

# The Global Future of Public Service Broadcasting

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In January this year, the leading nations of the world convened an international conference in Tokyo to assist in the reconstruction of Afghanistan. One of the first things the conference endorsed was a report that the United Nations had commissioned from the British Broadcasting Corporation (BBC), the United Kingdom's principal public service broadcaster, on how to rebuild Afghanistan's media. In that divided country, where local warlords control the radio stations in the provincial cities, there was a remarkable consensus that a new broadcaster would be vital to prevent those stations from being as factional and divisive as they are at present. Everyone in Afghanistan's interim authority and most journalists wanted an editorially independent national broadcaster. Younous Qanooni, the new minister of the interior supported this view, while Hamid Karzai, the chairman of the ministers in the interim authority looked to something like the BBC.<sup>1</sup> It was therefore agreed that the BBC World Service Trust, a non-governmental organization founded by the BBC's international radio division, would redevelop a media infrastructure focusing on five areas, including the retraining of Afghan journalists, the provision of equipment for radio broadcasting, and initial work on a new regulatory framework for the national and local media.<sup>2</sup>

The rationale for establishing another public service broadcaster, this time in Afghanistan, was not due to a shortage of broadcasting frequencies, but rather stemmed from the political need to build a democratic nation of people who share a broadly common goal and can live together with each other in harmony. There is, of course, no guarantee that by establishing a new public service broadcaster, Afghanistan will be able to build a peaceful future for itself. But, at this time, nobody can suggest a better broadcasting strategy for rebuilding a democratic nation. Indeed, the establishment of a new national public service broadcaster is becoming a central facet of national reconstruction across the globe. It was a practice that the nations of Western Europe pursued

<sup>1</sup> John Tuckey, "Radio-controlled Peace?" *The Media Guardian*, 21 January 2002, p. 7.

<sup>2</sup> Ashling O'Conner, "BBC to Rebuild Afghan Media," *Financial Times*, 9–10 February 2002, p. 4.

in the 1990s in the newly liberated states of Central and Eastern Europe, and subsequently in the war-torn states of the former Yugoslavia. Looking back to the end of World War II, we find that the establishment of a new public service broadcaster was a central aspect of the plans of the Allied powers to rebuild democratic societies in both Germany and Japan. Public service broadcasting is therefore a cornerstone of democracy. As the Commission of the European Communities recently noted:

The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the broadcasting sector has, since its inception, been subject to specific regulation in the general interest. This regulation has been based on common values, such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, [and] consumer protection.<sup>3</sup>

### THE NEO-LIBERAL APPROACH AND ITS FLAWS

Broadcasting is also a business, however, and there are many neo-liberals in the developed world who argue that the days of public service broadcasting are over. New technologies, such as geo-stationary satellites and digital broadcasting, have made possible a multiplicity of radio and television channels, which are threatening to consign public service broadcasting to the scrapheap of history. The hidden hand of the free market, they argue, will automatically give listeners and viewers the broadcasting programs they want. A television set, they argue, is nothing more than an electric toaster with pictures.

There are three fundamental flaws in the neo-liberal argument. First, it ignores the profound difference between the markets for material goods and those for informational goods and services. Unlike a market in conventional goods, it is economically impossible for listeners and viewers of broadcasts to compare product availability before purchase. Second, the neo-liberal argument confuses a "free-market" in broadcasting channels with optimal program choice for users; and finally, their argument takes no account of the complex relationships between free markets in capital and labor and the informational needs of a healthy elective democracy.

In recent years, the pressures to build a "free market" in broadcasting have led to a number of key changes that now threaten the economic and political foundations of public service broadcasting. The first was the development of

<sup>3</sup> Communication from the Commission on Services of General Interest in Europe, COM (2000) final, p. 35.

free-to-air channels that were financed by the sale of air time to advertisers or sponsors. In some cases, these commercial revenues augmented the funds for public service broadcasters, but this only held good as long as the public service broadcasters were able to retain a quasi-monopoly in the sale of air time. As soon as competition emerged in the sale of air time, the business of broadcasting changed from one of delivering programs to the public, to that of delivering the ears and eyes of listeners and viewers to advertisers and program sponsors. The primary economic role of commercial broadcasters, therefore, is to produce popular and successful programs, and thus assist in developing the domestic economy by increasingly serving the needs of advertisers and sponsors. Although the twin aims of serving and informing the public and that of assisting in domestic economic growth are not totally incompatible, they are, nonetheless, radically different. In the U.K. for instance, competitive pressures have forced the advertising-financed ITV Network, which is still officially a public service broadcaster, to abandon its tradition of producing and transmitting hard-hitting current affairs programs or socially concerned documentaries.

A second, and more recent, development has been that of subscription television, whereby viewers are induced to pay in advance for a series of programs, without knowing what precisely they are paying for. Predictably, this has led to the development of themed channels, such as those for sporting events and new feature films, where the viewer buys "the sizzle" rather than "the steak." Just as people used to choose their cinema film by its star, so today, viewers are increasingly expected to subscribe to their television channel because of the soccer matches for which that channel has bought the broadcasting rights. It is not a free choice of television programs that has been established, but a restricted and partially blind choice in broadcasting services.

