of goods and services) were bound to bring them into conflict with commercial rivals who fear cross-subsidy from public funds and unfair competition, and who would prefer to see a more restricted form of public service provision. This has resulted in complaints to the European Commission by commercial operators disputing the compatibility of several mixed funding systems with the Treaty of the European Union.1 Public service broadcasting's attraction to commercial funding is also significant in another sense, as it is often argued that the method of funding is crucial in determining the nature of a broadcasting institution, with fears that commercial funding has a tendency to undermine public service values.2

Concentrating on public service broadcasting as it is practised and understood in Western Europe, this paper examines how the redefinition of public service broadcasting is becoming increasingly dependent on the reconciliation of two conflicting policy approaches. On

1 At the moment the following cases are pending; MEDIASET versus RAI; TF1 versus France 2 and 3; Tele 5 versus RTVE and the regional TV channels; BSkyB versus BBC News 24. In February, DGIV approved the state funding of the German public service niche channels, Kinderkanal and Phoenix. The case against was originally filed by VPRT, the organisation representing the interests of German private television.

the one hand it is still regarded by national political elites as a cultural entity, crucially connected to democratic and cultural objectives involving plurality, diversity and impartiality in the mass media. In this instance the future of public service broadcasting is just one of several issues raised by new technologies, but its resolution is held to be more than simply a question of deregulation and liberalisation.3 On the other, it needs to function in a media market governed predominantly by free market principles, where goods and services are offered in a converging, and increasingly global media and communications environment, characterised by rapid technological change. In terms of policy this reflects a shift from legislation based on the social functions of media (traditionally associated with public service broadcasting) towards regulation addressing technical and industry policy issues (traditionally associated with telecommunications).4

With the advance of digitalisation and communications convergence, broadcasting continues to become less of a universally available mass medium with more emphasis on transaction-based payment (subscription, pay-per-view), thematic programming, and alternative methods of delivery including the Internet. The problem for public service broadcasters is deciding where they belong. How far should they compartmentalise their output/products to appeal to different 'customers' in contrast to their traditional generalist channels which have always offered universally those things that a commercial market could ostensibly never provide? And how far should they go in securing commercial revenues to subsidise existing and new digital services without undermining their public service nature? Is it possible for public service broadcasting to have a foot in both camps and still remain 'untainted'? Or is the problem in fact one of 'saving' commercial television from 'unfair' competition by public service broadcasters? At the moment this isn't a debate about the very existence of public service broadcasting - even private broadcasters admit that it has its value.5 For public service

3See for example the UK Government's recent Green Paper from the Department of Culture Media and Sport and the Department of Trade and Industry, Regulating communications: approaching convergence in the Information Age, CM4022, July 1998, p.4.
5See ITV, The BBC’s Public Service Obligations and Commercial Activities (London: ITV, 1998), p.1. Here ITV acknowledges the BBC as 'the cornerstone' of broadcasting based on its ability to appeal to both the mainstream and those interests which would not be provided by the market. The VPRT's stance on public service broadcasting is less positive, but it does not dispute PSB's integrative role. See VPRT, Diskussionspapier des VPRT-Vorstandes zum Rahmenkonzept einer Medienordnung 2000 plus, 26 November 1997, III.2.2,
broadcasting is still widely recognised as a counterweight to the possible excesses and failings of commercial television, particularly in a situation where audiovisual media are becoming dominated by a few companies with considerable power over distribution, access and programming rights. But the central question here remains where does public service broadcasting go from here, how should it develop to fulfil its public purpose, and how is this development to be funded if it is not to stagnate and die.

Here I shall be looking at what has been happening to public service broadcasting in Germany and the UK, as their different responses clearly illustrate the importance of the political and legal framework in determining developments. First I shall look at how public service broadcasters have reacted to the digital challenge and the justification behind these reactions. Then I shall consider how these activities have been judged by commercial competitors and the extent to which they might be perceived as inimical to the public service ethos and a threat to fair trading. Finally I will take a brief look at the importance of the EU and national initiatives in determining the redefinition of public service broadcasting and the accommodation of its commercial activities, if at all. What is clearly apparent is that different pressures and circumstances in both countries are leading to different responses. In the UK the BBC looks to commercial activities, secondary markets and partnerships to enable it to fund and participate in digital distribution and services; in Germany PSB responses have tended to centre more, at least publicly, on the fulfilment of traditional public service tenets and constitutional obligations relating to the freedom of communication.

The debate about the future of public service broadcasting is of course hardly new. What has changed, however, since the 1980s is the acceptance in Western Europe of commercial broadcasting as part of a dual system, with public service broadcasting performing a significant, but no longer dominant role. According to McQuail, profit-seeking and consumerism have effectively been de-demonised in Europe⁶, although profit-seeking by public service broadcasters remains a complicated and controversial issue. However, public service broadcasters are still expected to behave according to commercial principles in the running of their affairs and when competing for those rights and sporting events which are supposed to form part

---

⁶Denis McQuail, 'Commercialization and Beyond' in Media Policy, McQuail & Siune, op.cit., p.112.
of their public service programming remit. An increase in channels means that public service broadcasting is already facing stiff competition for rights (particularly sport) and talent. If costs continue to rise it may become much more difficult for public service broadcasters to lay claim to the provision of broad ranging content if staples like sport become prohibitively expensive. At the same time their claim to be satisfying specialised as well as general programme interests is being challenged by the many thematic offerings of commercial providers.

However, although commercialism in broadcasting may have been 'de-demonised', key features of the old system still remain which work in favour of public service broadcasting and the values and public expectations it is expected to fulfil. This is because of the perceived shortcomings of market forces which may result in a concentrated industry structure, and a narrower range of programming to the detriment of democracy in general. These features include:

- aspirations for breadth of content and the representation of a wide range of opinions
- positive discrimination in favour of national culture
- the enforcing of public accountability
- and restrictions on cross-media ownership to enhance media diversity.

