UNIVERSITY OF MALTA

FACULTY OF LAWS

THE ROLE, DUTIES AND OBLIGATIONS OF THE PUBLIC SERVICE BROADCASTER IN MALTA

FRANCIS ZAMMIT DIMECH

(MALTA)

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ABSTRACT

This work covers the role, duties and obligatins of the public service broadcaster in Malta. It explores the subject through different perspectives, including the historical context, a comparative analysis with the situatin in the United Kingdom and Italy, and then by focusing on the main elements that define the remit of the public service broadcaster. Those elements consist of the duty of impartiality, that of imparting information and ensuring objectivity, and the cultural role to safeguard and enhance a country's sense of national identity and offering citizens a sense of belonging thereto.

The thesis covers the legislation relating to the subject matter at a national level – in particular the Constitution of Malta, the Broadcasting Act and relevant subsidiary legislation, as well as Broadcasting Authority regulations and guidelines. At the European level, the thesis covers relevant instruments, such as Council Directives of the European Union, recommendations and decisions of the Committee of Ministers of the Council of Europe, Resolutions of the Parliamentary Assembly of the Council of Europe, and judgments of the European Court of Human Rights.

The thesis includes a critical analysis of judgments of Malta's Courts of Justice and the evolution of thought that has taken place in particular with regard to the concept of 'due impartiality'. The judgments are examined in a chronological order as well as on a thematic basis to assess better this evolutionarly process. Moreover judgments are critically analysed from the point of view of substantive principles that have been established with regard to the subject matter, as well as, and separately so, from the point of view of jurisdictional and procedural issues that have had to be dealt with. These issues are of importance and relevance to practioners in this field as well as to any person who could be a claimaint wtih regard to an infringement on the part of the public service broadcaster.

The thesis concludes with a number of key recommendations that relate to public service broadcasting in Malta. These recommendations include how best to guarantee the independence of the public service broadcaster that cannot remain owned and licensed by Government, how to ensure a more independent Broadcasting Authority, the need to introduce the concept of a single convergent regulator, and how within the context of a broader reform relating to the entire broadcasting landscape in Malta, we need to bring about the closure of broadcasting stations owned by the political parties.

To my brother John

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'The real challenge for public service broadcasting
is not in reflecting democracy,
but its role in nourishing it.'

- *David Hendy,*
Public Service Broadcasting (Palgrave Macmillan)

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Table of Abbreviations

AGCom	Autorità per le Garanzie nelle Communicazioni *(The Communications Regulation Authority, Italy)*
AVMSD	Audiovisual Media Services Directive
BA	Broadcasting Authority
BAct	Broadcasting Act 1991 (Cap. 350 of the Laws of Malta)
BBC	British Broadcasting Corporation
BFBS	British Forces Broadcasting Services
BO	Broadcasting Ordinance, 1961
BSEPA	Broadcasting Services (Emergency Provision) Act 1975
CA	Communications Act 2003 (United Kingdom)
CLARMS	Consolidated Law on Audiovisual and Broadcasting Services (Italy)
CM	Constitution of Malta
COCP	Code of Organisation and Civil Procedure (Cap. 12 of the Laws of Malta)
CoE	Council of Europe
EC	European Commission
EC	Treaty establishing the European Community
ECRA	Electronic Communications (Regulation) Act (Cap. 399 of the Laws of Malta)
ECA	European Convention Act (Cap 319 of the Laws of Malta)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EDRC	European Documentation and Research Centre, University of Malta
EEC	European Economic Communities

ELSA	European Law Students' Association
EP	European Parliament
EU	European Union
GIO	General Interest Objective
GU	Gazzetta Ufficiale (Italy)
GWU	General Workers' Union
HM	Her Majesty's
HOR	House of Representatives
ITC	Independent Television Commission (United Kingdom)
Kollezz.	Kollezzjoni Deċisjonijiet Qrati Superjuri *(Collection of Decisions of Superior Courts)*
LN	Legal Notice
Ltd.	Limited
MAS	Moviment Azzjoni Soċjali *(Social Action Movement)*
MCA	Malta Communications Authority
MLP	Malta Labour Party
NBP	National Broadcasting Policy (2014)
NGN	News Group Newspapers Limited (United Kingdom)
NGO	Non Governmental Organisation
OFCOM	Office of Communications (United Kingdom) (Regulator for the Communications Services, United Kingdom)
OFTEL	Office of Telecommunications
OJ	Official Journal (of the European Union)
PA, CoE	Parliamentary Assembly of the Council of Europe
PBS	Public Broadcasting Services
PCP	Progressive Constitutional Court

PN	Partit Nazzjonalista
PQ	Parliamentary Question
Prof.	Professor
PSB	Public Service Broadcasting
PSBC	Parliamentary Commission for the Direction and Supervision of Public Service Broadcasting (Italy)
PSO	Public Service Obligation
RAI	Radio Televisione Italiana
SL	Subsidiary Legislation
TFEU	Treaty on the Functioning of the European Union
TPPI	The Today Public Policy Institute
TWF	Television Without Frontiers
UK	United Kingdom
USA	United States of America

INTRODUCTION

This work seeks to provide an up to date critical analysis on the what are the role, duties and obligations of the public service broadcaster in Malta in the light of what is provided for in this respect by the Constitution of Malta, the Broadcasting Act (Cap. 350 of the Laws of Malta), subsidiary legislation, practice, leading judgments, as well as by various authors who have explored this theme with regard to public service broadcasting in Malta or in European countries and in that regard what is of relevance to Malta.

The concept of 'duties' is broader than that of 'obligations' which by definition would relate to specific provisions of a legal or contractual instrument or emanating from what is laid down by Courts of Justice. The duties of the public service broadcaster, on the contrary are inherent in its very role, and over and above specific provisions in the law or other sources that create obligations, would always include the duty of imparting information, the principle of objectivity especially in news and current affairs services, the duty of impartiality, cultural obligations including the requirement to safeguard and promote the country's national culture and identity, in broadest terms: the duty to serve as the public's reliable and trusted provider to inform, educate and entertain. Even in an age where social media have become dominant, broadcasting has tremendous impact on how we perceive reality, how we receive information and form opinions, as well as on how we receive different services ranging from the educational and cultural to the entertaining. That explains why the law has consistently sought to regulate this sector and following the onset of pluralism, the role of the public service broadcaster has assumed added significance since it is held that the public service broadcaster has duties and obligations that are specific to its role that in turn are intertwined with what the public has a right to expect in a modern democratic society.

This work seeks to examine different perspectives that relate to the subject. These will include the historico-legal angle – how broadcasting has evolved in Malta, the effect of the introduction of pluralism that has provided direct space, *inter alia,* to the two mainstream political parties, the targets set by the current national broadcasting policy and how that policy could be evolving in the years ahead.

Another important perspective is the comparative context – drawing comparisons with the role of the public service broadcaster in the United Kingdom and Italy. These two countries have been chosen in view of the impact and influence that the UK has had on Malta as a result of Malta's colonial history. In particular specific reference to how the British Broadcasting Corporation (BBC) has been adapting to different challenges over the years will be explored and comparisons have been drawn between that model and what is happening in Malta. With regard to Italy, the proximity of that country to Malta has led to its own impact not only in the historical context, but also in view that the parliamentary scrutiny model followed by that country is one of the options from time to time recommended as a model to follow for the regulation of our own broadcasting sector in the future.

Literature Review

While media law in general has been the subject of multiple publications by authors in Europe as well as in Malta, apart from authors like David Hendy and Christian S Nissen who have specifically looked into the issues concerning public service broadcasting, there is a dearth of literature that directly focuses on public service broadcasting. The author has sought to address this lack by merging together available literature, inclusive of Court judgments by our Courts of Justice and by European Courts, as well as the relevant law and regulations – in order to have one work that deals exclusively and comprehensively with the role, duties and obligations of the public service broadcaster in Malta.

Furthermore, this work looks into future trends and challenges that are to be borne in mind with reference to the evolving nature of the public service broadcaster in Malta. In that regard, this work takes into account legal issues that have evolved over the years and that need to be addressed with urgency. These issues include the challenge of securing the independence of our public service broadcaster, whether or not we should adopt the single convergent regulator model, the future for political stations, and the need to transpose into the laws of Malta the 2018 amendments to the EU Audiovisual Media Services Directive. The transposition of the 2018 Directive has now been seen to through the Broadcasting (Amendment) Act, 2020 (Act No. LVI of 2020).

To the author's mind much of our legislation dealing with the role, duties and obligations of the public service broadcaster is anachronistic to the extent that it does not adequately address the challenges that are highlighted in this work. Thirty years since the enactment of the 1991 Broadcasting Act, a major overhaul is called for, and the author seeks to make specific recommendations with regard to the same challenges.

By way of providing context, the author commences by examining how the role of the public service broadcaster in Malta and other European countries is under scrutiny more than ever.

Up to 1991, the concept of public service broadcasting did not form part of our law. One could rather talk of the national broadcaster enjoying an absolute monopoly since pluralism had not been introduced as part and parcel of our law.

It is for that reason that the author has examined the historico-legal context within which the role, duties and obligations of the public service broadcaster have evolved and in many ways are still evolving in Malta. The broadcasting scene has evolved from one dominated by one service provider that was originally licensed when Malta was still a British colony to one dominated by a nationalised provider that enjoyed a monopoly over broadcasting, and eventually to a completely pluralistic set up where the national broadcaster has morphed into a public service broadcaster with specific obligations towards listeners and viewers in view of this status.

The question of establishing the difference between on the one hand the concept of the State Broadcaster – as Malta experienced throughout the seventies and eighties, and even before – and that of the Public Service Broadcaster which is in theory the model now being followed in Malta is of fundamental importance since it also relates to how well or otherwise is one of the country's tools of democracy working. It will be seen, even in the historico-legal analysis, that public service broadcasting is still owned and run by the State, by Government, and that unfortunately leads to the risk, subject to some legal safeguards – most notably the Constitutional provision to safeguard impartiality in broadcasting – that if and when Government decides to exercise full control over public service broadcasting in Malta, it can do so.

The concept of public service broadcasting – as opposed to the concept of State broadcasting – developed in the early 90s when a new Broadcasting Act came into force (Act XII of 1991, now Cap. 350 of the Laws of Malta). Public Broadcasting Services Limited was set up on 27 September 1991 and took over from *Xandir Malta.* Then, a National Broadcasting Policy was produced in 2004 highlighting the direction that was to be followed with regard to the role, duties and obligations of the public service broadcaster.

The historico-legal context is analysed after going through different sources that can shed a light on the matter. Naturally, the different laws that have regulated the broadcasting sector throughout the years provide one literary source as regards this context. A critical examination of these laws, before the 1991 Act came into being, is provided. Those laws include the Broadcasting Ordinances of 1935 and 1961, apart from references to legislation on wireless telegraphy. The transition from colonial rule to Independence needed to be analysed in depth to examine related constitutional issues of relevance, in particular how broadcasting has featured in the tug of war between the two sides of the diarchy – between the Imperial Government and the Government of Malta after the grant of self-government in the 1921 Constitution, and later the situation prevailing in terms of the 1947 Constitution.

Other literary sources include books that shed some light on the history of broadcasting in general or with regard to some specific aspects relating thereto. In 1986, the author had produced a publication by the name of 'The Untruth Game' that refers to how State broadcasting was provided in the seventies and eighties. Apart from referring to the research already carried out for that publication, the author has referred to: John Bezzina, *Servizzi Pubbliċi f'Malta* (Department of Information, Malta, 1962); Remiġ Sacco, *Ix-Xandir f'Malta* (1985); Michael J Schiavone, *L-Elezzjonijiet f'Malta 1849 – 1981* (1987); the Doctor of Law thesis, by Richard Vella Laurenti, entitled '1991 Broadcasting Act: A

Historical and Conceptual Analysis' (1993); Joseph M. Pirotta, *Fortress Colony: The Final Act, 1945 – 1964* (Vol. II and III) (1991 and 2001); Tony C. Cutajar, *'Ix-Xandir f'Malta'* (2000); a paper by Giorgio Peresso about the establishment of broadcasting in Malta, published in *Arkivju* (2013); Richard Muscat, *Għandi Missjoni Għalik* (2016); and Raymond Mangion, *Legislatures and Legislation in Malta, 1914 – 1964* (Second Edition, 2018).

Further historical information was sourced from the website of Rediffusion – the company that was tasked with providing radio and television services in Malta for forty years (1935 - 1975), as well as from the archives of 'Times of Malta' to refer in detail to newspaper reports and comments about the specific episodes therein indicated.

Moreover, the author has sourced various Reports about broadcasting in Malta, including Broadcasting Authority Annual Reports; the White Paper: 'Broadcasting: A Commitment to Pluralism' (September 1990); Joe A Grima, *Rapport dwar Public Broadcasting Services Limited* (1996) Tony Mallia, *Rapport dwar ix-Xandir* (1997); and the National Broadcasting Policy (2004)

Last, but not least, the author consulted different articles and papers produced by Prof. Kevin Aquilina – all of which shed light not only about the historico-legal context that needs to be borne in mind about the subject matter, but also with reference to different related issues, which explains why Aquilina's papers are referred to in different chapters throughout the work.

While the publications here referred to highlight different aspects of how broadcasting has evolved in Malta over the years, with the exception of the 2004 Broadcasting Policy, the specific focus on the role of public service broadcasting is generally missing. In view of that, the author has sought to use the literature available in order to merge historic and legislative milestones together in an effort to provide context as to how public service broadcasting emerged as a result of the 1991 Act, but then how

elements that pertain to the antecedent historical context that placed emphasis on a monopolistic national broadcaster that seeks to serve the Government of the day, be it of a colonial or independent nature, are still prevalent in our present law and practice, as evidenced by the fact that Government still owns and licences the 'public service broadcaster'.