The third development towards a "free market" in broadcasting is one that has been almost totally unremarked. This is the increasing separation between the production, acquisition, and packaging of programs and the transmission of those programs to the viewer. For neo-liberal theorists, this allows for free competition between delivery platforms, which, in turn, allows the broadcaster to subcontract transmission services to the commercially competitive private sector. Unfortunately, this theory ignores three crucial aspects of public service broadcasting. The first is that because all broadcasting, whether public or private, is intimately linked both technologically and economically with the market in receiving equipment, as every household has to buy either a radio or a television set to receive broadcast signals. The second is that it is the duty of public service broadcasters to broadcast their programs to all households, whereas commercially competitive transmission companies are only interested in delivering their broadcasts to the households that attract a sufficient increase

in advertising revenues to justify any additional transmission costs. The third is that all broadcasters that transmit their signals by satellite increasingly need to encrypt their broadcasts, thus potentially introducing an additional barrier between the broadcaster and the viewer. Although signal encryption obviously allows commercial broadcasters to prevent non-subscribers from accessing their broadcasts, it also enables public service broadcasters to restrict their broadcasts to households in their own domestic state. This prevents their signal from being picked up in neighboring countries, which, if allowed to continue unchecked, would also require public service broadcasters to pay the owners of the intellectual property rights in the programs they transmit for the rights to the overspill countries. The need for all broadcasters, both public and private, to encrypt their signals increases their financial and structural dependence on their private sector competitors, who own the patent rights to these conditional access systems. Moreover, television viewers also need to ensure that they have the appropriate receiving equipment to decrypt the signals transmitted to them. With the advent of digital broadcasting, it is becoming increasingly difficult for viewers to ensure that they have receiving equipment that can pick up and decode all the television services that are currently being broadcast in their area. Indeed, we now need to ask whether an organization that relinquishes control over its own distribution platform can still properly be called a broadcaster.

#### THE REGULATORY APPROACH OF THE EUROPEAN UNION

In 2001, the Commission of the European Communities decided to introduce two parallel regulatory regimes—one for the regulation of signal carriage, and the other for the regulation of program content. What the commission envisaged was a comparatively *laissez-faire* approach to the regulation of signal carriage, which would ensure a converged regulatory regime for the communication of electronic signals, whether they were broadcast over the air or relayed through a telecommunications network. The content of broadcast services, on the other hand, would be regulated via a revision of the EU “Television Without Frontiers” Directive, which ensured the free flow of television signals between member states; established minimum standards for television advertising and program sponsorship; provided “where practicable” for a quota of European programs; prohibited racist speech and programs potentially injurious to the physical, mental, and moral health of minors; and provided for a right of reply or equivalent remedy.<sup>4</sup>

<sup>4</sup> Council Directive of 3 October 1989 on the coordination of certain provisions laid down by

The commission's approach undermined the licensing policy of most member states, which had previously linked the provision of a license to broadcast with a number of positive content requirements. Those often included an obligation to provide a service that could be received by all households in the country, combined with requirements and expectations about the range and diversity of programs that the broadcaster was expected to offer, for accurate and high quality news and current affairs programs, and for the observance of due political and industrial impartiality. By attempting to establish a free market in transmission services, however, the European Union has broken the direct link between the broadcaster and the viewer. One, perhaps unexpected, result has been to make many viewers financially dependent on providers of transmission systems.

The problems are perhaps clearest in the U.K. which has the highest penetration of digital television ownership in the European Union (see Figure 1).

**Figure 1. Digital TV Ownership in Europe (end 2001)**

United Kingdom	37%
Denmark	26
Sweden	23
Spain	20
Ireland	17
France	16
Italy	13
Netherlands	10
Germany	8
Portugal	6
Austria	5
Finland	4
Greece	3
Belgium	3

Source: Based on information provided by Strategy Analytics Group, cited in, "Switch-over: 'A Distant Prospect,'" *Digital News*, 23 February 2002.

These figures include all platforms—satellite, cable, terrestrial, and DSL—but it is satellite operators that dominate the market with 70 percent of viewers.

law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *Official Journal of the European Communities* L 298/23 (17 October 1989) (89/552/EEC); and Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *Official Journal* L 202/60 (30 July 1997).

Cable companies, with 22.5 percent of the market are increasing their share, while terrestrial operators only garnered 7.4 percent of the market.<sup>5</sup>