Therefore even though there are now many more media outlets, competition alone is not usually regarded as a guarantee of audiovisual diversity. Public service broadcasting is still seen to have an important role to play and this role may become more important if new types of inequality emerge which strengthen pre-existing ones based on age, education, geographical location, poverty and ethnic origin.

At the same time however, there is clearly a need for a rethink of the concept of public service broadcasting to reflect ongoing changes in content, access, and distribution. A balance needs to be found between allowing public service media to meet broader social goals, while allowing them to function effectively and develop in a 'dual' system. A key problem to emerge, however, has been the definition of the role of public service broadcasting, the extent of its commercial activities, and its

---

7 Ibid., p.113.
relationship with commercial media. In a converging environment of mass and individual communication how do you define the public service mission? And should this mission be confined to traditional broadcasting content or extended to cover new types of service which may at some point be deemed to be indispensable for the public at large, for example on-line services? Should public service broadcasters have the right to grow with the new technical possibilities or is it time to consider new forms of public provision? Ultimately is it even worth maintaining generalist public service channels if consumers can eventually choose from hundreds of individual offerings? The answer to these questions lies partly in political willingness to further endow public service broadcasting with a social purpose which still regards it as a universally available public good which fulfils objectives that are noticeably different from those of commercial media companies. A problem lies in deciding what type of activities are covered by these objectives, who should decide the extent of any new activities, and the extent to which new activities merit public funding. Central to public service broadcasting's survival therefore is continued political consensus about its broader political value and purpose, continued public and political support for public funding, and an ability on the part of the broadcasters themselves to devise a survival strategy.

Redefining Public Service - The Broadcasters' View

How then have public service broadcasters in Germany and the UK been responding to the digital challenge? Not surprisingly in both instances, they regard themselves as a key driver in the take-up of new digital services, and this is closely connected with their future survival, based on the argument that they need to fulfil their public service mission in new ways and across new platforms if they are not to be sidelined. Their aim for digital has not been to develop new technology or support distribution systems (this in itself is a break with the past), but to provide universally accessible content for all platforms - satellite, terrestrial, cable, on analogue and digital, thereby fulfilling the objective of universal

---

access for a diverse range of content. The assumption is that the technology and the delivery of content might change, but public service broadcasting is still a standards setter and a guarantor of impartial news and diverse programming.

In Germany the existence of private broadcasting and the Constitutional Court's acceptance of its lower standard of broadcasting practice is actually dependent on public service broadcasting meeting a higher standard relating to programme balance and the reflection of different opinions within society (called Grundversorgung - the basic provision of services). As a result, the Federal States (Länder), who are responsible for media policy, rather than central government (Bund), are constitutionally bound to ensure that public service broadcasting has sufficient financial resources to enable it to fulfil this classical mission. However, this mission has never been explicitly described by the Constitutional Court, much to the annoyance of private broadcasters. In return for meeting its Grundversorgung commitments, German public service broadcasting has a constitutional right to existence and further development and financial support from the licence fee, but again there is little agreement on what further development means in terms of access to new technologies, new programme forms, and alternative sources of funding.

In the case of the BBC, there is additionally an explicit and politically sanctioned industrial role connected with digital transmission. Although the Corporation has always been involved in commercial activities on a small scale, it was the 1996 Royal Charter which endorsed commercial

---

16. Constitutional Court Judgement of 1986 - BVerfGe (Bundesverfassungsgericht), 'Urteil des Bundesverfassungsgerichts vom 4. November 1986', in Funk Korrespondenz Dokumentation (7 November 1986), pp.19-20. Although it is not described in detail Grundversorgung does not refer solely to those programmes which are not supplied by commercial operators - it is meant to be a dynamic concept.
activities and digital services as core objectives of the BBC.\textsuperscript{19} The BBC now regards it as its public duty to exploit the assets paid for by the licence fee payer in the most commercially successful form, so that money can be ploughed back into core services for the benefit of all licence fee payers.\textsuperscript{20} The BBC also sees itself as the key vehicle for investment of public money in the public purposes of broadcasting which cannot be guaranteed by the market, and believes that it as an institution can fulfil these purposes more adequately than any external provision of public service type programmes by commercial operators who might be forced to act at variance with their commercial purposes.\textsuperscript{21} It regards it also as its public service obligation to become a global multimedia enterprise.\textsuperscript{22} However, the BBC's overt embrace of commercial strategies linked to digital expansion contrasts starkly with the more limited responses of German public television, whose digital ambitions have been tempered by political and commercial opposition, and a non-centralised and complicated policy process, involving policy-making at regional (Land) level.

Yet, the responses from public service broadcasting are not solely defined by the technological change brought about by digitalisation. To a large extent they are also a response to and continuation of the deregulation of broadcasting in the 1980s, which saw a sustained and successful attack on public service broadcasting's dominance over audiovisual media. To survive and retain legitimacy for public funding within a dual system of public and commercial broadcasting they adopted a range of responses with varying degrees of success. These responses have included changes in programming strategy (competitive scheduling, extensions in broadcast hours, an extension of 'popular' programming formats at the expense of cultural and information programming), co-operation with third parties (independent producers, co-producers, joint ventures), the exploitation of supplementary sources of revenue (advertising, sponsorship, subscription), rationalisation strategies and changes in working practices including the establishment of internal departments as separate limited companies (e.g. BBC Resources).\textsuperscript{23} Some believe that the end result has been in

\begin{itemize}
\item \textsuperscript{19} Department of National Heritage, Copy of the Royal Charter for the continuance of The British Broadcasting Corporation, May 1996, CM 3248, clause 3.
\item \textsuperscript{20}David Currie and Martin Siner 'The BBC: Balancing Public and Commercial Purpose' in Public Purposes in Broadcasting, eds. A Graham et. al., p.74,
\item \textsuperscript{21}BBC Response to the EU Green Paper, May 1998, op.cit.
\item \textsuperscript{22}Docherty, p.14
\item \textsuperscript{23}Steven Barnett and Andrew Curry, The Battle for the BBC (London: Aurum Press, 1994), p.180pp.;Yves Achille and Bernard Miège, 'The limits to the
many instances a convergence of quality between public and private provision as public broadcasting adopts the style and ethos of private broadcasting in order to retain an acceptable audience share and justify licence fee funding.24.