Another perspective that has been pursued in this work is that of providing a comparative analysis, in particular with regard to the U.K. and Italy models.

With regard to the UK and Italy, the author has used as his primary literary sources the relevant laws of both countries.. Apart from that, the author has sourced documentation that refers directly to BBC (including the Royal Charter, the Operating Licence, Editorial Guidelines and the Framework Agreement) and OFCOM with regard to the position in the United Kingdom, and to RAI (including the National Contract of Service 2018 – 2022) and AGCom in Italy.

Two authors who have produced themselves comparative works are Eric M. Barendt and Irini Katsirea. Although their publications do not reflect the more recent changes, the author has found it useful to refer to their own comparative analysis. With regard to the United Kingdom, a new edition produced in 2018 of Thomas Gibbons' *Media Law in the United Kingdom* proved useful. Other authors whose works were examined include Lesley Hitchens, Tony Prosser, Maya Capello and Roberto Mastroianni; as well as Mastroanni and Arena. As regards Italy, two judgments of the Italian Constitutional Court had that a significant impact on the issue of public service broadcasting have been examined.

The author supplemented the literature regarding the position prevailing in the U.K. and Italy by drawing comparisons therefrom with the situation prevailing in Malta. In the process the author has sought to provide an analysis of where the state of play in

our own country contrasts with or is similar to that in the U.K. and Italy, in order to make recommendations about how our own system of public service broadcasting should evolve in the future.

Further to providing a historico-legal and comparative analysis, the author has given due importance to the legal framework within which public service broadcasting operates in Malta. The main literary sources in this regard are the relevant and salient provisions of the Constitution of Malta, the European Convention on Human Rights, the Broadcasting Act, as well as relevant subsidiary legislation, which sources have been critically analysed.

The presentation of the legal framework would not be complete without the guidelines that have been issued by the Broadcasting Authority, especially with regard to matters that relate specifically to the role of the public service broadcaster. Moreover, the author has examined the Guidelines on Impartiality that have been issued directly by the public service broadcaster.

[1]

In examining the legal framework, other relevant literary sources include the Instruments, such as Council Directives of the European Union, Recommendations and decisions of the Committee of Ministers of the Council of Europe, Resolutions of the Parliamentary Assembly of the Council of Europe, and judgments of the European Court of Human Rights.

[1] Public Broadcasting Services Limited, *Guidelines on the Obligation of Due Impartiality* (2012)

An important monograph that provided the author with much needed information is Kevin Aquilina's Media *Law in Malta* (2014)

The author has sought while referring to these sources to provide focus on the role, duties and obligations of the public service broadcaster as opposed to examining the broader and more general media and broadcasting issues that are covered in the same sources.

When it comes to establishing the more important substantive principles that relate to the role, duties and obligations of the public service broadcaster, the judgments delivered by our Courts of Justice have provided the author with the main literary source. These judgments, the more so when to the extent that they offer pronouncements about the specific duties and obligations which pertain to the public service broadcaster – as with the duty of impartiality, or the duty of objectivity in news and current affairs - required to be critically analysed in this work. . The judgments are examined in chronological order as well as on a thematic basis since the author has felt that that makes it easier to assess how the interpretation of our Courts of Justice particularly with regard to the concept of 'due impartiality' has evolved, generally, but not always in the right direction, over the last fifty-six years.

Since judgments have dealt with both substantive as well as procedural issues, the author has opted to dissect his analysis of these judgments by dealing separately with these two angles. For this purpose, judgments are firstly analysed from the point of view of substantive principles established – such as what constitutes impartiality or objectivity, when and to what extent is the right of reply to be accorded, what constitutes political controversy, the nature of an effective remedy, extending obligation of impartiality directly to all broadcasting licensees, concept of independence of Broadcasting Authority,

quality of reporting required, civil society rights, political advertising, and the impact of pluralism on the concept of impartiality.

An analysis of the substantive principles established to date by the Courts of Justice in Malta in this regard gives rise to a number of issues that call for critical analysis. For instance, how do the concepts of impartiality and fair apportionment of broadcasting time and facilities relate to or complement each other? In *Partit Nazzjonalista v Awtorita' tax-Xandir et (Nationalist Party v Broadcasting Authority et)*, Court of Appeal, (31 July 2003)

[2]

the Court was faced with a situation where preserving balance in terms of one leg of article 119(1) of the Constitution created a 'flagrant imbalance in terms of another aspect of the same article' since it led to unfair apportionment of time and facilities between the different political parties.

This case dealing with political spots in anticipation of the Referendum for Malta's joining the European Union led to the consideration of another issue – does civil society also have a right to have its own voice heard. The fact that the law refers to fair apportionment of broadcasting time and facilities with regard to political parties, to the author's mind, places civil society at a disadvantage, although the author would strongly argue that on the basis of the need to ensure balance, the public service broadcaster is still obliged to allocate space and access to civil society. The other angle from which judgments have been examined regards jurisdictional and procedural issues. It has been felt that the issues raised in this regard merit separate analysis. From the point of view of offering a remedy to enforce the duties and obligations of the public service broadcaster, issues regarding the jurisdiction of the Courts of Justice to oversee such duties as well as

[2] *See:* Chapter 5, pp 231 - 234

other relevant procedural matters are as important to a complainant as the substantive principles themselves.

In particular the author has looked into the issue of whether the Courts of Justice have any jurisdiction at all over the Broadcasting Authority and over broadcasters, and once it was established that such jurisdiction exists, what would be the latitude of discretion allowed to the Authority and broadcasters before the Courts of Justice intervene. Can the Courts substitute their own judgement, or do they merely pronounce themselves on whether an infringement of obligations has occurred? Just as there has been an evolution of thought with regard to the substantive principles established, there has been an evolution of interpretation on the more procedural angle that needs to be borne in mind. Most of the issues examined are of an administrative law nature, in particular relating to the right of judicial review of administrative actions – with reference to decisions of the Broadcasting Authority and at a later stage, directly to decisions of broadcasters. Since the Broadcasting Authority is a constitutional body, the issue of whether jurisdiction pertains to the ordinary courts or to the Constitutional Court had to explored. The same dilemma cropped up in view of the consideration that in some of the more recent cases, complainants have not only relied on provisions relating to broadcasting legislation but also relied on the right to protection to their fundamental human right of freedom of expression.

Again, the author has opted for a largely chronological approach, but equally focusing on the various themes of relevance such as: jurisdiction of courts, whether to base that jurisdiction on the basis of contract or *ex lege,* nature of juridical interest required, which Courts have jurisdiction, particularly at the appeals' stage, to what extent does that jurisdiction extend, latitude of discretion in favour of the Authority, the distinction between interpreting and applying provisions of the Constitution, the meaning of an 'administrative act', as well as the need to deal with such cases with

urgency. One of the more important duties that needs to be fulfilled by the public service broadcaster is that of imparting information, and in the process of ensuring objectivity.

While a private broadcaster could in certain circumstances be exempted from this duty, the same could never be done with regard to the public service broadcaster. An analysis of the *raison d'être* behind this duty is relevant since it could be argued that in an age where everyone is exposed to multifarious forms of information, the role of the public service broadcaster in this regard is facing new challenges. Equally it could be argued that the role now carries with it, more than ever before, the duty of reliability – the duty of being a reference point that one can rely on, precisely as one wades through an indigestion of information that is reaching us all the time in different formats. Hence the role of the public service broadcaster as a provider of information carries with it a duty of trust – an obligation of reliability.

The analysis provided includes an examination of the specific duty of being objective – especially with regard to news and current affairs services. The author has found it necessary to supplement pronouncements by our Courts of Justice regarding the duty of objectivity by referring to a number of judgments of the European Court of Human Rights

[3]

which were examined in view of the important principles established in those judgments, which principles would be applicable to Malta Moreover, all legislation and other Regulations specifically referring to the importance of objectivity in news services has been analysed in order to ensure that all relevant material on this important obligation is brought together in a comprehensive and thorough analysis. Furthermore a

[3] *See* for e.g.: *Manole and Others v Moldova* (2009) (Application no. 13936/02); *Khurshid Mustafa and Tarzibachi v Sweden* (2008) (Application no 23883/06)

sample of relevant decisions on this issue by the Broadcasting Authority, as well as a couple of Court judgments that have dealt specially with the issue of news coverage, are provided and examined critically to complement the other sources that are referred to.

One of the significant developments in the development of the concept of public service broadcasting is the emphasis on the cultural dimension of such broadcasting. In our own Broadcasting Act, '"Minister" unless otherwise indicated means the Minister responsible for culture.' The 'company providing public broadcasting services' in Malta is in terms of that law to be licensed by the Minister responsible for culture (Art. 10, sub-articles 4C and 4D).

Still, in virtue of the Broadcasting (Amendment) Act, 2020 (Act No. LVI of 2020), regrettably the definition of 'Minister' has been substituted by 'Minister responsible for broadcasting.' That unfortunately means that while Government is regularising its position in the sense that the Minister given responsibility for broadcasting has in the current Cabinet of Ministers not been the Minister responsible for Culture, on the other hand the linkage between broadcasting and the Ministry for Culture at Ministerial level is being removed. While this move is regretted at the political level, it is suggested that the cultural remit of the public service broadcaster remains a crucial component of its very *raison d'etre.*

In this regard, it needs to be borne in mind that any 'general interest broadcasting service' must ensure 'that proper proportions of the recorded and other matter included in the programmes are in the Maltese language and reflect Maltese cultural identity.' (Art. 13 (2) (d), Broadcasting Act, 1991) The impact of this dimension which is a crucial element within the role of the public service broadcaster and the consequent duties and obligations that it carries was examined in this work.

Distinction in programmes' quality is one of the more important points of emphasis made in Malta's first ever National Broadcasting Policy published in April 2004 to set out clear guidelines for the public service broadcaster to follow. A 'high educational and cultural element' is considered as one of the 'minimum requirements for national broadcasting.'[4]

In examining this duty that is of most significance in defining the very remit of what public service broadcasting is all about, apart from using, as primary literary sources, legislation, European Union and Council of Europe Instruments as well as how Malta could make better use of same as with regard to the MEDIA programme, the author has referred to authors who have dealt with this obligation. Two works that have been examined and made ample reference to, not least because of their precise focus on public service broadcasting, are: Christian S Nissen (ed) *Making a Difference – Public Service Broadcasting in the European Media Landscape* (2006) and David Hendy, *Public Service Broadcasting* (2013). In the absence of sufficient local literary sources that refer to the cultural remit of the public service broadcaster, in particular from a legal angle, the author has sought to examine the applicability of European legislation, recommendations and programmes that relate to the issue, as well as the works of authors like Nissen and Hendy, to the Maltese context.

The cultural role of the public service broadcaster includes safeguarding and promoting a country's cultural identity through its language. On this specific issue, author has examined specific provisions in Broadcasting Authority regulations and guidelines regarding the correct use of the Maltese language, as well as initiatives taken up in that regard.

[4] Annex 1, Recommendation 748 (1975) on 'The role and management of national broadcasting', 26th Ordinary Session, PA, CoE

The role of the public service broadcaster for the future will clearly bear the impact of "what is commonly called the age of multi-media 'convergence'"[5] In view of that, the author has examined the challenge of whether or not Malta should adopt the single convergent regulator concept, not least in view of the fact that a lacuna in our legislation has come about as a result of internet based television being considered as not requiring to be regulated by the Broadcasting Authority and therefore ending up without any programme content control since the Malta Communications Authority does not deal with programme content. This is a serious legislative and administrative gap that must be addressed with urgency. Moreover, this creates a situation that is incongruous both with regard to the Constitution of Malta that provides for regulation of all broadcasting services as well with regard to the Audiovisual Services Media Directive that again requires regulation of all broadcasting services, irrespective of method of transmission, the more so following the 2018 amendments to that directive that have been transposed into our law.

One of the options that merits to be explored is precisely whether in the light of such present and future trends, Malta needs to opt for a regulatory structure that combines within its remit the various forms of communication. In the UK, the Office of Communications (Ofcom) established under the Communications Act 2003 has replaced various regulatory bodies with one that covers the entire broadcasting industry.[6]

In *Conclusions,* the author has collected together a number of key recommendations that relate to the public service broadcaster in Malta, on the basis of the various issues that are explored in this work These recommendations include how best to guarantee the independence of the public service broadcaster that cannot remain owned and licensed by Government, how to ensure a more independent Broadcasting

[5] Robertson, G and Nicol, A, Media Law, Fully Revised Fifth Edition, 2008, Penguin Books, UK
[6] *See* Chapter Nine, p. 384 - 390

Authority, the need to introduce the concept of a single convergent regulator, and how within the context of a broader reform relating to the entire broadcasting landscape in Malta, we need to seriously look into the future of broadcasting stations owned by political parties in Malta.

Research Methodology

This work has dealt with the subject through a thorough examination of relevant legislation, Regulations, Court judgments as well as salient pronouncements from the Council of Europe, in particular texts adopted by European Ministerial Conferences on Mass Media Policy, and by the Parliamentary Assembly. Moreover, I have examined legislation at the European Union level, including in particular the Audiovisual Media Services Directive. but will also critically delve into what has already been written about this subject by academics and other authors in Malta as well as in Europe, in order that this work may reflect the latest research and body of opinion that is available about this subject.