### THE ROLE OF PAY TELEVISION IN THE DIGITAL BROADCASTING MARKET

The dominant pay-TV platform in the United Kingdom is BSkyB and its associated satellite service SkyDigital, which are chiefly owned by Rupert Murdoch, who also owns the encryption system. His nearest rival, ITV Digital, which uses the Canal Plus encryption system, is jointly owned by the two major ITV companies, Carlton Television and Granada. It has only about a sixth of SkyDigital's subscribers. Both channels rely heavily on acquiring the rights to sporting events, notably soccer matches, to attract subscribers. Carlton and Granada originally intended to control their own digital destiny with a terrestrially-delivered system, but the venture has proved disastrous. It has swallowed up £800 million, nearly double the annual program budget for the terrestrial channel ITV1, and still needs a further £300 million to break even. At the time of writing, Carlton and Granada have put ITV Digital into administration, since it failed to persuade the content providers, notably sports bodies like the Nationwide Football League, to accept a massive cut in its fee for the rights to broadcast their soccer matches, and to persuade the rival satellite and cable delivery systems to guarantee them £80 million and £20 million, respectively, for delivering their services to new subscribers. Unless the administrators appointed by the court can persuade these organizations to agree to these drastic proposals, it looks as though ITV Digital will become bankrupt, thus precipitating redundancies for its staff, and probably a substantial cutback in Carlton and Granada's program investments in ITV, the U.K.'s commercially-financed public service channel.

On the cable front, the situation looks equally bad. NTL, the U.K.'s leading cable operator has run up £18 billion of debt that it cannot seem to service, and has led to a moratorium on new customers. Meanwhile, Telewest, its principal rival, has fallen £5 billion into debt. The financial crises at NTL and Telewest have also led to a profits warning from Pace Microtechnology, the world's third largest manufacturer of digital converter boxes, and the largest in Europe. In March, the company told the London stock exchange that Swiss Re, its credit insurer, was unwilling to extend NTL's existing credit insurance as the company still owed £25 million from its last order, while Telewest's orders have dropped

<sup>5</sup> See "Switch-over: 'A Distant Prospect,'" *Digital News*, 23 February 2002, p. 5.

by a quarter, knocking a further £10 million off Pace Microtechnology's sales.

Nor is the situation in Great Britain unique. In Germany, the Kirch Media Group is also in deep financial trouble. Its major shareholder, Rupert Murdoch's BSkyB, has refused to invest any more money in the company, and is hoping to recoup some of the £1.5 billion that it has already invested in Kirch's pay-TV operation, possibly through an alliance with Italian prime minister Silvio Berlusconi's television chain. Kirch owes more than £200 million in future payments to the German soccer league and more than £350 million to FIFA for the rights to soccer's World Cup, and is currently hoping to sell its rights to Formula One motor racing to stay afloat.

In part, of course, these pay-TV companies are responsible for their own financial troubles, because of the high fees they have been prepared to pay for the rights to broadcast premium sporting events. But there is a further issue that will affect the future of digital broadcasting. This is whether pay-TV can survive as anything other than a minority business in a predominantly free-to-air broadcasting market. Many households are simply not prepared to subscribe to pay-TV services and are quite happy to stay with the traditional, largely public service free-to-air services. Furthermore, they are also happy with analogue broadcasts and see no need to upgrade their receiving equipment to accept digital signals. In the United Kingdom, for instance, a recent survey commissioned by the government showed that a sixth of viewers will refuse to switch to digital, while another survey conducted by the Consumers Association indicated that as many as a third of viewers would refuse to switch.<sup>6</sup> The substantial resistance by many members of the British public to switch to digital television is echoed all over Europe, as the take-out figures in Figure 1 show.

### THE ROLE OF PUBLIC SERVICE BROADCASTERS IN THE DIGITAL PLATFORM MARKET

The reluctance of large sections of the public to switch to digital television raises a substantial number of policy issues for European governments, and by extension for public service broadcasters. Most European governments plan to replace analogue broadcasts with the more "spectrum efficient" digital signals. Their aim is to free up part of the electromagnetic spectrum in order to sell it to the private sector for other uses, such as mobile telecommunications.

<sup>6</sup> Great Britain, Department for Culture Media and Sport, Broadcasting Policy Division, *Digital Decisions: Viewer Choice and Digital Television. A Report by the Viewers' Panel to the Secretary of State for Culture, Media and Sport*, December 2001, para. 3.3.

Analogue switch-off, and thus the roll-out of digital terrestrial television, is therefore an important aspect of national economic policy. But matters are not going well. Europe lacks a coherent strategy and there is a widespread downturn in advertising revenues. Furthermore, the EU's recently agreed policy of creating a separate market in program transmission makes it difficult for member states to use public service broadcasters to subsidize digital terrestrial delivery, as opposed to that by satellite or cable. For, although individual member states can provide state aid to public service broadcasters for their programming, it seems clear that EU competition policy prevents them from favoring one delivery system over another. Apparently, if broadcasters using digital terrestrial systems get even one digit's worth of governmental subsidy, the very real threat exists that cable and satellite operators will file law suits in the European Court of Justice, citing an abuse of Europe's rules on state aid. Indeed, Rupert Murdoch has already threatened a similar response if the British government gives any support to ITV Digital.<sup>7</sup>