This is crucial because it brings us back to the definition of public service broadcasting, something which is exercising many bodies, and is closely linked to its commercial activities. What exactly is public service broadcasting if there is little to distinguish it from its commercial rivals? And how can both public funding and commercial funding be justified for broadcasters who might be little different from commercial operators with no access to public funding. These earlier responses and ongoing responses to the digital challenge have opened public service broadcasting up to more sustained criticism from commercial rivals who regard public services broadcasting's move into new digital services and commercial activities, in particular, as a threat; and from regulators and politicians who recognise the growing contradiction between commercial and public service activities. Public service broadcasters are therefore having to pursue a careful balancing act, which publicly explains and justifies their commercial activities and expansionary strategies in the context of their overall remit.25

Regardless of any criteria for distinguishing public service from commercial activities, digital technology has given public service broadcasters ample opportunities to attempt new types of services, even if the full details of funding and scope have yet to be resolved. For the public service argument is simple - public broadcasting either adapts to the new circumstances or it dies. It must be allowed to use all distribution opportunities and offer new forms of content to fulfil its public mission in a converging communications environment or it loses its universal appeal, and ultimately its claim to public support and funding.26 Commercial operators, however, see


24McQuail, p.116-117. Also Karen Siune & Olaf Hulten, 'Does Public Broadcasting Have a Future' in *Media Policy*, eds. McQuail & Siune, op.cit., pp.28-29. They refer to this convergence hypothesis, but suggest that it is not sufficiently supported by empirical evidence.


the addition of new services as attempts to preempt the
market at the expense of commercial broadcasting.27

Content Issues: Thematic Content and Value Added Services

One ongoing trend closely connected with digital, but not
entirely so, has been the growth in thematic channels and
value-added services offered both by private and public
operators. This reflects a general trend towards the
compartmentalisation of content away from balanced
nationally targeted generic services. For example, since
the early 1980s there have been few new general channels –
the emphasis has tended to be on speciality channels and
services. Seen from a public service point of view this
looks like the targeting of genres and groups with
packages of services in anticipation of the breakdown of
mass audiences, precipitated by plentiful audiovisual
offerings and the prospect of individual choice. In
Germany participation in these new services is seen as a
valid response to public service broadcasting's obligation
to provide basic provision of services (Grundversorgung) in
a dynamic way in line with changing viewer needs, and
this underpins their constitutionally sanctioned guarantee
of further development.28 Looked at from a commercial point
of view the establishment of public service niche channels
involves the creation of a secondary market for the
exploitation of archive programming and the opening up of
new opportunities to compete.

At the BBC the digital strategy has involved a dual
approach of free and commercial services, first outlined
in its policy document Extending Choice in the Digital
Age, published in May 1996, and elaborated on more
recently in The BBC Beyond 2000, published in December
1998. In addition to the digital transmission of its
existing services in widescreen format, the BBC offers a
range of free digital services including a complementary
extended and repeats channel (BBC Choice), a 24 hour
television news channel (BBC News 24), BBC Parliament, BBC
Learning and an Internet service BBC Online. This strand
in the approach ties in neatly with traditional thinking
on public service broadcasting as these services are
available to all licence-fee payers without additional
charge (excluding of course the extra cost of reception
equipment capable of receiving digital transmissions), and
they will also be available on the BBC’s own digital
terrestrial multiplex.

27 See VPRT, Diskussionspapier des VPRT-Vorstandes zum Rahmenkonzept einer
Medienordnung 2000 plus, 26 November 1997, 1.1.5.
28 ARD Weißbuch 2000, 3.1
In Germany ARD's free digital bouquet ARD Digital began as a pilot project in 1997. Apart from the simulcast of existing broadcasting output, it includes the value added TV services MuXx (time shifted highlights), ARD Extra (extended information coverage), ARD Festival (drama repeats) and a navigational aid with a Lesezeichen, which allows viewers to bookmark programme topics for viewing at a later time. ZDF operates a similar package, ZDF-Infobox. Both digital packages offered by ARD and ZDF include speciality channels, funded by the licence fee, which are justified in terms of their public service remit. Kinderkanal is a dedicated children's service which is regarded as a counterweight to the predominantly imported animation offerings of commercial channels and a complement to the core generalist services. Phoenix is a documentary and information service which meets public service broadcasting's information remit. In spite of sustained attempts to justify these channels, they have been challenged by commercial interests, who fear that there is no barrier to public service expansion and its funding through the licence fee. This in turn is seen to affect private broadcasting's ability to compete in the very competitive German free-to-air commercial market.

Funding Issues: Alternative revenue sources

New services are bound to raise questions about funding. In the case of the services mentioned above, funding occurs through the licence fee, but digital transmission and the increase in services has also raised the prospect of securing additional commercial revenues for public broadcasters. What digital technology does, in particular, is to provide increased opportunities for charging consumers directly for what and how much they consume, through subscription on a per package, product or programme basis, thus further altering the public nature of television to that of a consumer product. However, there is little evidence yet that anything other than sport and films will prove a goldmine, and in some markets, notably Germany, the progress of subscription television has been underwhelming.