Writers such as Kevin Aquilina, Joseph Borg and Mary Anne Lauri, Raymond Mangion, Eric M Barendt, David Hendy, Jan Oster, Lesley Hitchens, Peter Carey, Nick Armstrong and Duncan Lamont, Oliver Castendyk, Stephen Cushion, Egbert Dommering and Alexander Scheuer, Oliver Castendyk, Egbert Dommering and Alexander Sheur, Thomas Gibbons, Chris Hanretty, Christian Nissen, and Ireni Katsirea are among the leading authorities on media law and have provided me with profound insight, not least as regards the role, duties and obligations of the public service broadcaster – which insight I have, humbly, tried to reflect in my work. I gained tremendously by going through their publications as well as other publications that are referenced throughout this thesis.

This work, reflects the legal position as at **20 May 2021**. Broadcasting law in general and that with regard to the role, duties and obligations of the public service broadcaster is in a state of constant flux and evolution. Since there is a total co-relation between the quality of service offered by that broadcaster and the state of democracy in any country, it is hoped that the research carried out and recommendations provided will

help towards giving more value to and strengthening to what is in fact a significant pillar of democratic life in any modern European society where respect of fundamental human rights, in particular respect of freedom of expression is truly paramount and allows for no compromises or worse still, any form of manipulation.

1.1 The role of the public service broadcaster

In an age that is dominated by communication systems and information overflow characterised by a multitude of devices and sources, the need of having a public service broadcaster assumes utmost importance. That need can be gauged by examining in depth the role, duties and obligations of the public service broadcaster within the overall context of safeguarding democracy by becoming the trusted provider of what society needs for its fulfilment, be it by way of receiving reliable information, having access to an open marketplace of different opinions and ideas, and, apart from other targets, having culture cherished as a means of enhancing a nation's sense of identity.

The role of the public service broadcaster in Malta and other European countries is under scrutiny more than ever.

> Public service broadcasting matters *now* more acutely than ever…… The sheer *ambition* of public service broadcasting is not just a past achievement of which we can approve – it is also something which today, still, is too precious to throw away.[1]

Legislation and regulations which were originally enacted in view of the scarcity of frequencies and in order to protect the public with regard to a very powerful medium are now being re-examined not only in the light of a far wider choice available to the public as regards traditional broadcast media but also in view of what is becoming available through the new media. Notwithstanding such tumultuous changes, the role of the public service broadcaster is more relevant than ever before. Much as there is a body of opinion that favours in an absolute manner the free market principle, others contend that it is only through public service broadcasting which concept is being

[1] David Hendy, *Public Service Broadcasting (Key Concerns in Media Studies)* (Palgrave Macmillan 2013) 3, 6

changed into that of public service media, that democracy and the fundamental human right of freedom of expression are safeguarded.

The right to freedom of expression is enshrined in Article 10 of the European Convention on Human Rights and Article 41 of the Constitution of Malta. This right -

> 'encompass the audiences' right to receive creative material, information and ideas without interference but subject to restrictions prescribed by law and necessary in a democratic society.'[2]

Carey, Armstrong, Lamont and Quartermaine further point out -

> Competing technologies such as the latest mobile phones and laptops at one end, and live sports in pubs and even cinemas at the other, suggests that the future may involve people pulling out content when they want and where they want it, rather than having it pushed out by broadcasters to suit the agendas(e) of editors and advertisers. These are exciting times.[3]

Broadcasting has, even in an age where social media have become dominant, tremendous impact on how we perceive reality, how we receive information and form opinions, as well as on how we receive different services ranging from the educational and cultural to the entertaining. That explains why the law has consistently sought to regulate this sector in general and following the onset of pluralism, the role of the public service broadcaster has assumed added significance since it is held that the public service broadcaster has duties and obligations that are specific to his role which in turn is intertwined with what the public has a right to expect in a modern democratic society.

1.2 Different perspectives

In this respect, different perspectives that relate to the subject need to be borne in mind.

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[2] Peter Carey, Nick Armstrong, Duncan Lamont and James Quartermaine, *Media Law, (*Sweet and Maxwell, UK, 2010) 244

[3] Ibid 238

> In many parts of the world broadcasting's been run as an arm of the state, so that in dictatorships or imperfectly democratic countries in the former Soviet bloc, Asia and Africa, broadcasting's been a crudely handled and aesthetically impoverished tool of government…. And in many remaining parts of the world – in Western and Northern Europe, in India, Australia and New Zealand, and in Canada, for instance – a completely different model has long existed: broadcasting run neither by the state nor by private commercial interests, but by large public bodies working in what they have thought of as the public interest.[4]

The model followed in the United States of America on the other hand is largely the commercial one. While offering this broad linkage between different broadcasting and political systems in different parts of the world, Hendy makes a strong argument for the need of public service broadcasting:

> Its disappearance would represent a real and deep-seated crisis within liberal democracy. The value of a strong public dimension to media – free of commercial influence or political interference, universally accessible, pluralist in spirit, mindful of the value to be found in collective experiences and in nurturing our collective potential: that has, I believe, been magnified, not diminished, by the proliferation of new channels and new media.[5]

The importance of public service broadcasting to safeguard democracy is an issue that has been debated in Germany, among other European countries.

> …the German Constitutional Court's decisions have been fundamental for the development of the nation's broadcasting sector. The Court has repeatedly stressed the importance of publicly funded broadcasting's functions for democratic government and public opinion formation.[6]

Public service broadcasting makes a commitment towards society that it will contribute to the maintenance of society's foundations and to play a decisive role in the process of making available relevant information to each and every citizen. The German Constitutional Court phrased these considerations as follows:

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[4] Hendy (n1) 2
[5] Ibid 3
[6] Hallvard Moe, 'Commercial Services, Enclosure and Legitimacy: Comparing Contexts and Strategies for PSM Funding and Development' in Gregory Ferrell Lowe and Jo Bardoel (eds) *From Public Service Broadcasting to Public Service Media* (RIPE@2007, Nordicom Göteborg University, Sweden, 2007) 63

> public service broadcasting is both a medium and factor for the individual and collective formation of public opinions, it is an indispensable element for and thus at the core of democracy.[7]

In the consistently held view of the UK Government,

> If anything, people are maintaining PSB (public service broadcasting) as more important, not less, as more and more commercial services crowd on the scene.[8]

No less an authority than the first President of the Czech Republic, Václav Havel pointed out, 'European public service broadcasters are, in my opinion, essential societal institutions in the service of culture and democracy.' Then after outlining why public service broadcasters 'act as guardians of national cultural diversity' – one of the core duties and obligations of such broadcasters, he added:

> Public service broadcasting has, however, an importance beyond cultural diversity. Independent media without ties to specific commercial and political interests are crucial to pluralist political democracy. For millions of Europeans living half a century behind the Iron Curtain that was a painful lesson, which has not lost its relevance now, nor will it do so in the future.[9]

1.3 The remit of public service broadcasting

A public broadcasting service can be defined above all by its remit, which generally includes information, culture, education, the organisation of pluralism, promotion of minority cultures, etc.[10]

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[7] Thomas Kleist and Alexander Scheuer, "Public service broadcasting and the European Union: From 'Amsterdam' to 'Altmark': The discussion on EU State Aid Regulation" in Christina S Nissen (ed) *Public Service Broadcasting in the European Media Landscape* (Eastleigh: John Libbey Publishing / European Broadcasting Union 2006)

[8] UK Government Green Paper, *Review of the BBC Royal Charter; A Strong BBC, Independent of Government* (DCMS March 2005) 2

[9] Václav Havel, Preface to Christina S Nissen (ed) *Public Service Broadcasting in the European Media Landscape* (Eastleigh: John Libbey Publishing / European Broadcasting Union 2006)

[10] André Lange, 'The European Audiovisual Industry at the Verge of Convergence' in Christina S Nissen (ed) *Public Service Broadcasting in the European Media Landscape* (Eastleigh: John Libbey Publishing / European Broadcasting Union 2006)

Also of relevance is the definition of public service broadcasting provided by UNESCO:

> Public Service Broadcasting (PSB) is broadcasting made for the public and financed and controlled by the public. It is neither commercial nor state-owned. It is free from political interference and pressure from commercial forces. Through PSB, citizens are informed, educated, and also entertained. When guaranteed with pluralism, programming diversity, editorial independence, appropriate funding, accountability and transparency, public broadcasting can serve as a cornerstone of democracy.

1.4 Main duties and obligations

The author will be examining in detail the main duties and obligations pertaining to the public service broadcaster. These duties include that of imparting information, the principle of objectivity especially in news and current affairs services, the duty of impartiality, cultural obligations including the duty to safeguard and promote the country's national culture and identity – not least by making suitable provision for Maltese language programmes, the concepts of the Core and the Extended Service Obligations, the General Interest Objective, as well as specific obligations that could relate to time limits on advertising and rules on advertising content – this issue could assume more importance in those situations where the public service broadcaster opts for the public funding revenue model as opposed to funding through advertising, rules regarding providing access to different interest groups, rules to protect children and vulnerable persons, and in general the role model that a public service broadcaster is meant to portray.

All the duties and obligations of the public service broadcaster must be seen from the perspective of the public, the perspective of the people in general. It is all about offering broadcasting that is of service to the public. As one of the BBC Internal Memos

succinctly put it, ''We are not here to influence, but to serve.'[11] The BBC Charter provides for what is known as the 'public value test' which needs to be undergone whenever new services are proposed.

Seeing these duties and obligations from the perspective of the public is what would ensure that the public service broadcaster's main role is that of guaranteeing freedom of expression which includes both the freedom to impart as well as the freedom to receive information. George Orwell in his introduction to *Animal Farm* had pointed out, 'if liberty means anything at all, it means the right to tell people what they do not want to hear.'

Lord John Reith, the Founding Father of BBC hoped that broadcasting would allow people to circumvent 'the dictated and partial version of others'[12] in order that they could make up their own minds.

> This is why a core concern of public service broadcasting from the very beginning has been the notion that it fails to act in the service of the public unless it offers a thoroughly non-partisan approach to reporting the world.[13]

Such fundamental duties and obligations as those pertaining to the need to be impartial and to observe the values of objectivity and accuracy in news reporting and current affairs programmes have this underlying principle at their basis.

Finally, present and future challenges that are to be borne in mind with regard to the evolving nature of the public service broadcaster in Malta as in other European countries are considered, not least since the subject matter being examined is still in a state of flux and evolution.

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[11] BBC Memo, 6 March 1969 (R51/1332/1 BBC Written Archives Centre, Caversham)
[12] John C W Reith, *Broadcast over Britain* (London: Hodder and Stoughton 1924) 4
[13] Hendy (n1) 28

One of the significant ways in which the role of public service broadcasting is evolving reflects the stronger emphasis being placed by society on the values of diversity and plurality:

> There is no doubt… that over time the most important shift in editorial values – not just at the BBC but across all forms of public service broadcasting – has been the steady widening of the range of people, voices, opinions, subject matter and styles allowed on air. In other words, the broadcasters' understanding of democracy has become more demotic. It has taken more account of ordinary people's opinions, and it has included a more accessible set of communicative styles.
>
> …
>
> The element of 'public service' resides in the peculiar mix of standpoints broadcasting can supply at one and the same time.[14]

1.5 Future Challenges

An examination of future challenges then needs to encompass the ongoing controversy that is being generated in view of the constantly evolving context in which broadcasting services in general and public service broadcasters in particular operate, not least the increased competition, the challenges offered by the internet and the new media.

> These challenges are being reflected in broader institutional terms.
>
> Without a commitment to public service, broadcasters are increasingly vulnerable to detailed political interference in the content of programmes….. Broadcasting needs to find a new relationship to the state – a new form of commitment to public service, and indeed a new definition of public service that will work in the conditions of increased competition.[15]

[14] Hendy (n1) 35, 45

[15] James Curran and Jean Seaton, *Power Without Responsibility: Press, broadcasting and the internet in Britain* (Seventh Edition, London and New York: Routledge) 353

2.1 How the Role of Public Service Broadcaster evolved in Malta

Understanding the historico-legal context sheds a light on how the role of the Public Service Broadcaster has evolved in Malta. Moreover, it is proposed to examine the present situation as well as future challenges within this context. What commenced as a monopoly provided by the UK Rediffusion Group when Malta was still a British colony gradually evolved into a different kind of monopoly that was subject to full political control by the Government of Malta. The situation changed again when the principles of having a public service broadcasting setup as opposed to a State-run monopoly was introduced in the laws of Malta alongside pluralism.

The present role of the public service broadcaster in Malta needs to be assessed within the context of competition emanating from a plurality of different radio and television channels, including channels that are owned and run by the two main political parties in the country, as well as within the context of the fact that in Malta, as in other European countries, we begin to see a transition from public service broadcasting to public service media and then again that situation needs to be examined within the competitive environment within which it operates.

The cultural innovation that the twentieth century brought about through broadcasting can be compared for its importance with the invention of printing.[1]

In 1922, in the UK the British Broadcasting Company (later to become the British Broadcasting Corporation – BBC – as known until this day) began a system of regular broadcasts.