In order to drive digital terrestrial transmission forward, therefore, the governments of EU member states appear to be adopting two parallel strategies. One is to relax most of the traditional restrictions on analogue broadcasting; the other is to require public service broadcasters to make their programs available on all distribution platforms. The governments of France and Italy are desperately trying to attract private investment in digital terrestrial television by cutting back on cross media ownership rules and by abolishing the link between network providers and content operators.<sup>8</sup> In the United Kingdom, the government has effectively given away the digital terrestrial licenses to the public service operators that have already been licensed for analogue broadcasting, and is proposing to relax the programming requirements for all broadcasters by effectively switching, in essence, to a system of self-regulation. Indeed, it now intends to go further and require all the U.K.'s licensed public service broadcasters—BBC, Channel 4, and ITV—to make their programs available on satellite and cable delivery platforms, by imposing “must offer” requirements on them that require them to make their services available on all three platforms.<sup>9</sup> This requirement will not only cost the UK public service broadcasters a substantial sum of money for hiring satellite transponders and paying encryption fees to avoid territorial overspill for their national channels;

<sup>7</sup> Chris Forrester, “End the Digital Dithering,” *Digital News* 23 February 2002, p. 4.

<sup>8</sup> Pierre Braillard, “The Drive towards DTT,” *Intermedia* 30:1 (February 2002), pp. 24–25.

<sup>9</sup> Great Britain, Secretary of State for Trade and Industry and Secretary of State for Culture, Media and Sport, *A New Future for Communications* (Her Majesty's Stationery Office, December 2000), para. 3.4.2. ([www.communicationswhitepaper.gov.uk](http://www.communicationswhitepaper.gov.uk)).



it will also force them to pay out further sums for their regional programs, as each of them will have to be down-linked on a separate channel.<sup>10</sup>

By linking the “must offer” requirement imposed on its public service broadcasters with a “must carry” requirement imposed on satellite broadcasters and cable operators, the U.K. government hopes to be able to switch off its analogue terrestrial broadcasts without having to roll-out a universal delivery service for digital terrestrial broadcasts. The theory is that viewers will be able to receive public service broadcasts by means of one of the three delivery platforms—terrestrial, cable, or satellite. In some parts of the country however, such as along the South coast of England or in the valleys of Wales, it may be too expensive or too difficult to provide digital terrestrial coverage. This means, therefore, that households in those areas may have to rely on satellite or cable delivery systems, which in turn means that the imposition of a “must offer” provision on public service broadcasters will also assist the economic development of alternative transmission systems. As the U.K. government itself observes:

Viewers who get cable or satellite via a set-top box may want to get all their television service in this way in order to avoid the need for an additional set-top box to receive terrestrial signals. When this is the case, cable and satellite operators *will probably want to carry all public service* broadcasting services without any prompting from Government.<sup>11</sup>

Indeed, it is already clear that cable operators receive substantial economic benefit by carrying public service channels. As the U.K. Office of Telecommunications (OFTEL) recently noted, the public service channels,

have some of the highest viewing by consumers and there is a high level of consumer expectation that such channels will be available. It is possible that without the “must carry” arrangements, platform operators would have to pay a considerable amount to public service broadcasters for these channels.<sup>12</sup>

Thus it is clear, in light of the above, that the U.K. is making sure that its public service broadcasters assist in the growth of all digital platforms—whether

<sup>10</sup> Satellite broadcasters normally have to encrypt their broadcasts in order to assure rights holders in programs that they are not being received in neighboring countries. This is especially important in the European Union, which despite claiming to be a single economic area, has fifteen separate copyright regimes—one in each member state.

<sup>11</sup> *A New Future for Communications* (see note 9). My emphasis.

<sup>12</sup> Great Britain, Office of Telecommunications, *The Pricing of Conditional Access Services and Related Issues: A Consultation Document Issued by the Director General of Telecommunications* (OFTEL, 30 October 2001), para. 3.25. See [www.oftel.gov.uk](http://www.oftel.gov.uk).

satellite, terrestrial, or cable—by requiring them to make their services available on all three platforms.

Viewers, on the other hand, appear to take the opposite approach. In a recent report, the Viewers Panel—which was established by the U.K. government to provide it with advice on consumer attitudes toward digital television and to identify the barriers preventing those who wanted it from obtaining digital television—evinced concern that the U.K. was potentially abandoning its traditional policy of delivering a basic universal service by means of terrestrial transmissions. “Cable and satellite platforms,” it noted, “should add to, not replace, the terrestrial offer.”<sup>13</sup>

The rarely acknowledged truth is that it is viewers who will ultimately have to pay for the switch from analogue to digital television. This will occur in one of two ways. Either the market will subdivide into those viewers who are prepared to pay subscription fees to receive additional channels, while the remainder rely on free-to-air television; or alternatively, it will be public service broadcasters who will drive the switch from analogue to digital by effectively subsidizing all platforms. In many countries, of course, both strategies will run side by side. Thus, not only has the U.K. imposed a duty on all its public service broadcasters to offer their programs on all digital transmission platforms, but it has also raised the television license fee for all viewers by 1.5 percent per annum above inflation between 2000 and 2006. The Davies Committee that reviewed the future funding of the BBC, originally proposed that a digital supplement should be charged to the television license fee, because it would be unfair to charge analogue households for the development of digital services they could not receive.<sup>14</sup> But the British government decided instead to increase the license fee for all viewers in order to provide the BBC with sufficient revenue to finance its extra digital channels. Undoubtedly, one of its reasons for doing this was to hasten digital take-up and thus the time when analogue broadcasts could be switched off. But as the Viewers Panel noted, research indicates that four out of ten British viewers, especially those who are elderly and female, remain unaware of the benefits of digital television, while many of those who are aware of, and even well-informed about, digital TV remain skeptical of its benefits.