30 ARD-Weißbuch 2000, Section 3.1 Zur Zukunftsfähigkeit des öffentlich-rechtlichen Rundfunks
31 Adelt, op.cit. At the end of February the EC approved the state funding of Kinderkanal and Phoenix, following complaints from VPRT, the commercial broadcasters' organisation. Broadcast, 5 March 1999, p.13
32 Hans Kleinsteuber, 'The Digital Future' in Media Policy, op.cit., p.66. In the spring of 1998 only 100,000 subscribers had been signed up to the DF1 digital package, and it had become clear that DF1 was threatening the future of the Kirch Group.
In Germany ARD and ZDF have embarked only on modest plans (at least compared with the BBC's activities) because of political hostility to public service broadcasting expansion, limits to the expansion of advertising income, restrictions on subscription funding and the requirement that digital experiments be funded from internal savings rather than licence fee increases. Mixed funding (including subscription and advertising) is constitutional as long as the licence fee remains the main source of funding, because of the tendency of commercial funding to reduce the diversity of broadcasting. The state (in this case the Länder) are obliged to secure funding for anything covered by the basic provision of services or Grundversorgung (including niche channels like Phoenix and Kinderkanal which form part of this basic provision). However, it is up to the state to decide the form of funding through legislation, and the Länder have been unwilling to sanction subscription funding. The situation is further complicated by the partial funding of ARD and ZDF by advertising, although in a limited form (twenty minutes a day on television before 8pm). Recently the public service broadcasters asked for the television advertising ban after 8pm to be lifted around sports transmissions to match the increased costs of football coverage, much to the annoyance of private broadcasters. This level of hostility has to be seen in the context of the overcrowded free-to-air broadcasting market in Germany, where few advertising funded channels are in profit, and where new channels have to compete both for audiences and attractive programming. This underpins commercial broadcasting's hostility to any attempts by public service broadcasting to provide additional tv services, move into new areas such as on-line services, or increase its advertising income.

In the UK by contrast the BBC was encouraged, first by the Conservatives, and then by the Labour government to be more commercial in its approach to the introduction of new channels and the exploitation of its brand. Enhancing commercial revenue has become a significant strand in the BBC's digital strategy in addition to its main public

35 BVerfGE "Urteil des Bundesverfassungsgerichts vom 24. Maerz 1987", in Funk Korrespondenz Dokumentation, 12 June, 1987, pp.29-31. According to this judgement, the state must in theory also secure funding for any public channels and services which are not part of Grundversorgung as well; because public service broadcasting has an equal and constitutionally guaranteed right to equal participation in the new technologies.
36 ARD Weißbuch 2000, 3.1; Adelt, op.cit.
service remit, and commercial revenues are expected to provide 10-15% of income over the decade, primarily via new subscription channels established as joint ventures with private partners. The goal is to quadruple cash flow back to the Corporation between 1996/97 and the end of the Charter period to £200-300m, but capped at 15%.\(^{38}\) However, this requires a careful 'balancing act' between what is regarded as the BBC's primary purpose as a licence-fee funded public service broadcaster and its secondary ambitions for commercial expansion. However, in reality there is still a long way to go. Commercial revenues are still small compared to licence fee revenues, and some might point to the BBC's failure to exploit its assets commercially in the past, particularly in the field of overseas programme sales.\(^{39}\)

The commitment to additional commercial revenues at the BBC looks set to continue, however, following the appointment in October 1998 by the Culture Secretary, Chris Smith of a BBC licence fee review body which will report next summer on how the BBC should be funded when the current licence fee settlement ends in 2002.\(^{40}\) The starting point is that the licence fee is sustainable at least until the review of the BBC Charter in the run up to 2006. However, the review is examining options for supplementing licence fee revenue in the meantime, and how to secure an appropriate balance between the BBC's public service and commercial activities. Although advertising has been ruled out on the BBC's core free-to-air channels (BBC1, 2 etc.), the panel is believed to be looking at the issue on the BBC's new digital channels (including BBC Choice and BBC News 24) and on-line services.\(^{41}\) This, of course, could spell complications later on, if online services, for example, were to become core services in future.

**Global Aspirations: Building a Brand**

In Britain the BBC's digital strategy and its commercial aspirations outlined above are closely related to its building a global presence as a high quality brand. The Conservative Government's 1994 White Paper on the BBC actually encouraged this evolution 'into an international multi-media enterprise, building on its present commercial

---

\(^{38}\) The BBC Beyond 2000 (Funding the BBC); Also Steve Clarke 'Head Banger', Broadcast, 17 July 1998, p.19

\(^{39}\) In 1997/98 BBC Worldwide contributed £75 million in cashflow to the BBC from global sales of £409m. This compares with licence fee revenues of £209.7m. BBC Annual Report and Accounts 1997/1998, pp.30-31, p.60. Also 'We're not always their cup of tea', The Independent, 13 October 1998, p.15.


\(^{41}\) Smith urges net gain for licence fee', Broadcast, 29 January 1999, p.3.
services for audiences in this country and overseas'.

This has resulted in an expansion of the activities of the BBC's commercial subsidiary BBC Worldwide to include not only the commercial exploitation of BBC programme properties for consumer products, publishing and international sales, but also the establishment of new domestic and international channels with commercial partners (see below).

Similar ambitions are evident in Germany, where public broadcasters have been keen to exploit their archive material and launch new digital channels, although global ambitions are subject to the limitations of exporting German language programming to the all important American market. More importantly however, for the domestic market, and unlike the BBC, ARD and ZDF do not have the consolation of subscription income to bolster their finances. Joint programming ventures with private operators are probably constitutional, but there is little evidence of such ventures emerging in the present antagonistic and competitive climate. However, other forms of commercial activity have been around for a long time, with ARD using advertising subsidiaries to sell their airtime and schedule the framing programmes around their advertising slots; profits are transferred to the parent organisations. Various ARD stations also operate production subsidiaries (Studio Hamburg, Bavaria Film GmbH) who make programmes for both the public and private sectors. And although joint programming ventures with the private sector may not be a talking point at present, the outsourcing of production resources to save money has become a big issue more recently. But the fact remains that German public broadcasting's ability to raise additional commercial revenues continues to be blocked by a lack of political support to provide the necessary legislative backup, supported by a strong commercial lobby against public service expansion and the extension of advertising.