[1] Tony C. Cutajar, *Ix-Xandir f'Malta* (PIN – Pubblikazzjonijiet Indipendenza, Malta 2001) ix

By then, in Malta local enthusiasts of wireless telegraphy were, even in 1921, acquiring and applying radio sets to the extent that they had formed their own association. 'Its telegraphic media and telecommunications networks were more developed and far flung.'[2] 'Through the Nominated Council (Lord Plumer) hustled another statute on wireless telegraphy in the form of Ordinance II (1922). This was designed to regulate the apparatus on land. In a matter of weeks, local wireless enthusiasts had proliferated beyond measure.'[3]

Robert Pentland Mahaffy who occupied the post of Legal Advisor in the 'Maltese Imperial Government' was originally expressly requested by the British Secretary of State to engraft into the Maltese legal fabric a replica of an enactment that the British Parliament had passed: the Merchant Shipping Wireless Telegraphy Act 1919, to regulate wireless telegraphy apparatus on ships. Then Ordinance II of 1922 was enacted to regulate wireless on land, and later Ordinance IV was enacted to regulate wireless in relation to men-of-war.[4]

The Ordinance to regulate wireless on land, issued on 10 March 1922, stipulated that radio sets could be held provided there was written permission from the (Imperial) Government. Article 2 of that Ordinance[5] provided –

> 'No person shall, without the written permission of the Governor, make, buy, sell, or have in his possession or under his control any apparatus for the sending or receiving of messages by wireless telegraphy, or any apparatus intended to be used as a component part of such apparatus; and no person shall sell or give any such apparatus to any person who has not obtained such permission as aforesaid…'

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[2] Raymond Mangion, *Legislatures and Legislation in Malta, 1914 to 1964* (Department of Legal History and Methodology, Faculty of Laws, University of Malta, 2nd Edition, 2018) 98
[3] Ibid, 100
[4] Raymond Mangion, 'Aspects on forces of influence by persons and groups under Malta's first responsible government' in Emmanuel Agius and Hector Scerri (eds), *The Quest for Authenticity and Human Dignity* (Faculty of Theology, University of Malta 2015) 317
[5] Wirless Telegraphy Ordinance – Ordinance II of 1922

People liked this method of communication, and after the enactment of the Ordinance, there were thousands of radio sets in Maltese households. As far as is known, the first radio set in Malta, dates back to January 1914 when Perit Robert F. Galea, Retired Royal Engineer Commanding Militia Malta, who had become enthusiastic about building a receiving apparatus after reading the book 'Story of Great Inventions' which he had acquired as a prize when he was still a student at the Lyceum. Then in January 1914 he fulfilled his dream and furthermore managed to build a transmission set which he used a month later to make contact with an American Merchant Ship. In view of the commencement of World War I, he was ordered in August 1914 by Marconi Co. to consign all his wireless apparatus to the nearest police station.[6]

2.2 Commencement of Rediffusion in Malta

Focusing on radio transmissions originating from Malta, -

> 'the history of broadcasting in Malta dates back to 1935 when Rediffusion started operating a wired broadcasting system….Initially many of the programmes were foreign in origin although from the start there was a strong effort to promote Maltese programmes…'[7]

Tony C Cutajar however points out that two years earlier, in 1933, the British authorities were already providing some broadcasts over the radio from their naval base in Malta.[8]

Giorgio Peresso refers to another attempt to provide a cable service that had been made by the Imperial Government, before eventually reaching agreement in 1935 with Broadcast Relay Service Ltd with its Head Office at Bush House, City of Westminster,

[6] John Bezzina, *Servizzi Pubbliċi f'Malta* (Department of Information, Malta, 1962) 51
[7] Francis Zammit Dimech, *The Untruth Game – Broadcasting under Labour* (Malta 1986) 90
[8] Cutajar (n1) 12

London, which agreement is the one that led to Rediffusion commencing its wired services in Malta.

This was happening against the background of Italian propaganda using culture as a medium of influence making headway in Malta through broadcasting.

> Against this background, the imperial authorities viewed the absence of broadcasting on the island as a serious setback for their propaganda requirements. Following a meeting at the Colonial Office in London on 22 December 1932, attended also by the chiefs of the armed forces stationed in Malta, Lieutenant Governor Sir Harry Luke reiterated that "the imperial government can extend the diffusion of British influence in Malta, both for its own sake and as a counter-blast to and subsequent for Italian propaganda in these Islands."[9]

The issue of broadcasting was one of concern to the British authorities even in the preceding years. Raymond Mangion refers to the diarchy situation created through the grant of self-government to Malta in 1921, which meant a system of power sharing between a locally elected legislature handling transferred matters and the 'Maltese Imperial Government' handling reserved matters. It is significant to examine under which category was broadcasting to be considered.

The diarchy entailed having a dual Legislature, namely in terms of the 1921 Constitution, a local bicameral legislature (Legislative Assembly and Senate) and an Imperial unicameral Legislature (Nominated Council), from 1921 to 1930. This meant that control of the island was divided between a responsible and a gubernatorial government: the 'Maltese Government' and the 'Maltese Imperial Government'. Britain entrusted the 'Maltese Government' with the administration of 'transferred matters' or purely local matters like finance, justice, education, public works and health, while it secured external affairs, the so called 'reserved matters' such as defence, immigration, telecommunications, particularly wireless telegraphy, trade and foreign relations to the

[9] Giorgio Peresso, 'The Establishment of Broadcasting in Malta'(2013) 4 Arkivju 17 - 24

'Maltese Imperial Government'.[10] The Maltese Legislature enacted legislation through 'Acts' while the 'Maltese Imperial Government' could enact legislation on 'reserved matters' through Ordinances.[11]

It is worth pointing out that even in terms of the subsequent 1947 Constitution, wireless telegraphy was retained as a reserved matter[12] although as observed by Joe Pirotta[13] while the Imperial Government retained responsibility for the wireless element of the licence to Rediffusion, the Maltese Government was concerned with the wiring system and with broadcasts of local origin. Such overlapping between the two sides of the dyarchy needs to be borne in mind when reference will be made to the 1956 incident between the Government of Malta and Rediffusion.[14] Even with reference to the 1921 Constitution, Andrea Zammit observes, 'The unprecedented system of a diarchy was destined to malfunction owing to the clash-provoking intertwinement of two spheres of interest.'[15] In the words of Prof J J Cremona, the 1921 Constitution 'carried in the folds of its own sumptuous robes, the little rope with which it could be hanged.'[16]

The second term of the first responsible government, from 1924 to 1927 was 'another period of much political and legislative instability within and outside the law-making body.'[17] It is at this time, that in 1926 Governor Sir Walter Norris Congreve rejected an application by an Ireland-born, permanent Maltese resident, John James

[10] The Malta (Constitution) Letters Patent 1921, article 41 (1) (e)
[11] Mangion (n2) 84; Mangion (n4) 303 - 305
[12] The Malta (Constitution) Letters Patent 1947, article 23 (3) (f)
[13] Vide *infra,* 56
[14] Vide *infra,* 54 - 56
[15] Andrea Zammit, 'The Maltese Constitution of 1921 Introuduced a Clash between Responsible Government and Imperial Exigencies in the Aftermath of the Great War' (2011) https://www.researchgate.net/publication/336085561 accessed 23 May 2021
[16] J. J. Cremona, *The Maltese Constitution and Constitutional History since 1813, 1813* (2nd edn, Malta 1997) 35
[17] Mangion (n2) 117

Scorey, to be the first broadcaster in Malta. Sir Walter used the pretext that 'public transmissions were the monopoly of the British Broadcasting Corporation'.[18]

Richard Vella Laurenti in his thesis refers to another concern for the imperial authorities –

> 'To make matters worse for the Colonial Government, the few, bulky radio sets which embellished Maltese homes in the early '30s, were useful almost only for transmissions from Italy on the Medium Wave.'[19]

This led the British authorities in Malta to issue a licence to Lt Cdr Leonard Mansfield Robinson on 7 September 1932 to run a broadcasting service styled 'Radio Distribution (Malta) Limited'. The service was inaugurated at 26, Buskett Road (today Ġorġ Borg Olivier Street), Rabat, Malta on 3 March 1933 but the project ended up as a miserable failure in view of commercial issues, difficulties with the Nationalist Government then in office as well as following a takeover by a group of Maltese shareholders who had a different outlook from the initial promoter. 'In any case, the duration of the licence was supposed to expire on 7 September 1933 and, by that time, Lt Cdr Mansfield Robinson was no longer expected to be in Malta.'[20]

Through the subsequent agreement dated 9th October 1935, which is referred to in the paper by Peresso,[21] Sir Harry Charles Luke, Governor of Malta and acting for the Government of Malta, would grant to the British company, Broadcast Relay Service Ltd a licence to establish maintain and work a broadcast receiving station or stations in the Islands of Malta and Gozo, and that the said company would set up a subsidiary Operating Company by the name of Broadcast Relay Service (Malta) Limited. The

[18] Ibid, 133, quoting National Archives, Petition 115/1926
[19] Richard Vella Laurenti, '1991 Broadcasting Act: A Historical and Conceptual Analysis' (LL.D. thesis, University of Malta, 1993)
[20] Peresso (n9)
[21] Ibid

Operating Company was set up for the purpose of operating the licence, and then began to carry out its business under the name of 'Rediffusion' or 'Rediffusion Company'.

Broadcasting at this stage was considered as a reserved matter pertaining to the Imperial Government as evidenced by the fact that in order to facilitate matters further for the British company that was to start operating a service under the name of 'Rediffusion' and in anticipation of the agreement reached with that company on 9th October 1935, the Governor acting for the Imperial Government, through the Nominated Council, enacted on 23rd September 1935 the Broadcasting Company Guarantee Ordinance[22]. The purpose of the Ordinance was to authorize the Government 'to guarantee debentures issued by the Company to be formed for the purpose of operating a broadcasting receiving and rediffusion station in these Islands.' The definitions provided in Article 2 of this Ordinance spell out how broadcasting was being directly regulated by the Government of the United Kingdom –

> "licence" means the licence to establish, maintain and work a broadcast receiving and rediffusion station or stations in these Islands;
>
> "parent company" means the company to whom a licence has been issued by the Governor with the approval of the Secretary of State for the Colonies;
>
> "Governor" includes the Officer Administering the Government of Malta and its Dependencies.

In terms of Article 3 of the Ordinance, the principal of the debentures to be guaranteed by Government was not to exceed 'an amount sufficient to raise fifteen thousand pounds.'

Clearly at this stage there is no notion of a public service broadcaster with duties and obligations towards the people as a whole, but only the concept of licensing a national broadcaster that would be loyal to the Imperial Government against a

[22] Ordinance XXXIV of 1935

background dominated by the war in Abyssinia and the looming prospect of World War II.[23] The Governor Sir Harry Luke had enacted the Ordinance 'with the aim of relaying pro-British views to the island'.[24]

2.3 Difference brought about by Rediffusion

The difference brought about by Rediffusion in Malta was that the 1935 agreement was now being entered with a company that was already active in the broadcasting field in the United Kingdom and as a result had more experience and expertise in the matter. The Rediffusion Malta subsidiary or Broadcasting Relay Service (Malta) Limited 'was a branch of a very large broadcasting organisation in the UK which had subsidiaries similar to the one operating in Malta, in countries such as Canada, the West Indies and Nigeria.'[25]

In line with an agreement reached between this company and the Government of Malta, a licence was provided to the company through which it could connect its station with people's homes through a cable system.

> Unlike the common radio where the user had the option to choose the type of station which was more appealing, with cable radio it was the choice of the service provider that mattered.[26]

Interestingly enough, seventy years later, broadcasting in Malta as in other countries went through another milestone through the introduction of cable television that includes within its services cable radio, as a means of offering listeners and viewers a wider choice of programming as well as a means of commercialisation of broadcasting.

According to the Rediffusion tribute website[27] in the section 'The Cable Story', this was the first overseas network set up by Rediffusion outside of Great Britain. At this

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[23] *Vide Infra,* 51 - 53
[24] Mangion (n2) 174
[25] Vella Laurenti (n19) 1
[26] Peresso (n9)
[27]Rediffusion ‹http:///www.rediiffussion.info/› accessed 02 January 2014

stage, the company was still known by the name of 'Broadcast Relay' which was 'one of the world's first cable distribution systems. [28]

Rediffusion started operating in Malta on the 11th November 1935 and had fifty Maltese employees through a company by the name of *Broadcast Relay (Service) Malta Ltd*.[29] While 'Rediffusion' was used as a brand name from the very beginning, the change of company name to Rediffusion Malta Ltd. took place in 1955.[30] As indicated above, the decision to introduce this system of broadcasting in Malta was made by the colonial authorities in view of the socio-political situation in the country.

> The colonial government introduced broadcasting in Malta mainly in view of the historical situation which prevailed. The Italian influence on the upper class in Malta began to worry the government and when Italy decided to enlarge its empire through the war in Abyssinia in 1935, the government could not take any more risks. To compound matters further, the few large radios that you would find in the homes of Maltese people in the beginning of the thirties were nearly exclusively used to receive transmissions from Italy on the *medium wave.* It was difficult to receive the BBC on the *short wave*.[31]

Even before Rediffusion began its broadcasts, the acting Governor, Sir Harry Luke had arranged with the Royal Navy to introduce a regular BBC service on the island to combat 'pro-fascist' news and propaganda, through a naval station based in Rinella. The British Government none the less had realised that this system had limited effect since it only reached a small fraction of the people that would congregate in one public square or other to follow the news or some talk but there was no service which reached the whole family at home.[32] The initial radio transmissions which the British colonial government

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[28] Rediffusion, 'The Cable Story' ‹http:///www.rediiffussion.info/cablestory.html› accessed 02 January 2014

[29] Cutajar (n1) 14

[30] Fr Vic George, 'Broadcasting in Malta' ‹http:///www.rediiffussion.info/Malta/history› last accessed 02 January 2014

[31] Cutajar (n1) 13 - 14

[32] Remiġ Sacco, *Ix-Xandir f'Malta (Broadcasting in Malta)* SKS, Department of Information, Labour Party, 1985, 22

beamed from its naval base were in the beginning made through a system of loudspeakers in Malta's various squares in order to provide "balance".