While some viewers welcome the increased channel choice afforded by digital broadcasting, many others do not want to pay a subscription for the new channels. This is why U.K. broadcasters are trying to increase public

<sup>13</sup> See note 6 above, p. 4.

<sup>14</sup> Great Britain, Department for Culture Media and Sport. *The Future Funding of the BBC. Report of the Independent Review Panel* (Chairman: Gavyn Davies), July 1999., pp. 4 and 33.

awareness of free-to-air services. But they have had to go further. While BBC digital services are available on all three platforms as free-to-view channels, those viewers who do not want to pay a subscription and want to view only the free-to-air channels, currently have to pay out at least £300 more for additional receiving equipment, such as an integrated digital television receiver or a set-top box converter device for their analogue receiver.<sup>15</sup> It is anticipated that this cost will fall to between £100 and £130 when a number of free-to-view set-top boxes are brought on the market later this year. Many are very basic, containing little more than a tuner, an MPEG-2 chipset, and a COFDM modulator, but others could be more advanced. Not only will it be cheaper for viewers to acquire one of these set-top boxes, but it looks as though their low cost and flexibility will enable viewers to upgrade their receiving equipment comparatively easily, rather than having to replace their entire television set. It seems that in future, public service broadcasters' programs will not only be supporting the sales of traditional television receivers, but also the sales of successive generations of set-top boxes.

#### OPEN VERSUS CLOSED SYSTEMS

The nature of the relationship between the other link in the chain between the digital broadcaster and the viewer, namely the distribution platform for digital interactive services, and its associated encryption system, remained an issue of political debate in Europe until December 2001, when the European Commission reached a compromise with the European Parliament. The commission, which wanted to avoid destabilizing the businesses of existing interactive operators, such as Rupert Murdoch and the French company Canal-Plus, was completely at odds with the parliament's proposal to mandate the open standard DVB-MHP (Multimedia Home Platform) for digital interactive platforms. Finally, both parties adopted a compromise package that struck a balance between sector-specific regulation and EU competition rules. This required member states to "encourage" providers of digital interactive TV services for distribution to the public to use an open API (associated program interface). Member states were also required to "encourage proprietors of APIs to make available on fair, reasonable and non-discriminatory terms and against appropriate remuneration, all such information as is necessary to enable providers of digital interactive TV services to provide all services sup-

<sup>15</sup> A set-top box is an electronic "black box" that converts a digital signal into a number of analogue channels that can be viewed on an analogue television receiver. Pay-TV operators usually provide subscribers with a free set-top box, but viewers of free-to-air digital services are currently expected to buy their own box.

ported by the API in a fully functional form.” How the agreed compromise will work in practice remains to be seen. The directive allows the commission to examine, one year after the date of the directive’s application, whether “inter-operability and freedom of choice for users” has been achieved.<sup>16</sup>

One of the solutions now being canvassed in the United Kingdom to save ITV Digital is for the consortium of public service terrestrial broadcasters, which are behind the emerging market in set-top boxes that will allow viewers to receive digital signals via an analogue set, to include a built-in provision for encrypted pay-TV signals. This proposal would go beyond the current plan to limit the set-top box to converting free-to-air television services. But it has two serious disadvantages: not only would it further the confusion in the public’s mind between digital television and pay television, but it would also increase the cost of the set-top box and require every viewer who purchased a box to pay a one-time registration fee as a potential pay-TV subscriber, whether they wanted to do so or not.

Thus public service broadcasters in Europe are entering a world in which, on the one hand, they are expected to keep the idea of digital broadcasting afloat by providing broadcasts to all households by means of a series of distribution platforms over which they have less and less structural and financial control; and yet on the other, they are having to devise broadcasting services that can both fulfill their public service mission and compete with the services of their pay-TV rivals, which have more ruthless profit-oriented program agendas. Moreover, these pressures are intensifying as the technologies of broadcasting and telecommunications converge. Although channel choice is increasing rapidly, the modes of signal transmission are also becoming ever more diverse, making it virtually impossible for each household to access all the channels offered without installing either several set-top boxes, and possibly more than one aerial or satellite dish.

The strategy adopted by the European Union and the emerging burdens that are being imposed on public service broadcasting is one that should be studied by the rest of the world with care. For the EU is probably the leading proponent of a dual system of public service and commercial broadcasting. It is now clear that in Europe, the packaging of programs, the transmission of signals, and their encryption for interactive use are all businesses from which investors and shareholders increasingly seek to make a profit. Furthermore, it will not be long before the World Trade Organization pressures the nations of the world to follow the EU lead and open up these sectors to a global free market in the electronic transmission of broadcasting services.

<sup>16</sup> EU *Framework Directive on Electronic Communication*, Art. 16a.