In the UK the BBC's collaboration with commercial partners to provide commercially funded channels and services has emerged as a key component of its digital strategy. The BBC is cash poor, but its most important asset is content, which it owns and can exploit in collaboration with third

---

43 BVerfGe 'Urteil des Bundesverfassungsgesichts vom 5 Februar 1991', Media Perspektiven Dokumentation, 1 (1991), pp.32-33. As long as it does not override the public service obligations of the broadcaster, collaboration with private operators is constitutional, but legislators must ensure that such collaboration does not undermine public service broadcasting's constitutional obligations.
44 See the special edition devoted to 'Outsourcing' in Media Perspektiven, 1, 1999
parties. Commercial operators have in fact been keen to cooperate with the BBC, recognising the value it brings to digital packages, and it is now involved in significant joint ventures through its commercial arm, BBC Worldwide. So far (March 1999) the following joint venture agreements have been announced by BBC Worldwide in its attempt to quadruple its contribution to BBC coffers within the Charter period:

• An alliance with ICL/Fujitsu, the IT systems and services company, concluded in September 1996, to create a commercial BBC Online Internet service with the BBC as an online service provider. However, the commercial site, beeb.\@the BBC, has been undermined by the success of the BBC's own free online sites.45

• A 50:50 joint venture with UK channel packager, Flextech to supply thematic subscription channels in the UK under the UKTV banner. Flextech is providing investment funds, management services, airtime sales and off-air marketing; BBC Broadcast has editorial control and is responsible for scheduling, programming and presentation. Licence fee funded programmes must appear on the BBC's free-to-air services first. Four of the thematic subscription channels form part of the digital terrestrial package of On Digital. The channels are UK Gold (drama and entertainment) UK Horizons (factual), UK Arena (culture), UK Style (lifestyle and leisure) and UK Play (music and comedy, launched 10 October 1998).

• A global partnership with Discovery Communications (48% owned by TCI, also Cox and Newhouse) to launch the joint venture international channels Animal Planet and People and Arts, and to co-produce programming. The agreement was announced in September 1996 and concluded in March 1998. This gives the BBC 50% of any new Discovery channels, including Animal Planet, outside the US. The BBC also acquired a 20% stake in Animal Planet in America (reportedly valued at $120m46). In return Discovery gained priority access to the BBC library for its global services and the production base of the BBC's Natural History Unit. Discovery will reportedly invest $175m in BBC programmes (and $360m towards creating new international channels) and is assisting in the marketing of BBC America (a wholly owned BBC channel) which launched in the US in March 1998.47

45'BBC sets off on rethink of web sites' Broadcast, 3 July 1998, p.3
46'Delays dog BBC Discovery deal', Broadcast, 18 April 1997, p.3..
BBC Worldwide is responsible for the BBC's commercial media interests, and its goal is to maximise the value of licence fee funded assets for reinvestment in the BBC's core free-to-air services for the benefit of all licence fee payers. It has acquired partners with capital because it can not use the licence fee for risk ventures, and this type of collaboration means that it gets access to new forms of digital distribution without having to subsidise the consumer equipment, necessary to receive digital services. The BBC has justified the joint ventures by pointing out that it will now benefit directly, instead of indirectly funding the success of US companies like Discovery with BBC programming for which it used to receive only a small fee. However, without access to the same borrowing facilities as its commercial rivals the BBC has had to risk striking agreements with commercial operators whose ultimate interests may not concur with its public service objectives. It has also been pointed out that if it had been able to borrow externally, it would have had more influence over the management of its joint ventures and reap more revenue and value in the longer term.

More importantly for the BBC, however, at this stage is its ability to defend its commercial activities against accusations of unfair competition and misuse of the licence fee. The BBC's Charter and Agreement already contain constraints to prevent licence fee funds being used for commercial ventures, and the BBC's commercial subsidiaries (BBC Worldwide and BBC Resources) are subject to the same competition laws as other companies. The Charter also contains provisions specifying that all new commercial activities need approval by the Secretary of State for Culture and Media.

The BBC has tried to allay fears about cross-subsidy and unfair trading through the separation of its commercial subsidiaries, BBC Worldwide and BBC Resources from its licence-fee funded services, and additional monitoring from a sub-committee of the BBC Governors, the Fair Trading Audit Committee. It has also established criteria for its commercial activities, set out in its own Fair Trading Audit Committee.

---

49 See Currie and Siner, p.92
50 See Braxton Associates, Summary of Report by Independent Consultants to the Department of National Heritage, 18 December 1996 Available at (as at September 1997) <http://www.bbc.co.uk/info/braxton.htm>. Under the current Charter, the BBC's borrowing is limited to a £200m ceiling.
Trading Commitment which requires its commercial subsidiaries to:\(^5^1\)

1. engage only in those activities which are commensurate with the BBC’s role as a public broadcaster, and which reflect the same values as its core services i.e. commercial products and services must arise from, support and enhance, or extend the range and reach of BBC programming.

2. compete fairly in all markets which means preventing cross-subsidy from the licence fee to support commercial operations. To ensure this, commercial activities are funded, operated and accounted for separately. The requirement to prevent any accusations of cross-subsidy is underpinned further by the insistence on an arm's length relationship with the rest of the BBC involving transparent trading and contracts between the commercial and public service parts of the BBC, and the payment of fair prices for services and products traded between the two. There are also restrictions on the promotion of commercial products on the core services, unless they can be justified on editorial grounds.