One can form an impression of what the atmosphere was like as regards people gathering in squares to follow broadcasts beamed through loudspeakers through a report entitled 'Broadcast Relay Service at the Palace Square'. The report, accompanied by a photo of a sizeable crowd at the Palace Square in Valletta, carried by the 'Times of Malta' on 20 October 1935 describes the atmosphere –

> A large crowd gathers on the Square and members of the Casino Maltese appear on the balcony of their Club all waiting for the announcer's voice "This is Malta Naval Wireless Station calling". All sorts of people are there, rich and poor alike ….
>
> The crowd is expectant, some attempt to predict what the latest news may be, others are in heated discussions over points of international interest, others condemn the policy of a certain government as bellicose, whilst others inveigh against all dictators.[33]

According to the same report, after a Maltese version of the News in English, there would be a fanfare of bugles heralding the strains of 'God Save the King' and 'everyone reverently bares his head and prays fervently that God may save our beloved King' while hats are replaced at the end of the British National Anthem and the crowd disperses.

From 1935 onwards, the loudspeakers were given over to Rediffusion. The company made use of those loudspeakers to reach the general public but soon enough began providing a cabled service in people's homes, as well as in public buildings such as hospitals and schools, bars, hotels, offices and other venues.

A campaign was carried out to encourage people to subscribe to the new service, with advertisements pointing out that persons could 'have the best possible wireless entertainment' for two and a half pence a day, and without requiring any electricity.

[33] Victor G. Griffiths, 'Broadcast Relay Service at the Palace Square', *The Times of Malta* (20 October 1935)

Adverts published by Broadcast Relay Service (Malta) Ltd. extolled people to 'join in the Swing to Rediffusion!'[34]

Although initially Rediffusion kicked off with some 2,200 subscribers of whom only 594 were Maltese, a figure that was well below expectations, the onslaught of World War II in 1939 led the new British Governor Bonham Carter to embark on an extensive campaign to increase the number of customers all over Malta.

> As much as Abyssinia hastened the inauguration of broadcasting in Malta, so did Hitler's attack on Poland in 1939 accelerate the increase in the distribution of the Rediffusion sets.[35]

It is deemed that by 1955, Rediffusion was available in most homes and the company employed a system through which collectors would visit homes on a monthly basis to collect the monthly subscription fee – set at half a pound.

In the meantime, it should be noted that following World War II, Malta was given another Constitution by virtue of Letters Patent and accompanying Instructions issued by Britain to restore responsible government on 5 September 1947. The diarchal pattern of the 1921 Constitution was closely followed.[36] While wireless telegraphy was considered a 'reserved matter' within the remit of the Maltese Imperial Government, broadcasting was not on the list of reserved matters, but the Maltese Imperial Government had re-entrusted broadcasting to the Rediffusion group.[37]

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[34] Such adverts were carried on a regular basis. *See* for example, *The Times of Malta* (25 April 1936) 2
[35] Peresso (n9) 1
[36] Mangion (n2) 215
[37] Ibid, 215, 217

2.4 Incident with Government in 1956

An interesting episode that highlights the diarchal issue as well as the tension between the Colonial authorities and the Government of Malta when the Labour Party took office in 1955 and which relates to the broadcasting scene took place in 1956.

It is of interest to observe, by way of background, that when Labour took office in 1955, 'first on its agenda, the MLP also placed the establishment of national broadcasting and the installation of a station for television transmissions, phenomena never yet experienced on the island.'[38]

For over three weeks, from the 12th August until the 4th September 1956, Rediffusion went off the air as a result of the Government making it physically impossible for the station to reach people's homes.

The background to the incident is provided by the situation in the Suez Canal when President Nasser of Egypt had taken over the canal and did not want Israel to make any use of it. At the time the Government of the United Kingdom had sent a number of ships to Malta with women and children on board. The British Forces had then asked Rediffusion in Malta to transmit a notice to the effect that the Maltese fishermen were to avoid the ports of Marsaxlokk and St Paul's Bay for six days.

The Prime Minister of Malta, Dom Mintoff had objected to this notice being broadcast and when Rediffusion still went ahead, the Prime Minister insisted that Rediffusion broadcasts a message of protest by the Government of Malta calling upon fishermen to ignore the notice issued by the British Forces. Rediffusion refused to

[38] Mangion (n2) 254, referring to MLP 1955 electoral manifesto

transmit this message on the basis that the company needed to consult the Governor since Malta was still a colony.

The Prime Minister then reacted by ordering government employees to remove the company's poles and the cable system of transmission was as a result rendered non-operational.

> This statement (by the Government of Malta) was not broadcast by Rediffusion Company with the result that (poles) used in the carrying of wires were uprooted and wires were cut, leaving more than 20,000 subscribers out of service[39]

The 'Times of Malta' commented that Government had managed to disrupt the wired broadcasting service in the country, and observed –

> On Sunday in a few hours Rediffusion was silenced. Hitler's bombs failed to do this in war save for short periods in different areas.[40]

The same newspaper referred to this action as a 'violent interruption' in an editorial entitled 'A Wild Act'.[41] Twenty-four days later, Government and Rediffusion reached agreement, the service was resumed and a notice was broadcast to the effect that the two sides were satisfied that Rediffusion was not responsible for the lack of agreement that had existed.

Since this episode happened during colonial times, it has been described as one that required definition of competencies between the two sides of the Dyarchy – between the Imperial Government on the one hand and the Maltese Government on the other. A spokesperson for the Imperial Government was to this effect quoted by 'The Times of Malta' as stating that the 'dispute was fundamentally between the two sides of the Dyarchy, and not between either Government and the Rediffusion Company.'[42]

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[39] Vella Laurenti (n19) 4
[40] 'Did the Electorate Vote for This?', *Times of Malta,* 14 August 1956, 4
[41] 'A Wild Act', *Times of Malta,* 13 August 1956, 6
[42] 'The Two Governments and Rediffusion', *Times of Malta,* 16 August 1956, 3

This factor is explained by historian Joe Pirotta in the following terms –

> When responsible government was restored to Malta in 1947, the Maltese Imperial Government (M.I.G.) became responsible for the wireless element of the licence, whilst the Maltese Government was concerned with the wiring system and with broadcasts of local origin. The Company's licence stipulated that it should place half an hour a day at the disposal of "the Government", which in practice meant the Maltese Government, since the M.I.G. only used the Company's services for occasional announcements connected with reserved matters. Rediffusion's dual responsibility towards the two sides of the dyarchy could result in the Company finding itself emmeshed, as it did on this occasion, in violent disagreement between them.[43]

The UK Rediffusion Group of Companies enjoyed a monopoly for sound broadcasting in Malta and was eventually to enjoy a monopoly with regard to television as well. Having said that, as of the early fifties, the British Services in Malta began a wireless broadcasting service known as BFBS – *British Forces Broadcasting Service.* The broadcasts which were received on radio throughout the country remained operative until 1979 when the British Forces left Malta and BFBS closed down. The station originally transmitted in the Medium Wave band on a wavelength of 202 metres (1430 KHz) until 1971 when it shifted its main transmitter to 93.7 MHz in the VHF / FM band.

2.5 Television Broadcasting

Television broadcasting commenced in Malta in 1962. Five years earlier, in 1957, RAI had set up a booster in Sicily on Mount Camarata at a height of 1,500 metres above sea level, radiating 30KW in the direction of Malta, and the Maltese people began receiving the Italian station in their homes. RAI *(Radio Televisione Italiana)* had commenced its television service in black and white that was received in all of Italy a year earlier.

[43] Joseph M. Pirotta, *Fortress Colony: The Final Act, 1945 – 1964, Vol. II, 1955 – 1958* (Studia Editions, Social Action Movement 1991) 276

A certain Frank Bonnici contrived a television picture apparatus by virtue of which he intercepted audio-visual transmissions coming from nearby Italy via antennae mounted in Sicily. Bonnici managed to receive programmes from France, Switzerland, the Netherlands and other countries. On 11 January 1957 he demonstrated what his television set could do to guests, and the following day, despite inclement weather, a large crowd gathered in Zachary Street, Valletta to see the first ever television screening in Malta.[44] In the meantime, a few established businessmen were beginning to import the first TV sets from Germany, exhibiting them in their shop windows in Valletta and *Il-Ħamrun* where crowds of people gathered to watch RAI transmissions.[45]

The colonial administration reacted to the impact of RAI on Malta and only a year later, in 1958, brought over to Malta Mr Harman Grisewood, then Chief Assistant to the Director of BBC, who after investigating the matter, came to the conclusion that Malta should have its own television station.

Significantly it was also in that year, on 18th October 1958, that the British Governor Laycock had appointed a Broadcasting Board which in its preparatory work was assisted by Mr Grisewood

> (The Board was) made up of Mr Joseph E Axisa. Ex-Commissioner of Police as Chairman, and Professor Joseph Aquilina and Mr Rogartino Cachia as members. Subject to the overriding authority of the Governor the Board was empowered to make arrangement "in a fair and impartial manner" for political broadcasts.[46]

The main remit of the Board was to ensure 'a fair distribution of broadcasts over the Rediffusion system between political parties in Malta'. So much so that when it came to providing for quiz programmes, these were meant to be programmes 'in which members of the political parties and of other groups and interests will answer questions

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[44] Bezzina (n6) 52
[45] Mangion (n2) 268
[46] Joseph M. Pirotta, *Fortress Colony: The Final Act 1945 – 1964* (Vol. III 1958 – 1961, Studia Editions, M.A.S. 2001) 354

put by members of the public.' 'The first step in regulating broadcasting in Malta had been taken.'[47]

Even if the appointment of the Broadcasting Board was meant to be a breakthrough by ensuring that it would be making arrangements for political broadcasting on the same lines as those obtaining in the United Kingdom and that it would follow B.B.C. criteria, its impartiality and credibility were seriously contested by both the M.L.P. and P.N. which 'adopted a hostile attitude towards the Broadcasting Board.'[48] The Board was appointed by the Governor on the basis that he had decided 'to reintroduce broadcasting on political subjects in Malta and its Dependencies'. The Board was a mere administrative entity and was appointed subject to 'the overriding authority of His Excellency the Governor'.

Prior to the setting up of the Broadcasting Board, the Labour Party was arguing that the Maltese Imperial Government 'was stifling opposition by denying them the right to broadcast' while the British Governor was arguing that the former Labour Government had sought to preserve a continuous broadcasting monopoly, with reference to how the Labour Government had dealt with allocation for broadcasts over cable radio during the Integration Referendum campaign of 1956.[49]

This was hardly the time in view of the difficult political situation in the country for the Broadcasting Board to make much headway with its main remit of creating debates and other discussions with the involvement of the political parties. When a month after its set up, the Board tried to organise the first series of political broadcasts and in this sense extended an invitation to the Malta Labour Party, the Nationalist Party and the Progressive Constitutional Party (PCP), both the Malta Labour Party (MLP) and

[47] Ibid
[48] Ibid 144, 355
[49] Ibid 144, 353 – 354. *Vide also* Pirotta (n43) 138 - 143

the Nationalist Party (PN) turned down the invitation and were both rather hostile towards the Broadcasting Board, arguing that the Board was not truly impartial, that there was no proper process of consultation with the major political parties with regard to its constitution, and that the PCP should not have been invited to participate at all in the series even though the Board had only allocated equal time to MLP and to PN but only one third of each of the major party's time to PCP.

The Broadcasting Board attempted to make up for this gap by creating a series of discussions on topical subjects under the title of 'Argument of the Day' but the major parties instructed their Party members not to take part in such programmes and anybody taking part would be doing so in a purely private capacity.

Mr Dom Mintoff as Leader of the Labour Party went further and asked the British Governor to allow the Labour Party to set up a broadcasting station in competition with the Rediffusion system. Mr Mintoff had mentioned the same idea when in 1956 he had ordered the felling of Rediffusion pylons. The answer from the Colonial Government was 'that it was not the government's policy to allow the setting up of broadcasting stations.'[50]

A call for applications for the setting up of a wireless television service was then issued on 4 February 1960. Significantly, in parallel with this development, the scene was being set for the enactment of broadcasting legislation that would lead to the setting up of the Broadcasting Authority.

> The Broadcasting Ordinance bill was published in December 1960 and Mr Kenneth Brown (who had great experience from the BBC system) was appointed to the post of Chief Executive (Designate) of the Malta Broadcasting Authority on 18 January 1961.[51]

The object of the Broadcasting Ordinance was

[50] Ibid 358
[51] Zammit Dimech (n7) 91

> to make provision for sound and television broadcasting services in Malta and to set up a Broadcasting Authority for that purpose; and to make provision as to the constitution, powers, duties and financial resources of that Authority and as to the position and obligation of persons contracting with it for the provision of such services on its behalf; and for the purposes connected with the matter aforesaid.

An analysis of the constitutional situation in Malta providing the background to the enactment of the 1961 Ordinance is relevant. The Labour Government that had ordered the removal of the poles used by the Rediffusion group of companies in 1956 had in 1958 resigned following the adoption of the 'Break with Britain' resolution that was approved unanimously by Malta's House of Representatives. The Nationalist Party in Opposition had declined an offer from the British Governor to take over Government and this led to the Constitution of Malta being suspended. Malta was being governed directly by Whitehall through the British Governor in Malta aided by a Council which was however appointed entirely by the Governor and was therefore not representative of the people.