## TO SERVE THE PUBLIC

The principal aim of public service broadcasting, on the other hand, in all countries from Afghanistan to the European Union, should be precisely what that name implies: to serve the public. As the European Commission notes, broadcasting represents,

for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately ensures that all citizens participate to a fair degree in public life.<sup>17</sup>

Even so, there are as yet only vague international guidelines to indicate the differences between public service broadcasting and “state broadcasting,” such as that established under the Communist regimes of the USSR and its satellite states in Central and Eastern Europe, or even in General Charles de Gaulle’s France.<sup>18</sup>

Although the precise meaning of the term “public service broadcasting” varies widely from country to country, one of the outcomes of the post-Communist political order in Central and Eastern Europe was the need to establish a common definition of the term that would stretch from the Atlantic seaboard to the Russian border. The result emerged at Prague in December 1994, when the Fourth Ministerial Conference of the Council of Europe, along with the ministers from another six non-member states, unanimously adopted a resolution on the future of public service broadcasting.<sup>19</sup> The resolution covered four principal aspects of public service broadcasting: (a) the informational responsibilities of public service broadcasters; (b) provisions for their funding; (c) their political independence and public accountability; and (d) their access to new technology.

At the center of the Council of Europe’s nine-point mission statement for public service broadcasters lies the right of each citizen in the European public

<sup>17</sup> Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting (Text with EEA relevance), *Official Journal of the European Communities* C 320, 15 November 2001, pp. 5–11, at para. 8.

<sup>18</sup> For General Charles de Gaulle, the role of ORTF was to be “*le gouvernement dans la salle à manger*” (the government in the dining room). It took France nearly twenty years to dismantle this philosophy.

<sup>19</sup> Council of Europe, *4th Ministerial Conference on Mass Media Policy. The Media in a Democratic Society, Political Declaration, Resolutions and Statement*, MCM (94) 20, Resolution 1, The Future of Public Service Broadcasting. For an extensive discussion of the Ministerial Resolution, see Vincent Porter, “The New European Order for Public Service Broadcasting,” in, Eric Barendt et al., eds., *The Yearbook of Media and Entertainment Law 1995* (Oxford and New York: Clarendon Press, 1995), pp. 81–100.

to receive information and ideas that is guaranteed by article 10 of the European Convention on Human Rights, as it has subsequently been elaborated and interpreted in the case law of the European Court of Human Rights.<sup>20</sup> As is evident in the nine-point mission statement below, the resolution seeks to commit the public service broadcasters of Europe to editorial policies that are both impartial and pluralist, with programs that look both backwards to the nation's cultural heritage and forward to the emergence of multi-ethnic societies. At the same time, they are expected both to serve the needs of minority audiences and to be culturally innovative.

### **Nine requirements of public service broadcasting**

(excerpted from Resolution 1 of the 4th Ministerial Conference  
on Mass Media Policy, Prague, 1994)

- (a) to provide, through their programming, a reference point for all members of the public and a factor for social cohesion and integration of all individuals, groups and communities. In particular, they must reject any cultural, sexual, religious or racial discrimination and any form of social segregation;
- (b) to provide a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed;
- (c) to broadcast impartial and independent news, information and comment;
- (d) to develop pluralistic, innovatory and varied programming which meets high ethical and quality standards and not to sacrifice the pursuit of quality to market forces;
- (e) to develop and structure programme schedules and services of interest to a wide public while being attentive to the needs of minority groups;
- (f) to reflect the different philosophical ideas and religious beliefs in society, with the aim of strengthening mutual understanding and tolerance and promoting community relations in pluriethnic and multicultural societies;
- (g) to contribute actively through their programming to a greater appreciation and dissemination of the diversity of national and European cultural heritage;
- (h) to ensure that the programmes offered contain a significant proportion of original productions, especially feature films, drama and other creative works, and to have regard to the need to use independent producers and co-operate with the cinema sector; and
- (i) to extend the choice available to viewers and listeners by also offering programme services which are not normally provided by commercial broadcasters.

<sup>20</sup> The right to receive information and ideas, which is guaranteed by Article 19 of the Universal Declaration of Human Rights, is effectively identical to that guaranteed by Article 10 of the European Convention, although the juridical arrangements for implementing and enforcing them are far weaker than those in the European Convention.

Naturally, the Committee of Ministers recognized that the precise manner in which each country would implement these principles would vary. But even so, for the first time, over forty European countries had agreed upon a common definition of public service broadcasting that they could share with the rest of the world, and which could possibly form the basis of a global convention on public service broadcasting.