3. to ensure that licence fee funds are not put at risk by commercial activities. The commercial subsidiaries cannot borrow against assets generated from licence fee funds and there is a £200m ceiling on the investment capital they can raise on their own assets, which is fixed in the Charter.

However, in spite of these efforts to place commercial activities on a separate footing, the BBC has still attracted criticism. For ITV the relationship between the BBC and BBC Worldwide is not nearly arms-length enough. While not disputing the BBC's right to operate a commercial arm to augment the licence fee, it has criticised the Corporation for a lack of transparency in accounting procedures between its public service and commercial operations.\(^5^2\) This means amongst other things, for example, that there is no indication in the accounts of whether BBC programmes have been sold to joint ventures at market prices. ITV goes on to demand separate and much more detailed accounts for the BBC's public and commercial activities. Suspicious of the BBC's self-regulatory initiatives, it has also demanded more independent scrutiny of the BBC's commercial activities (including an extension of ITC and Office of Fair Trading/OFT powers.

\(^{5^1}\) See BBC Worldwide Annual Report and Accounts, 1997/98, p.22; Also Currie and Siner, pp.86-88.

\(^{5^2}\) ITV, 1998. The European Commission is now seeking industry comment on possible competition issues arising from the BBC/Flextech deal arising from the joint venture’s exclusive access to the BBC library. Official Journal - 15 February 1998- 'EC seeks opinion on BBC/Flextech', Broadcast, 19 February 1999, p.11.
and the oversight of BBC accounts by the National Audit Office).\textsuperscript{53} Others have gone on to demand complete separation of the BBC's commercial activities under a separate agency operating under a strict licensing agreement, thereby allowing the BBC to concentrate solely on its public service responsibilities.\textsuperscript{54} In practice however, it may be impossible to demonstrate that there is no cross subsidy because both sides will be using BBC programmes, and the ultimate success of the new commercial services really depends in large part on their success in exploiting the brand identity developed over many years by the licence-fee funded core services.

**Facing the Opposition: Commercial Broadcasters Fight Back**

We have already seen the response of public service broadcasters to the digital challenge, and in many ways these responses are really an ongoing response to commercial competition rather than to digital technology. As we have seen, this brings them into conflict with commercial competitors who see public service rivals with a huge range of programming, buoyed up by guaranteed licence fee income and prominent branding. In terms of the programming of public service broadcasters, we can distinguish:

- a move towards thematic content and narrowcasting
- the provision of value-added services (timeshift, extended coverage)
- the provision of new services which go beyond broadcasting, particularly on-line services.

However, all these new activities need to be funded and what we are seeing is a search for alternatives to supplement the licence fee and produce savings. Depending on the different political climate, the options include:

- subscription
- advertising and sponsorship
- exploiting the brand and associated products
- collaboration with third parties to provide backing for the introduction of new services
- rationalisation and outsourcing

In Germany the basic argument directed against the public broadcasters by their commercial rivals, represented by VPRT, is that they have launched new channels and services into a fragile and crowded advertising-funded broadcasting market on the back of editorial autonomy and guaranteed public funding to the disadvantage of private

\textsuperscript{53}ITV, 1998., pp.8-9.

competitors.\textsuperscript{55} Examples cited include the launch of thematic channels (Phoenix, Kinderkanal), the national distribution of ARD's regional third channels, and the launch of on-line services. The VPRT would prefer to see public service broadcasting restricted to the digital distribution of its existing services, and online services confined to programme information, but it is vehemently opposed to all other forms of expansion.\textsuperscript{56} In the UK criticism from commercial rivals has tended to focus more on the BBC's ability to separate its commercial and public service activities in the interest of fair trading, rather than a substantive questioning of its right to operate a commercial arm and launch new services at all (see the ITV's criticisms above).

However, the concern of commercial broadcasters about the digital and expansionary strategies of the public broadcasters in both countries is connected with a perceived lack of accountability. In both Germany and the UK the public service remit is only loosely defined leaving it to the public broadcasters to fulfil in line with their editorial independence from both commerce and the state. This compares with the legally binding and specific regulations imposed on ITV by the ITC in the UK and by a variety of regional authorities on German commercial broadcasters. ITV, for example has expressed doubts about the effectiveness of self-regulation of content by the BBC through its Governors, and argues that there has been a decline in the public service ethos and standards on the two main television services, BBC1 and BBC 2, pointing to the marginalisation of factual programming, and the use of airtime on the BBC's core channels to promote non-public service events as examples of this.\textsuperscript{57} There is a growing mood amongst commercial broadcasters in both countries that it is wrong for public broadcasters to be both broadcasters and their own internal regulators, and that it would be better to subject them to external regulation to bring them into line with their commercial competitors and safeguard public service goals.\textsuperscript{58} ITV, for example, has suggested that the ITC could extend its powers over commercial television to become the single content regulator for all television channels in the UK (it already licences the BBC's joint venture channels).\textsuperscript{59}.

\textsuperscript{55} Jurgen Doetz 'Medienmacht 2000 - Informationskultur im digitalen Zeitalter' Rede anlässlich des Medientages des Deutschen Beamtenbundes', Mainz, 23 April 1998
\textsuperscript{56} Adelt, 1998.
\textsuperscript{57} ITV, 1998, pp.3-5.
\textsuperscript{58} ITV, 1998, p.10; also Adelt 1998.
\textsuperscript{59} ITV, 1998, p.10.
In Germany the broadcasting councils (Rundfunkrate) which perform a similar function to the BBC Governors have been criticised by commercial television operators for allowing ARD and ZDF to expand with little opposition. They point not only to uncontrolled public service expansion in electronic markets with the establishment of new channels and online services without legislative basis, but also to shareholdings in private companies, and the establishment of production, marketing and merchandising subsidiaries.\textsuperscript{60}