Tony Mallia in his report about broadcasting observes that the setting up of an independent Broadcasting Authority in 1961 'to regulate broadcasting in Malta was born out of political controversy in the fifties. At that time the British authorities both in Malta as well as in the UK came to the conclusion that measures had to be adopted to ensure that broadcasting would not be subjected to political influence and as a result be manipulated and manoeuvred by a political party.'[52]

> All of broadcasting in our country became the responsibility of the (Broadcasting) Authority that among other matters was given the task to ensure that in the country there will be impartiality as regards political or industrial issues. The time when the government of the day could take full control of broadcasting as had precisely happened between 1955 and 1958 had come to an end, at least for a number of years.[53]

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[52] Tony Mallia, *Rapport dwar ix-Xandir [Translation: Report about Broadcasting]* (Malta Broadcasting Authority 1997)

[53] Lawrence Mizzi, *Minn Wara l-Mikrofonu* (Malta 1994)

2.6 Broadcasting Ordinance 1961 and setting up of Broadcasting Authority

The law setting up the Broadcasting Authority was the Broadcasting Ordinance - Ordinance XX of 1961, enacted on 28th July 1961. Controlling the police and broadcasting and bringing same under gubernatorial control are indicated by Mangion as among the important measures introduced after the return of Crown Colony rule from 1958 to 1961.[54] In fact the enactment of this Ordinance was carried out by Admiral Guy Grantham, Governor of Malta, three months *before* the 1961 Constitution was enacted by Order in Council on the 24th October 1961. Significantly the 1961 Constitution included in its own 'reserved matters' list a number of bills that the Maltese legislature could not enact unless the Governor had previously obtained the instructions of the Queen of the United Kingdom through the Secretary of State in that regard, and failing such instructions, the Governor would reserve such bill 'for the signification of Her Majesty's pleasure'. The bills included in this 'reserved' list included any bill to amend, repeal, or otherwise appear to the Governor in his discretion, to affect, any provisions of the Broadcasting Ordinance 1961.[55] In other words, not only was the Broadcasting Ordinance enacted before the enactment of the 1961 Constitution which restored self-government to the people of Malta, but the 1961 Constitution had a provision to protect that Ordinance from being amended or repealed by the Maltese Parliament, unless with the specific approval of the Colonial Government.

The leader of the Malta Labour Party had considered the Ordinance as dictatorial arguing that the 'protection of religion clause' (still present in the present broadcasting law) was a restriction to freedom of speech. Despite Mr Mintoff's opposition to this law, Sir Guy carried on with his legislative proposal through the Attorney General's office and

[54] Mangion (n2) 275, 284
[55] Malta (Constitution) Order in Council 1961, art. 76 (d) (ii)

the Executive Council.[56] The Ordinance was brought into force by the Governor and the Authority was appointed in terms of that law. Aquilina points out -

> The Malta Broadcasting Authority as it was originally known, came into existence on September 29, 1961 when the Broadcasting Ordinance 1961 was brought into force. In 1964 it was upgraded to a constitutional authority and renamed Broadcasting Authority.[57]

The Malta Broadcasting Authority replaced the former Government Broadcasting Board.[58] As of that date, all broadcasting services, be it through radio or through television, except for BFBS, became the exclusive responsibility of the Authority.[59] In 1966, the Authority was deprived of that exclusivity, and the Authority was vociferously critical of that decision.[60]

An examination of the main features of the Broadcasting Ordinance 1961 sheds considerable light on how the role, duties and obligations of the public service broadcaster, even if this designation was not being used at this stage, were then perceived and how such role, duties and obligations have evolved since then. It is in this respect significant that the present broadcasting legislation still reflects a number of fundamental principles (such as the principle of ensuring that programmes maintain a proper balance in their subject matter, the principle that any news was to be presented with due accuracy and impartiality, and the principle to ensure that due impartiality is preserved as respects matters of political or industrial controversy or relating to current public policy[61]) that were laid down in that Ordinance.

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[56] Mangion (n2), 288

[57] Kevin Aquilina, 'Safeguarding the Public Interest in Broadcasting: Celebrating the Broadcasting Authority's 50th Anniversary', *The Times of Malta,* 29 September 2011, Malta Broadcasting Authority 50th Anniversary Supplement, 4

[58]Fr Vic George (307)

[59] Cutajar (n1) 43

[60] Aquilina (n57)

[61] Broadcasting Ordinance 1961 (BO 1961) – Ordinance No. XX of 1961 – art 7 (b), (c) and (g)

The 1961 Ordinance established that the function of the Malta Broadcasting Authority was to 'provide … sound and television broadcasting services in Malta and such function shall be vested solely in such Authority.'[62] Still, the Ordinance then provided that these services 'may be provided for and on behalf of the Authority by broadcasting contractors' and such contractors would then have 'the right and duty to provide such services for and on behalf of the Authority, which right and duty in respect of any such services may be conferred by the Authority under a contract as an exclusive right and duty for the duration of the contract without prejudice to the right of the Authority to provide such services.'[63]

The Chairman and all members (the number of whom was to be not less than three and not more than six) of the Malta Broadcasting Authority were appointed by the Governor, so however that one of the members was to be nominated by the Metropolitan Archbishop of Malta, and another by the Vice-Chancellor and Rector Magnificus of the Royal University of Malta.[64] The Governor reserved the right to direct at any time that any member of the Authority 'shall cease to hold office.'[65]

Another important right that was reserved by the Governor was the appointment of the Chief Executive 'from among persons appearing to the Governor to have had experience of, and shown capacity in, dealing with problems associated with broadcasting.'[66]

The Governor could also by notice direct the Authority –

> to broadcast, at such times as may be specified in the notice, any announcement or other material so specified, with or without visual images of any picture, scene or object mentioned in such announcement' and equally could by notice require

[62] BO 1961 art. 3(1)
[63] BO 1961 art. 3(2)
[64] BO 1961 art. 3(4)
[65] BO 1961 art 3(5)
[66] BO 1961 art 4

the Authority to refrain from broadcasting any matter of classes of matter specified in the notice.[67]

All powers conferred upon the Governor in terms of the Broadcasting Ordinance were to 'be exercised by him in his discretion.'[68]

The Ordinance furthermore provided that the revenue of the Authority was to consist of such sums as it could collect from the broadcasting contractor, as well as an allocation of funds that Government would start providing to the Broadcasting Authority that however was not to exceed the greater of revenue collected from wireless and television licences after deducting Lm 15,000 (€ 34,500) incurred for the collection thereof, and Lm 45,000 (€ 103,500) which therefore became the maximum capping, established by law, of the level of financial assistance that Government could provide annually to the Malta Broadcasting Authority.[69]

The day before the Broadcasting Authority was set up, that is on 28th September 1961, the colonial Government signed three agreements with Rediffusion through which the latter was given the exclusive right to broadcast through cable radio, and through television for twenty-five years. The third agreement, in respect of a wireless radio service and effective for a period of ten years, was never made use of, except for some periods of test transmissions.[70] These agreements were signed by the (Colonial) Government of Malta through the Chief Secretary and Rediffusion (Malta) Limited, referred to in the agreements as 'the Contractor'. The agreements specifically refer in their first premise to the coming into force of the Broadcasting Ordinance through which the Broadcasting Authority was being established with the exclusive function of providing sound and television broadcasting services in Malta, but that the Authority could provide those

[67] BO 1961 art. 11
[68] BO 1961 art. 15
[69] BO 1961 art. 12
[70] Zammit Dimech (n7) 92

services through a contractor. The agreements were 'to have effect in favour of and against the Authority as if, instead of the Government, the Authority had been party hereto.' The Government contracts with Rediffusion were moreover safeguarded through article 15 of the new Broadcasting Ordinance which provided that 'any contract entered into between Government and a broadcasting contractor before the commencement of this Ordinance relating to the provision of any broadcasting service shall have effect in favour of and against the Authority as if, instead of the Government, the Authority had been named therein or had been a party thereto.'

The rights pertaining to Government were on the basis of these agreements transferred to the Broadcasting Authority which meant that once the Authority was set up, Rediffusion became its broadcasting contractor in terms of the new law and the obligations which Rediffusion had vis-à-vis Government became the company's obligations vis-à-vis the Broadcasting Authority, apart from the fact that the new law established the Authority as a broadcasting regulator which gave it additional powers in terms of law. This means that there were then two levels of obligations vis-à-vis the Authority: *ex contractu* and *ex lege.*

One of the very purposes behind the setting up of the Authority was to control this company since as Mr Hugh Fraser – then Colonial Under-Secretary had stated in the House of Commons in the UK in reply to comments made by Labour Member of Parliament Sir Leslie Plummer: "I believe if there is to be a monopoly, it is important to see there is set up an Authority which will see that proper control is carried out on both programmes which are on the air and television."[71]

In the meantime, Malta was on the path to regain self-government and the 1961 *Blood Constitution*[72] led to the holding of fresh General Elections between the 17th and 19th

[71] Ibid
[72] The Malta (Constitution) Order in Council 1961

February 1962. The *Blood Constitution* is so named after Sir Hilary Blood, the Constitutional Commissioner appointed by the UK Government on the 27th July 1960. Sir Hilary was tasked with drawing up a new Constitution after consulting the political parties and civil society. A report was drawn up by Sir Hilary on the 15th December 1960. The report was accepted by the British Government on the 8th March 1961 leading to the granting of a new Constitution to Malta, in terms of his report, on the 24th October 1961. The 1962 General Elections were held in line with that Constitution.[73]

The BA was put to the test to ensure that the broadcasting services provided an impartial service and to organise a scheme of political broadcasts in anticipation of those General Elections.

One of the broadcasts which formed part of that scheme and which was meant to be aired on the 25th January 1962 was withheld by the BA. It was a speech by the Labour Party leader Dom Mintoff and the BA held that part of the text offended religious sentiment in violation of the Broadcasting Ordinance. The Labour Party leader refused to alter the script of his speech, and when the broadcast was withheld, the Labour Party reacted by making a recording of the same speech and sent it to every Labour Party club in the country as well as transmitted it to Malta from outside the country. It is significant to point out that Malta's present broadcasting legislation still provides against offending religious sentiment.

The 1962 General Elections were won by the Nationalist Party and the new Prime Minister was Dr George Borg Olivier who had as his immediate and most important task to demand Independence for Malta from the British Government.

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[73] Michael J Schiavone, *L-Elezzjonijiet f'Malta 1849 – 1981 (Translation: Elections in Malta 1849 – 1981)* (Pubblikazzjoni Bugelli, Malta 1987) 71

Malta became an Independent Sovereign State on the 21st September 1964. The country was granted a new Constitution and the BA became a constitutional body whereby its set up and its functions are provided for and entrenched in terms of what are now articles 118 and 119 of that Constitution. A week after that the new Independence Constitution came into force, the new members of the Authority were appointed, with Mr Justice A J Montanaro Gauci serving as Chairman and Mr John A Manduca serving as Chief Executive. Mr Manduca succeeded Mr Brown who had been made available by the BBC when the Broadcasting Authority was set up in 1961.

Following Independence, all references in the Broadcasting Ordinance to the Governor became references to the Governor-General[74] who would now need to act on the advice of the Government of Malta since the 1964 Independence Constitution put a definite end to all forms of colonial control or shackles.

In the run up to the referendum whereby the people of Malta had to vote whether or not they favoured the new Independence Constitution, the Broadcasting Authority drew up a scheme of political broadcasts that were focused on the referendum. Regrettably another broadcast by the Labour Party had to be withheld on the basis of lack of agreement on the script of a broadcast that had to be made by Dr Anton Buttigieg, Deputy Leader of the Labour Party. As a result, the Party quickly made arrangements in order to transmit its messages to the people in Malta, on a daily basis, from Cairo.[75]

Remiġ Sacco refers to this incident as follows –

> The Labour Party then sent Lorry Sant (then a Member of Parliament and Minister from 1971 onwards) to Cairo in Egypt in order to make arrangements for the Party to make its voice heard through a radio station in that city. Transmissions in

[74] Malta Independence Order 1964, Adaptation of Laws Order 1965 – L.N. 46 of 1965 – art 3

[75] Cutajar (n1) 44. On the same page the author reproduces a photo of Labour Party spokesperson Lorry Sant in Cairo where he had gone to transmit Labour Party messages to Malta in connection with the referendum campaign with regard to Malta's Independence.

> Maltese from Cairo began on Monday, 20th April (1964) and would last for half an hour every evening.[76]

2.7 Inauguration of Malta Television

Television broadcasting which had become the responsibility of the Rediffusion Group of Companies commenced after the 1962 General Elections. A subsidiary company of that group by the name of Malta Television Service Ltd, on the 28th June 1962 for the first time ever in Malta's history of broadcasting managed to transmit pictures from one part of the island to the other, but the more significant date is 29th September 1962 when television transmissions commenced with messages for the occasion by Her Majesty Queen Elizabeth II, His Holiness Pope John XXIII, and Prime Minister of Malta, Dr George Borg Olivier.[77]

In his speech on the occasion of the inauguration of Malta Television, the Prime Minister made the point that the "Maltese people have no voice in the running of television". A letter by the Acting Director of Information to 'The Sunday Times of Malta' published on October 7, 1962, to correct misreporting by the paper with regard to the same speech, pointed out that 'in actual fact the speech read as follows' -

> All preparations and the contract were made under the previous (Colonial) administration and up to this very day, the Government and the Maltese people have no voice in the running of television though they pay well for its upkeep. But I hope it will not be long before Malta will have a direct participation in this medium which is so important in man's life.
>
> In their programme for the general elections, the Government's party had provided for the building of a national radio station and for the examination of the television question so that the national interest will be served.[78]

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[76] Sacco (n32)103

[77] Cutajar (n1) 53. Transmissions were in black and white until the switch over to colour which took place nearly twenty years later, on the 8th July 1981.

[78] Ibid 57

It was the new Governor of Malta, Sir Maurice Dorman who inaugurated the opening of the Malta Television Service. Following the inauguration, the leader of the Labour Party, Dom Mintoff, sent a petition to Sir Maurice Dorman dated 25 October 1962, arguing that the 'protection of religious sentiment' clause ran afoul of the constitutionally entrenched 'freedom of expression'.[79] The Opposition persisted with its pressure on this issue in the first half of 1963.[80]

Following Independence, the Broadcasting Authority was set up in terms of Malta's new Constitution and had its first Maltese Chief Executive Officer appointed. The Authority extended facilities for ministerial broadcasts by whoever would be in Government but kept intact the formula used for the allocation of time to Parties contesting a General Election, which since 1947 related to the number of candidates fielded by each Party with the Electoral Commission.[81]

In September 1965, the Authority became a full member of the Commonwealth Broadcasting Conference, and later in January 1970, became a full member of the European Broadcasting Union.