### THE FUNDING OF PUBLIC SERVICE BROADCASTERS

The second aspect of the Council of Europe's Ministerial Resolution on Public Service Broadcasting was that it required each state to "maintain, and where necessary establish, an appropriate and secure funding framework which will guarantee to public service broadcasters the means necessary to accomplish their missions."<sup>21</sup> This is by no means easy, since most public service broadcasters now have to survive in an increasingly competitive environment, where commercial broadcasters compete for the sale of advertising air time, for program sponsorship, and even for the provision of subscription services. The problem was especially delicate for the fifteen member states of the European Union.<sup>22</sup> In those countries, the competitive environment established by the Treaty of Rome only allows state aid to be given to "undertakings entrusted with the operation of services of a general economic interest" when not to do so "would obstruct the performance, in law or in fact, of the particular tasks assigned to them."<sup>23</sup> A new article 16 was therefore introduced into the Amsterdam Treaty, which revised the Treaty of Rome and entered into force on 1 May 1999. This article defined the principles and scope of application of the term "services of a general economic interest" and in a protocol annexed to the Amsterdam Treaty spelled out the interpretation of these principles as they applied to public service broadcasting.

After specifying that the system of public service broadcasting in member states was related to "the democratic, social, and cultural needs of each society and to the need to preserve media pluralism" the protocol went on to state:

<sup>21</sup> See note 19 (above): II. Policy framework for public service broadcasting: Funding, para. 1.

<sup>22</sup> Only fifteen members of the Council of Europe are currently member states of the European Union. They are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom of Great Britain and Northern Ireland. Several other European countries hope to accede to the European Union in the near future. Meanwhile several aspects of EU legislation currently extend to other European countries in the *European Economic Area* (EEA) through separate multilateral treaties.

<sup>23</sup> Treaty of Rome, Article 86 (2).

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 fulfillment 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.

Consequently, each member state is authorized to provide funds for its public service broadcaster enabling it to fulfil its public service mission, but not to such a degree as to distort the general competitive environment. Even so, other key policy issues are emerging as broadcasting and telecommunications technologies begin to converge, and as broadcasters switch from analogue to digital broadcasting.

#### STATE AID AND NEW TECHNOLOGICAL DEVELOPMENTS

Technology does not stand still and public service broadcasting needs to take advantage of new technological developments. Indeed, in their 1994 resolution on public service broadcasting, the ministers from the Council of Europe specifically agreed that public service broadcasters should be allowed to take advantage of any new technologies. The technological convergence between telecommunications and broadcasting, and the switch from analogue to digital broadcasting both mean that the word "broadcasting" is becoming progressively more difficult to define. The recent debate in the European Union about how to establish a free market in transmission services, which will be separate from the regulatory regime for broadcasting content, demonstrates the difficulty in disentangling the regulation of content from that of carriage. It is even more difficult to determine how far the state aid that is permitted for public service broadcasters can assist the emergence of a separate and competitive transmission sector.

As noted above, the remit for nearly all public service broadcasters requires them to broadcast their signals to every household, wherever they may be. Whereas a commercial broadcaster only needs to transmit signals to those households that it deems to be commercially worthwhile. Indeed, in many nations, the transmission facilities needed to reach the people who live in outlying parts of the country do not cover the marginal costs of providing the additional transmitters necessary to do so. As long as a public service broadcaster retains its own transmitter network, it can effectively cover these additional costs from its own revenues. But in those nations where public service



broadcasters have been required to sell their transmitters to private companies, the costs for ensuring universal delivery of their broadcasts throughout the highlands and islands of the whole country, they may have to depend both on broadcasting encrypted signals via satellite (in order to avoid overspill) and on commissioning commercial transmission companies to build additional terrestrial transmitters at an inordinately high cost.<sup>24</sup>

Whether the “must offer” requirements that the U.K. proposes to impose on its public service broadcasters could constitute an abuse of the European Union’s restrictions on state aid is currently unclear. A key issue will be whether the Office of Telecommunications is prepared to set the price that public service broadcasters have to pay to Rupert Murdoch for encrypting their signals at a suitably low level. The EU Framework Directive merely says that “appropriate remuneration” should be paid to proprietors of APIs, but elsewhere the European Commission has already noted that,

it is necessary that the State aid does not exceed the net costs of the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid.<sup>25</sup>

In carrying out its proportionality test, the commission has already indicated that it will consider “whether or not any distortion of competition arising from the aid can be justified in terms of the need to provide the public service as defined by the Member State and provide for its funding.”<sup>26</sup> Thus it will be crucial for the commission to decide whether the U.K. intention to require its public service broadcasters to broadcast their digital signals by satellite (and cable) as well as terrestrially constitutes a de facto use of public service broadcasting to subsidize the transmission industry in an unjustified manner and is thus acting as a closet form of subsidy for the transmission industry. A crucial issue in coming to a judgment will be the manner in which the common costs involved in the provision of a conditional access service are charged to the various users of that service, whether they are rival broadcasters or other users. Under the current arrangements, U.K. public service broadcasters pay

<sup>24</sup> In 1990, the United Kingdom government privatized the transmission facilities of the Independent Broadcasting Authority and sold them to an American company, NTL. Later, the government also required the BBC to sell its transmission facilities to another American company, Crown Castle Communications, so that it could spend 80 percent of the receipts on digitalization and return the remaining 20 percent to the Treasury.

<sup>25</sup> Communication from the Commission on the application of State aid rules to public service broadcasting (note 17 (supra.)), para. 57.