Chief amongst the complaints in Germany is the perception that public service broadcasters have no limits to their expansion and an ill-defined purpose which is used to justify further public funding.\textsuperscript{61} Public service broadcasting's constitutional guarantee of existence and further development, connected to its fulfilment of Grundversorgung, which the Constitutional Court has never defined in detail, is seen to underpin a strategy of expansion. Once new services are recognised as part of the basic provision of services, they too are given a guarantee of existence, further development and funding, further undermining the position of private broadcasting.\textsuperscript{62}

Public service broadcasters are of course doomed whatever they do. They need to retain and reach significant audiences without being seen to abandon core public service principles. If they fail to rise to the competitive challenge of digital media and concentrate on existing services, they may perish as new types of services and leisure supersede traditional generalist channels. If they occupy the cultural high ground to provide those things which commercial media do not, they risk marginalisation and cutting themselves adrift from public support and ultimately adequate funds. If they seek to concentrate their efforts on popular programming, then they are bound to be accused of neglecting their public service remit, which also threatens their claim to licence fee funding. Other dilemmas face their attempts to maximise the value of their assets. If they are too successful, competitors may use competition law to issue fair trading challenges. If they perform badly, licence fee payers can claim that licence fee funds are being misused for dubious commercial purposes.

What these concerns highlight is that there continues to be little agreement about what public service broadcasting


\textsuperscript{62}Ibid.
is, and also disquiet about the way it decides what it should do. For the commercial rivals of public service broadcasting there is a strong fear of increasingly commercially minded public broadcasting institutions, who are publicly funded and to a large degree unaccountable to outside agencies. However, this stance ignores the power and gatekeeper role of strong commercial entities in each country like BSkyB, Bertelsmann and the Kirch Group, and public service broadcasting's role in providing a counterweight to any imbalance caused by media concentration.

The Role of the Regulators - Tensions at the EU and National Level

It is at the level of the European Union that the tensions between the cultural aspects of broadcasting policy (predominantly national) and the economic aspects of competition policy coupled with telecommunications liberalization have come to the fore. Tensions have been pre-programmed because EU policy concentrates primarily on industrial and market concerns with cultural considerations playing a secondary role.

The important role of public service broadcasting is acknowledged in a Protocol to the Amsterdam Treaty, signed by the member states in June 1997. This recognises that public service broadcasting is directly related to 'the democratic, social and cultural needs of each society and the need to preserve media pluralism.'\(^63\) The Protocol also confirms that it is up to Member States to provide for the funding of public service broadcasting. At first sight this could be seen as strengthening public service broadcasting because it leaves the decision about type of funding and the definition of public service broadcasting to individual states, and this is likely to vary from country to country. However, this flexibility is subject to the important proviso that the funding of public service broadcasting 'does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest'.\(^64\) As Mather rightly points out it is not clear at this stage whether a particular type of public service broadcasting, or whether trading conditions and competition have priority in the EU.\(^65\)

---


\(^64\)Ibid.

\(^65\)Graham Mather, 'Competition and Public Purpose: a European Approach' in *Public Purposes in Broadcasting*, p.102
The EU Green Paper on Convergence of December 1997 recognised the need to find a balance between two regulatory approaches: one which supports technology, less regulation, and convergence and one that recognised the media as more than simply an economic phenomenon.\(^\text{66}\)

However, it also noted that 'the starting point for any analysis of public interest objectives in the light of convergence must be the need to define public interest objectives so that market actors had a clear idea of the obligations with which they must comply'.\(^\text{67}\) This suggests that the EU wishes to see a much clearer definition of public service broadcasting to allow a clearer demarcation from possible commercial conflicts. Equally, however, the Green Paper encourages the exploitation of new sources of revenue alongside current funding for public broadcasters, but it does warn against the use of state funds to leverage and cross-subsidise new activities or the use of new platforms such as the Internet, as these practices would be subject to the Treaty rules on competition.\(^\text{68}\)

At the moment there exist longstanding complaints to the Commission from commercial broadcasters about unfair competition by public service broadcasters, stemming primarily from public service broadcasting's use of advertising and subscription to raise additional revenues. The Commission was criticised by the European Court of First Instance in September 1998 for not making a decision on a case brought by the Spanish commercial channel, Telecinco in 1992 against the Spanish public broadcaster, RTVE on the use of advertising.\(^\text{69}\) This has brought the debate about public service broadcasting and competition policy in the EU to a head.

Spurred on by complaints from the UK, Spain, Italy, Germany and France over alleged subsidies to public broadcasters, DG4, the competition directorate, tried in October 1998 to take a lead in defining the limits to public service broadcasting’s commercial activities.\(^\text{70}\) The discussion paper appears to oppose the mixed funding of public broadcasting by licence fee and advertising, favouring instead a split system where public service broadcasters can 'compete on the market but only through

---


\(^\text{67}\) European Commission, Green Paper, IV.3 'Meeting public interest objectives'.

\(^\text{68}\) ibid


dedicated channels or subsidiaries, which would not receive direct or indirect subsidies from the public service entity.'

Recognising that it is up to the member states to define the scope of the public service remit, DG4 reminded the member states that the definition of this remit will be key in assessing whether funding is compatible with competition policy. However, this did not prevent it from suggesting that sport, films and entertainment might be excluded from the remit of public service broadcasting.

A recent Report from the EU High Level Group on Audiovisual Policy at DGX, entitled *The Digital Age* has attempted to propose a set of principles for the funding of public service broadcasting based on the Amsterdam protocol and the criteria of proportionality and openness. In doing so its approach has been much more supportive of the cultural role of media and communications compared to the industrial and commercial leanings of DGXIII and DGIV. In the Introduction to the report it states that 'The starting point for any examination of public policy for the audiovisual media must be the recognition of the specific role they play in our societies and the need to ensure balance between the free play of market forces and the preservation of the general public interest.'