2.8 Broadcasting (Amendment) Act of 1966

The Nationalist Party was re-elected in the General Election held on 26 – 28 March 1966. Following that Election, Government moved that same year to address its concerns about what it considered as not adequate enough 'voice in the running of television (and radio)' by enacting the Broadcasting (Amendment) Act of 1966.

Following this law –

> the (Broadcasting) Authority was deprived of the exclusivity of the function to provide sound and television broadcasting services since now these were also

[79] Sacco (n32) 100
[80] Mangion (n2) 295
[81] Cutajar (n1) 57 - 58

> extended to the Government or to "any person, body or authority under licence from or under arrangements with the government." This implies that Government can run its own radio station although it would be subject to the Authority in certain respects …[82]

Moreover, as a result of the amendments introduced in 1966, the composition of the Authority was altered in the sense that appointments made by the Archbishop and the Vice-Chancellor of the University as provided for in the original Broadcasting Ordinance of 1961 were removed, and now the law simply provided that "the number of members of the Authority, other than the Chairman, shall not be less than four nor more than six."[83]

Interestingly, the promise made by the Nationalist Party in its 1962 General Election Electoral Programme that the country would have its own national radio station which was referred to by the Nationalist Prime Minister when he was inaugurating Malta Television, and for which provision was made in the 1966 amendments, became a reality after a change of Government in the 1971 General Election when the Labour Party was elected to office and Dom Mintoff was again Prime Minister of Malta.

Following that General Election, in 1972 Mr Joe Grima was appointed as Chief Executive of the Broadcasting Authority by the Prime Minister after consulting the Authority. The procedure followed for the appointment of Chief Executive was that introduced through the 1966 amendments to the law. Grima who had been Head of Programmes with Rediffusion was specifically tasked with setting up Radio Malta.

[82] Zammit Dimech (n7) 101
[83] Broadcasting Act (Cap 350 of the Laws of Malta) 4(2)

2.9 Inauguration of Radio Malta

Earlier that year, on the 28th March, the Broadcasting Authority had declined to accede to a request by Malta Television Service Limited to grant a further extension to the licence that it had received in 1962 through which it was given ten years of exclusivity to operate a wireless radio service.

> In the end, the two radio frequencies formerly assigned to the Malta Television Service Ltd. were surrendered in March 1972 to the Broadcasting Authority. This withdrawal led to the inauguration on January 8, 1973, of Radio Malta – Malta's first radio service …[84]

> The wireless radio service was then set up by the Broadcasting Authority itself.

> Hence Radio Malta run not by contractors but directly by the Broadcasting Authority commenced transmissions on 8 January 1973 and one year later Radio Malta extended its schedule of programmes to turn into a regular station, since for the first year it only relayed two musical programmes and a news service for a limited part of the day. During the short period that Malta's wireless service was run by a different organization to that running the Cable Radio and television service, Malta had the temporary advantage that there was no monopoly in this sector, apart of course from the controversy as to whether the Broadcasting Authority is competent to run itself a radio station when its constitutional role is to serve as a watch-dog.[85]

'Radio Malta became a regular station with seventeen hours of daily local programmes. Transmissions reached Tripoli, Tunis and all of Sicily. This was a very important development in the history of broadcasting not only because it was the first time that Maltese programmes were being received beyond Malta's shores, but also because of the flexibility that radio began to offer its listeners.'[86]

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[84] Vella Laurenti (n19) 16
[85] Zammit Dimech (n7), 93
[86] Cutajar (n1) 60

Radio Malta run by the BA evolved into a service of three different channels with Radio Malta 2, focusing on news and music, which followed on May 1, 1974, and Radio Malta 3 which became known as Radio Malta International followed on 8 September, 1974.

2.10 Nationalisation of broadcasting

The two-year absence of monopoly in broadcasting in Malta was not to last and the situation evolved in a different direction in 1975. The tone was being set as talks between the General Workers' Union (GWU) representing the majority of employees at Rediffusion and Malta Television ended up in deadlock when according to the Union, management was refusing to bind itself to offer terminal benefits to the employees in the eventuality of nationalisation of broadcasting. The General Workers' Union was at this stage "married" to the Labour Government to the extent that a representative of the Union was invited to participate regularly in the Labour Government's Cabinet of Ministers' meetings.

On the pretext of the lack of agreement over terminal benefits, on February 14, 1975, GWU ordered a 'sit-in' by Rediffusion employees at the broadcasting premises. The sit-in also involved a lock-out of management officials. Broadcasting services by Rediffusion and Malta Television went off the air for a number of days until a committee of workers took over control and services resumed subject to the control of the committee that was set up.

The situation prevailing was clearly illegal, and Government proceeded to rectify matters by going to Parliament and enacting a law on February 25 entitled the Broadcasting Services (Emergency Provision) Act 1975 (Act IX of 1975). The Act was meant to make "temporary provision for the establishment of an Emergency Council to conduct and carry on all or any part of the business of Rediffusion (Malta) Ltd. and of the

Malta Television Service Ltd., and to provide for matters connected with or incidental to the purpose aforesaid." 'Among other things, the Emergency Council was empowered to terminate the employment of any person, without need for a "just cause" as it deemed appropriate.'[87]

This law was meant to prevail over 'anything contained in any (other) law, or in the Memorandum and Articles (of Rediffusion (Malta) Limited, and of The Malta Television Service Limited), or in any deed, contract, licence, instrument or other document.'[88] The General Council constituted in terms of this law was appointed by the Prime Minister and subject to such directions as the Prime Minister could from time to time give to the Council. The Council was empowered to exercise with regard to Rediffusion (Malta) Limited and The Malta Television Service Limited all the powers which would normally 'be exercisable by the Directors or by any of them, or by a meeting of the Directors or by the Board of Directors' while 'all the powers of the shareholders and of the Companies, whether in general meeting or otherwise' were to 'remain in abeyance.'[89]

The law remained in force long enough for a number of key persons within Malta's broadcasting set up at that stage to be removed from the scene. One such person was the Head of the News Division.

A month following the enactment of emergency legislation that sought to make temporary provision for the running of the business of Rediffusion (Malta) Ltd. and of Malta Television, Government, through Parliament, enacted the Telemalta Corporation Act (Act XVI of 1975) "to provide for the establishment of a body corporate to be known as 'Telemalta Corporation'" 'This would have the sole and exclusive authority to provide

[87] Zammit Dimech (n7) 94
[88] Broadcasting Services (Emergency Provision) Act 1975 (BSEPA 1975) – Act No. IX of 1975 – art 2(2)
[89] Ibid art 4(2)

for the transmission of messages by telephone, telegraph, telex or other means of telecommunication *and broadcasting.*'[90]

It is against this background that on July 30, 1975 agreement was reached, between Government and Rediffusion, for the transfer of all assets, including all immovable property, all movables, cars and all broadcasting equipment and inclusive of the contracts that had been entered into originally with Government and subsequently with the Broadcasting Authority. These assets were transferred from the Rediffusion Group of Companies to the newly set up Telemalta Corporation. The transfer was affected for the price of Lm 500,000 (approximately € 1,165,000). The Prime Minister made a statement in Malta's House of Representatives on 13 August 1975 wherein he indicated that Government 'had intended to pay Lm 600,000 (c. €1,398,000) but eventually paid only Lm 500,000 since Government took up the obligation to pay itself terminal benefit(s) to the workers, *except* to those persons whom the Workers' Committee, appointed during the sit-in, refused to work with any more, and who were thus dismissed without just reason in virtue of the BSEPA of 1975.'[91]

Following the setting up of Telemalta Corporation, the Broadcasting Authority transferred its own Radio Malta stations to this Corporation which was now broadcasting both through a cable system – the Rediffusion service was renamed 'Cable Radio' – as well as through wireless radio services. The Cable Radio service incorporated in its schedule many of the Radio Malta programmes, and the Broadcasting Authority which in theory resumed to act solely as a broadcasting regulator transferred those members of its staff who were responsible for programming as well as much of its technical equipment to Telemalta Corporation. The broadcasting division within this Corporation became known as *Xandir Malta* and this entity became solely responsible for all

[90] Zammit Dimech (n7) 95
[91] ibid, 95

broadcasting services in Malta with control totally centralised. Eventually the wireless and cable radio services were practically amalgamated – while the two services operated by Cable Radio and Radio Malta were operated in parallel - and that situation prevailed for fourteen years until 1989 when the cable radio service in Malta closed down.

This means that in the space of fourteen years, the three agreements that in 1961 were initially binding between Government and the Rediffusion Group of Companies, and then were binding between the Broadcasting Authority – in lieu of Government in virtue of the Broadcasting Ordinance 1961 and the Rediffusion Group, ended up binding between the Broadcasting Authority and Telemalta Corporation in 1975.

Telemalta Corporation was a public corporation subject to Government control. In particular it is relevant to point out that in terms of Article 28 (2) of the Telemalta Act whenever a general manager is appointed, he is "selected with the approval of the Minister (responsible for telecommunications)". This means that at this stage of Malta's broadcasting history, the approval of the Minister was required for the appointment of the general manager who would be responsible for the broadcasting division within that corporation.

This form of Government control meant that at this stage Malta had State broadcasting rather than public service broadcasting as would evolve at a later stage. Moreover, such Government control deprived the broadcasting service in Malta from being independent and as a result the service often failed to provide an objective and impartial service in line with the Constitution and relevant legal provisions, as evidenced through various court cases that were presented for lack of impartiality throughout the seventies and eighties.

Vella Laurenti observes –

> A record number of cases relating to broadcasting matters were registered during 1976. The Nationalist Party protested against the broadcasting media by means of a high-level delegation which on January 23, 1976, presented a memorandum to the Malta Broadcasting Authority accusing it of having failed to carry out its duties according to the Constitution and the Broadcasting Ordinance. The Party alleged that the Broadcasting Authority was allowing, daily and constantly, partial broadcasts on radio, Cable Radio and television planned to condition the people in favour of the Government and the Socialist Party.[92]

Freedom from political control is the only means to ensure balance and impartiality as expected from broadcasters in general, and from public broadcasters in particular. The point was succinctly made by former Labour Prime Minister James Callaghan in the UK on the occasion of the inauguration of the new BBC Headquarters in Manchester on 18 June 1976 -

> In this country it is the broadcasting organizations which are responsible for programme content. Sometimes your decisions and actions give me pain and I find myself having to explain to overseas countries, when they are hurt by what you say about them, that the Government does not control you. Even when I have convinced them of this, they still think the Government could do something to stop you if it had the will. I then go on to say that, domestically, you and we sometimes have differences but that none of these differences has ever disturbed the fundamental principle that the influential medium of broadcasting is free from political control and will so remain.[93]

That statement sharply contrasts with the State broadcasting situation prevailing in Malta between 1975 and 1987.

The situation in Malta regressed further following the General Election of 1976 which was again won by the Labour Party. In 1977, the *Confederation of (Free) Trade Unions* in Malta (CMTU) had called upon the employees whom it represented to strike for a couple of days following a deterioration of relations between the Confederation and Government. Around eighty of the persons who went on strike pertained to *Xandir Malta*

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[92] Vella Laurenti (n19) 24. For a full examination of Court cases relating to lack of impartiality on the part of the public service broadcaster, *cf.* Chapter 5, *infra*

[93] BBC Handbook 1986, 195

and these employees were "locked out" by the non-striking (pro Government) workers. For workers to be allowed back to work they had to sign a humiliating declaration and thirty-five workers at *Xandir Malta* who refused to sign this declaration were suspended from work and remained so suspended for seven months. Even on resuming their employment, many of them were transferred to other departments or ended up making way "voluntarily".

The General Election was again won by the Labour Party in 1981 but the country was facing a severe political crisis since while the Labour Party managed to secure the majority of seats in Malta's House of Representatives, the Nationalist Party still in Opposition had secured the absolute majority of votes cast in that Election.

Against this highly charged political background, the Government had chosen not to appoint the Broadcasting Authority for four years – from 21 July 1982 until 18 July 1986. This had already happened from 7 November 1980 until 21 January 1981. 'This used to result in a total advantage in favour of Government and the Socialist Party in view of political censorship from the persons responsible. The blatant abuse led to many protests from the Nationalist Party especially since this abuse was taking place merely a few months before the General Election of December 1981.'[94]

2.11 Broadcasting from Abroad

On April 25, 1979, the Nationalist Party had in these circumstances requested to be given a licence to run its own radio station. The Prime Minister, Dom Mintoff, who as discussed above, had himself in less serious circumstances resorted to broadcasting from abroad in 1962 in the lead-up to the General Election held that year, and then in 1964 when he resorted to daily broadcasts from Cairo in the lead-up to the Independence

[94] Cutajar (n1) 78

Referendum[95], declared in Parliament that he was considering the application by the Nationalist Party as a joke.

Faced with a situation of total bias and censorship of its message, the Nationalist Party on October 9, 1981 began to transmit a daily one-hour programme over a radio station situated in Ragusa, Italy. The radio station was entitled 'Studio Master', and on 27 November, the Party began television programmes over a Sicilian television station entitled 'Studio Rama'. Richard Muscat was tasked with carrying out this project and that meant that he had to live abroad from October 1981 until July 1987 – a form of exile since he was threatened with criminal proceedings against him which threat, he could only bring to an end following a change of Government in favour of the Nationalist Party in May 1987.