<sup>26</sup> *Ibid.*, para. 59.

the same fees as their commercial rivals. Even so, the current regime is under review as the public service broadcasters argue that this arrangement constitutes an unfair burden on their revenues. It is also arguable that the “must offer” obligation itself, which requires public service broadcasters to transmit encrypted signals from satellite, constitutes an abuse of the EU state aid rules, since arguably, if spectrum were made available, it could be cheaper to broadcast free-to-view signals terrestrially.

### BROADBAND AND BEYOND

As new communication technologies emerge, public service broadcasters naturally wish to take advantage of them. Beyond digital broadcasting, of course, lies the possibility of broadband transmission. The difficulty is that Europe, however, has no official standard for broadband. Standards vary from about 512 kb/s and upwards, although American cable modems operate at 10 mb/s. Even there, most households use it merely for e-mail and browsing the Internet, which they can often do already with their computer. In the EU, on the other hand, average broadband penetration is less than 0.4 percent. In the U.K., for example, the cable companies are currently charging their subscribers relatively high subscription fees in order to try and recoup their high investment costs. With insufficient competition to keep prices in check, this probably explains why many public service broadcasters held back from developing broadband services. Instead, they have established interactive websites that viewers can access by computer, rather than via their television screen. In the new digital age, establishing interactive communication with their public is essential for public service broadcasters if they are to fulfil their democratic, social, and cultural informational responsibilities, and interactive web-sites offer the simplest and most effective way to do this. Private sector operators have, of course, objected on the grounds that the establishment of interactive websites constitutes an abuse of state aid, but the European Commission has rejected this claim on the grounds that the public service remit,

might include certain services that are not “programmes” in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.<sup>27</sup>

<sup>27</sup> *Ibid.*, para. 34.

Clearly, the role of Europe's public service broadcasters in the digital age is to provide informational services that address the democratic, social, and cultural needs of each member state, regardless of the distribution technology used.

### FROM TECHNOLOGICAL PROGRESS TO NATION BUILDING IN THE GLOBAL VILLAGE

It seems clear that the role of public service broadcasters is changing from one of technical competence in the delivery of broadcast signals to one of building, sustaining, and (in some cases) rebuilding their nations by meeting the democratic, social, and cultural needs of their citizens. This is especially important at a time when globalization is simultaneously producing two opposing developments. First, the economies of the world's nations are becoming increasingly unstable as international investment capital switches from one economy to another in a relentless search for increased profits or capital growth. In this sense, digital broadcasting will account for an increasingly substantial part of the national economy.

But secondly, the cultural unity of many nations is also starting to come under increasing pressure as people from poorer countries migrate to richer nations, either to avoid political repression or in search of economic advancement. In the digital age, many of these migrants—such as Indians, Arabs, or Turks—are part of a series of cultural diasporae that can, and do, continue to watch satellite transmissions from their country of origin. This can give them a markedly different perception on world affairs from that offered by the broadcasters in their host country. Compare, for example, the coverage of the Israel-Palestine conflict given by Arab broadcasters to that offered by most of their Western European counterparts. This is not because one category is propagandist, whereas the others are objective. The Qatar-based Al Jazeera, for instance, already has a public service based philosophy that is upsetting many of the other Arab-language channels that are fundamentally state-run broadcasting services. Despite the struggle between Israel and Palestine, its BBC-trained broadcasters strive to obtain balanced coverage, and regularly carry interviews with Israeli politicians. And yet Al Jazeera's view of life from inside Palestine is markedly more bleak and disturbing than that seen on any Western European channels. It even carried a video news item with Osama Bin Laden after the 11 September attack, which prompted America to ask its allies to suppress the channel. When they declined to do so, the USA realized that Al Jazeera could become so influential to the Arab diaspora living across the globe that it would have to start up its own Arab-language broadcasts.

As nations become more multicultural and, even polyglot, they have a tendency to fragment into different ethnic sub-groups, which may often watch foreign television stations. As a result, the public service broadcasters of the host nation face an even bigger challenge than before to meet the democratic, social, and cultural needs of their multi-ethnic domestic populations. Their coverage of foreign news will become even more important. Thus, even as domestic pressures for the digitalization of broadcasting grow more intense, so the costs of establishing foreign news bureaus or funding foreign correspondents will become that much more difficult to sustain, let alone expand. The citizens of multi-ethnic nations will demand a wider, not narrower, coverage of foreign affairs.

One way out of this economic and informational dilemma, would be for public service broadcasters to establish a global union, similar to that of the European Broadcasting Union or the Asia-Pacific Broadcasting Union. Not only could a union of this nature reduce costs by providing public service broadcasters with an opportunity to exchange their news coverage of foreign events, but it could also become an arena where its members could share, on a global level, their experiences in meeting the challenges faced by the increased commercialization and digitalization of broadcasting in a globalized world.

It is surely ironic that, although the developed nations of the world have recognized the importance of establishing a new public service broadcasting organization in Afghanistan and other newly emerging democracies, the growing commercialization and digitalization of the global information economy in the economically advanced economies of Europe and elsewhere threatens to reduce, and perhaps even to abolish, the ability of their domestic public service broadcasters to meet the democratic, social, and cultural needs of their own people.