Looking to the future, the Report confirms public service broadcasting's important democratic role, and underlines its need to adapt to new markets and participate in digital developments in order to fulfil this role. However, recognising that the Commission is responsible for ensuring compliance with the Amsterdam treaty including competition rules, DGX drew up criteria for public service funding arrangements. The funding of public service broadcasting must:

1) be in proportion to and not more than, what is needed to discharge the public service remit (the criteria of proportionality)
2) be granted on open terms, so that compliance with this principle can be checked at any time (the criteria of openness)
3) a public service broadcasting remit can be entrusted to public or private sector operators

---

71 Ibid
73 Ibid, I.1
74 Ibid, 3.1
75 Ibid
4) if there are both public and private sector operators, there must be safeguards to ensure fair competition
5) each state must define clearly in its national legal system the scope of the public service requirement and the specific obligations in terms of programming and other requirements
6) to ensure compliance with the criteria of proportionality and openness, public sector funding must be provided exclusively for broadcasters with a public service remit as defined by each member state
7) for this purpose there is a need for financial openness, in particular where a public sector operator receives funding from other sources to realise its remit. When that operator engages in purely commercial activities, that go beyond those activities defined as part of its public service remit, separate accounting should apply. This is necessary to avoid public sector funds being diverted to commercial activities.
8) the funding of public service broadcasting activities should come mainly from public funds; advertising should be secondary.

What comes through quite clearly is that Member States must take measures to define the scope and specific obligations of public service broadcasting, if they are to avoid conflicts with EU competition rules. However, it is difficult to define public service broadcasting at the best of times, and definitions may end up being too vague and imprecise to check against competition law. Mather suggests that the best solution to the problem of state aid and distortion of competition would be to apply split financing with state support going to public service broadcasters, and commercial income going to commercial operators or commercial subsidiaries of public service broadcasters. The Commission has already indicated that it approves of the BBC's approach in separating its commercial and non-commercial activities; German broadcasting's advertising restrictions are also deemed to be proportional in respect of competition rules. In the end though it may be impossible to separate the commercial and public functions of public broadcasting entirely however many checks are installed. The VPRT has called the proposed separation of public and commercial activities the creation of a dual system within public service broadcasting, which still fails to address adequately the problem of unfair competition by public service broadcasters. This suggests that any move towards 'split

76 Mather, p.105.
77 Ibid., p.108
78 Oreja, 1998.
79 Doetz 27 November 1998. Here the BBC is cited as a negative example.
financing' is likely to be as contentious as the existing system of dual broadcasting which allows mixed funding.

At the national level the regulation of public service broadcasting in both Germany and the UK continues to underline its role as a benchmark of quality, whose purpose should be to fulfil the traditional broadcasting policy goals of plurality, diversity, and impartiality across a broad range of programming.\textsuperscript{80} However, convergence between telecoms and broadcasting has raised questions about the need and scope for public regulation, and in particular whether regulation should be relaxed for commercial operators and certain types of content depending on their ability to reach mass audiences or contribute to public debate.\textsuperscript{81} A debate is already raging about the degree of regulation and the reasons for applying it. At the moment there are simultaneous calls for deregulation of commercial broadcasting and the disappearance of separate regulatory frameworks, alongside calls for more regulation of public service broadcasting (see earlier). This appears to be in line with public expectations at the moment for a basic level of "negative regulation" (to prevent undesirable material) and for positive regulation to ensure programming of a certain character; but it also reflects a desire to keep the commercial ambitions of public service broadcasters in check.

\textbf{Outlook}

For the immediate future the survival of public service broadcasting in Germany and the UK as part of a mixed system, looks assured based on political support for institutions which fulfil a political, social and cultural purpose connected to cultural and journalistic diversity and the preservation of a public sphere. Of particular importance is the role of public service broadcasting as a safeguard against the potential excesses of private oligopoly and as a guarantor of pluralism. Public service broadcasting will also survive, because it satisfies a television experience which is still overwhelmingly national. The funding of public service broadcasting remains an eternal problem, but the licence fee will stay in the short term, because no-one has found an acceptable alternative yet. But it is unlikely to grow sufficiently in line with public service broadcasting's rising costs. In the UK its replacement by some form of subscription (either voluntary or not) looks likely in the longer term; in Germany the debate about subscription revenues and public service broadcasting is unlikely to be resolved in

\textsuperscript{80} See for example the UK's recent Green Paper, \textit{Regulating communications: approaching convergence in the Information Age}, p.4.

\textsuperscript{81} Steemers, 1997, pp.54-55.
the foreseeable future, because of a strong commercial lobby against it.

However, while public service broadcasting's traditional role is not in doubt, its expansionary and commercial activities are problematic. Public service broadcasting has always been involved in commercial activities; but the difference now is the scope and scale. The public service broadcasters would argue that a lack of adequate funding has forced them to look beyond the licence fee to enable them to participate in changes in the market and digital technology. However these strategies are likely to bring them into conflict with EC rules on competition and to attract more attention from DGIV.

Public service broadcasting's future survival depends on an ability to stand out from commercial rivals and cultivate a responsiveness to public concerns and needs. However, its ability to fulfil this task depends on a much more clearly defined role in a digital world, combined with the assurance of adequate financial resources to participate in new developments. A balance therefore needs to be found between industrial and cultural priorities. If public service broadcasting is to make up for shortfalls in commercial provision, then it should be allowed to participate in new developments which go beyond conventional broadcasting, and may become core services in future, e.g. niche channels and online services. The question which then needs to be addressed is how far should public service broadcasting be allowed to develop new services and to what extent should these new services be publicly funded. This is an area which still needs answers, but the Commission is pushing hard for a firmer definition of public service broadcasting so that public service objectives can be weighed up against commercial considerations. However, given the Commission's past bias towards industry and commerce, the reconciliation of the market approach and cultural approach to the media is unlikely to occur for some time.