Richard Muscat refers to the setting up of this station as follows –

> The television station was registered in accordance with Italian law. We named it MTV Studio Rama since "Rama" combined together the words "Ragusa" and "Malta" …. In the area of the Arcibessi mountain (from where we had to transmit) there was no electricity… and that meant that MTV Studio Rama was the only television station that operated through a diesel generator rather than through electricity.[96]

The Government of Malta reacted against the broadcasting that was taking place from abroad by exercising diplomatic pressure on the Government of Italy to put an end to those transmissions, by doing its best to jam the relevant broadcasting signals from abroad, and on September 1, 1982 by enacting the "Foreign Interference Act" which *inter alia* made it illegal for anybody to take part in or otherwise collaborate in the production or transmission of broadcasts aimed at the people of Malta from outside the country.

[95] Sacco (n32) 103

[96] Richard Muscat, *Għandi Missjoni Għalik (I Have a Mission for You) 1981 – 1987* (Richard Muscat 2016) 31

The Nationalist Party in turn reacted to that legislation by commencing a series of radio broadcasts through a mobile clandestine transmitting system which would move from one location to another in Malta to make it very difficult for the local authorities to detect it, and significantly these broadcasts were referred to as *Radju Libertà.*

At the same time, the Party had organised a boycott of the national broadcaster as well as of products advertised on the national station. The effective boycott lasted for twenty-three months and was lifted with effect from January 1, 1984, in an effort to achieve 'a negotiated settlement of the existing political crisis.'[97]

2.12 1990 White Paper and Introduction of Pluralism in Malta

The General Elections of 1987 were won by the Nationalist Party and thus led to a change of Government. One of the first tasks of the new Government was to place broadcasting as one of its priority areas for radical reform.

A committee was appointed by Parliament to make recommendations for change, in particular for reforms in Malta's broadcasting legislation. Then on 14 September 1990, Government issued a *White Paper* entitled 'Broadcasting: A Commitment to Pluralism' which set the tone for a total overhaul of the country's broadcasting legislation and for the introduction of pluralism of broadcasting in Malta, as well as for setting in motion the concept of public service broadcasting as opposed to that of national broadcasting

Referring to the new administration's electoral mandate, the White Paper pointed out -

> In May 1987 the new administration was elected with a clear and specific mandate to:
>
> (a) Take the steps necessary to ensure full respect for the fundamental right of freedom of expression;

[97] Vella Laurenti (n19) 29

(b) Introduce pluralism in the Maltese broadcasting media;

(c) Assist the print and broadcasting media in the reporting and analysis of both local and foreign news;

(d) Hive-off the State broadcasting network from Telemalta Corporation;

(e) Establish full working links between the State broadcasting media and the Department of Education;

(f) Provide wide access to the broadcasting media, in particular for Non-Governmental Organisations.[98]

Developments in the field of broadcasting at the European level should also be borne in mind. Only a year before the publication of the 1990 White Paper by the Government of Malta, the European Union had on the 3rd October 1989 issued a Council Directive "on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities."[99] Although Malta at this stage was not a Member of the European Union, the Government of Malta was following developments at that level. In any case, the European Union Directive followed and referred to the initiative adopted by the Council of Europe which on its part had on 5th May 1989 issued the European Convention on Transfrontier Television.

The European Convention on Transfrontier Television had already provided the guiding principle that freedom of expression and information as embodied in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every human being. With that principle in mind, the signatories to the European Convention began to lay out the

[98] White Paper: 'Broadcasting: A Commitment to Pluralism' (September 1990) 2.2

[99] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ L 298, 17.10.1989, p 23

groundwork for the concept of media pluralism – which principle was enshrined into the text of the Convention after that it was subsequently amended according to the provisions of the Protocol (ETS no. 171) which entered into force on 1st March 2002. The Convention in particular guaranteed freedom of reception and retransmission of programme services which comply with the terms of the Convention on the territories of all Member States of the Council of Europe as well as of all signatories to the European Cultural Convention.[100]

The European Council Directive in turn enshrined the principle that television broadcasting constitutes, in normal circumstances, a service within the Treaty establishing what was then still referred to as the European Economic Community, and therefore entitled to freedom of movement between the different Member States of the European Union. In this respect, Member States were to ensure freedom of reception on their territory of broadcasts from other Member States, except in very exceptional circumstances as to ensure protection of minors and public order.

Both the European Convention on Transfrontier Broadcasting issued by the Council of Europe and the European Union's Directive with reference to television broadcasting activities refer to the need to promote works of a European origin, as well as to create the infrastructure required to promote and offer space in favour of independent producers.

Set against this background, the 1990 White Paper issued by the Government of Malta paved the way for the introduction of pluralism of broadcasting in Malta, correctly asserting that freedom of expression as safeguarded through Article 41 of the Constitution of Malta (and through Article 10 of the European Convention on Human

[100] CoE, European Convention on Transfrontier Television, 4

Rights) should be interpreted as guaranteeing pluralism in broadcasting. Specifically, the White Paper provided: "The State's monopoly of broadcasting in Malta will be ended."[101]

As a first step towards this goal, a system of cable television was to be introduced through which the Broadcasting Authority would also have its own community channel.

A call for proposals for a cable system for the Maltese islands had already been issued by Government in 1989 and nine different companies had submitted proposals. When the White Paper was issued, Government and its consultants were negotiating with the company which had been identified from the different proposals received. The White Paper pointed out that the cable operator (the chosen company was Melita Cable) would be issued with an exclusive licence to operate a cable television network in Malta for fifteen years. Following that period other operators would be allowed to compete with Melita Cable, as has in fact happened, in particular through the telecommunications' company – GO.

Through the White Paper, Government furthermore indicated that in conjunction with the private sector it was interested in tapping the new important satellite television market and utilising Malta's frequency resources. In this respect Government had a year earlier gone to Parliament to enact the necessary legislation to permit individuals to receive television signals from telecommunication satellites, subject only to aesthetic and technical considerations.[102]

Pluralism was also going to be introduced in respect of radio, and it is significant to point out that the publication of the White Paper generated so much interest in this sector that in the first three months of 1991, there were as many as 48 applications for radio stations, sixteen of which originated from interests in foreign countries.[103] This

[101] White Paper (n98) 1.5
[102] Ibid 1.8 – 1.9
[103] Cutajar (n1) 86

followed a call for proposals for seven services, including one provided by Public Broadcasting Services, which were meant to be services

> of a public nature which will have to comprise education, information and entertainment programming calculated to appeal to a variety of tastes and interests, and not limited to a narrow format' as well as 'three twenty-four hour live stereo services providing music, information, news analysis, interviews and phone-in discussion programmes.[104]

Radio, as indicated in the White Paper was 'poised at the beginning of a new chapter in its history.'[105]

2.13 Public Broadcasting Services Limited (PBS)

Moreover, the broadcasting division within Telemalta Corporation known as *Xandir Malta* was to be taken over by a new entity which would be a limited liability company that became known as *Public Broadcasting Services Ltd* (PBS) which has since its set up remained to date Malta's public service broadcaster. The deed in the records of the Chief Notary to Government, through which the movable and immovable assets pertaining to *Xandir Malta* were acquired by PBS was drawn up on August 5, 1992.

The company was registered with the then Registry of Partnerships on the 27th September 1991. The functions of the Registry of Partnerships were eventually taken over by the Registry of Companies within the Malta Financial Services Authority, and subsequently within the Malta Business Registry. Public Broadcasting Services Limited is registered as company: C 13140.

Significantly, the objects of this company have largely remained unaltered since then, despite the actual Memorandum and Articles being substituted in their entirety a number of times.

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[104] White Paper (n98) 4.16
[105] Ibid 4.1

The most important object of this company was and remains:

> (a) to fulfil the role of providing public broadcasting in the Maltese islands and thereby to provide high quality programming across the full range of public tastes and interests in line with journalistic principles aimed at ensuring a comprehensive and accurate information service necessary in a democratic and pluralistic society.[106]

This was not merely a change of entity responsible to provide public broadcasting. Much less was it merely a change of name. In an interview with 'The Sunday Times' published on 6 September 1992, the Minister then responsible for broadcasting, Dr Michael Frendo had referred to PBS, as "a new wind, a new lease of life in public broadcasting".[107]

Public Broadcasting Services Ltd was and remains set up as a private limited liability company, where 'any invitation to the public to subscribe for any shares or debentures in the Company is prohibited.'[108]

The company was initially set up with a modest share capital of Lm 50,000 (€ 115,000) of which only Lm 5,000 (€ 11,500) were issued and taken up – divided in 5,000 shares of Lm 1 (€ 2.3) each.

What is particularly relevant is the fact that all the shareholding of the company pertained and still pertains to the Government of Malta which in turn appoints the Chairman and the entire Board of Directors. For a period of time (1997 – 1999), the Board of Directors included a Worker Director elected by the employees of the company.

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[106] Malta Business Registry, *Memorandum of Association of Public Broadcasting Services Ltd., 27 September 1991,* Clause 3 (a)

[107] Cutajar (n1) 85

[108] Malta Business Registry (n106) *Articles of Association of Public Broadcasting Services Ltd*., Article 1 (c) in 1991 Company Statute, now Article 2 (c) in latest Memorandum and Articles of Association of Public Broadcasting Services Limited, as substituted on 24th January 2006.

On 20th November 1996, Joe A Grima submitted a report to the Prime Minister about the workings of Public Broadcasting Services Limited. The report was carried out within the time frame of one week after being commissioned to carry it out by the Office of the Prime Minister. The report was meant to examine the financial and management structure of the company, make recommendations about better use of human resources, within the context that PBS was expected to remain 'at the forefront of Maltese broadcasting, and to take account of the fact that broadcasting was constantly becoming more pluralistic and competitive.'[109]

In this report, Grima carried out a critical evaluation of the public broadcaster's financial and managerial structures and made various recommendations for substantial improvements, including for better utilisation of the station's revamped news centre.

One of Grima's recommendations was to the effect that a new Board of Directors would give the internal situation within the company top priority, in order to ensure a system of efficient management that would offer workers more motivation, and that standards would be set to ensure quality, professionalism, culture and strict impartiality in every sector of public broadcasting.[110]

With regard to issues relating directly to the role and obligations of the public service broadcaster, the Grima report included a number of recommendations that do not appear to have been followed up. The more salient of those recommendations follow –

> Government should adopt measures in order that relations between PBS and the Broadcasting Authority would be established on a more stable basis. This could be done through the provision of a mechanism to provide for co-ordination in the formulation of the policy to be followed by PBS with regard to the provision of programmes and in order to guarantee quality standards in broadcasting. As a first step in this direction, there should be discussions between the new Board of

[109] Joe A Grima, *Rapport dwar Public Broadcasting Services Limited,* 20 November 1996
[110] Ibid 31

> Directors and the Broadcasting Authority at the highest possible level in order to advise the Prime Minister how this aim could be effectively achieved.
>
> It is recommended that in the shortest time possible a code of ethics about public broadcasting should be drawn up and published. This document should be drawn up by the Broadcasting Authority and presented for approval to the political parties in Parliament through specific meetings held for the purpose and which meetings would be chaired by the Speaker of the House.
>
> The PBS Board of Directors should publish a report not only about the company's financial performance but also about the work carried out to achieve the aims set out in the national broadcasting policy as formulated by Government. This report should be presented to the Prime Minister, the Leader of the Opposition, the Broadcasting Authority and the media. The report should be published not later than the 30th June and 31st December of each year.
>
> It would also be appropriate if a Parliamentary Committee to oversee Broadcasting (as had been proposed in the Government's electoral manifesto) be set up as soon as possible.[111]

On a more practical level, the Grima report had recommended an increase in the level of Government shareholding to place PBS on a stronger financial footing and to absorb part of the company's debt.

With effect from 27th February 1998, it was resolved by the shareholders that the Company initially formed and registered in terms of the Commercial Partnerships Ordinance would comply with the provisions of the new Companies Act 1995 and would be deemed to be a private company formed and registered in terms of the same Companies Act.

With effect from the same date, the Memorandum and Articles of Public Broadcasting Services Limited were changed in their entirety to be in conformity with the provisions of the new Companies Act 1995, and the authorised share capital of the company was now raised to Lm 1,050,000 (€ 2,415,000) divided into one million and fifty thousand shares of Lm 1 (€ 2.3) each. Moreover, all the authorised shares were issued and

[111] Ibid 34

taken up in their entirety by the Government of Malta. The Chairman and all Directors are all appointed by the Government and while appointed for a period of one year, they can be re-appointed as well as removed before the expiration of their term of appointment.

In terms of two Extraordinary Resolutions signed by the shareholders of the company on the 29th December 1999, the reference to Worker Director as a member to the Board of Directors was removed, the maximum number of Directors was increased from six to nine, and the Memorandum and Articles of Public Broadcasting Services Limited were substituted in their entirety.

The Memorandum and Articles of the company were again substituted on the 18th September 2002 in order to reflect an increase in the authorised share capital of the company to Lm 2,000,000 (€ 4,600,000), that is by the addition of a further Lm 950,000 (€ 2,185,000), as well as to provide for an increase in the issued share capital of the company to Lm 1,937,978 (€ 4,457,349.40), where the consideration for the issue of the new shares was satisfied by the capitalisation of reserves. Subsequently to the increase in share capital, the issued share capital was then reduced by Lm 1,037,978 (€ 2,387,349.40) in order to offset losses of the company, effectively bringing down the issued share capital to Lm 900,000 (€ 2,070,000).

Just over three years later, on the 20th January 2006, a fresh capital injection was required, and the Memorandum and Articles were substituted, this time to reflect a little more than doubling of the issued share capital to Lm 1,880,000 (€ 4,324,000).

To date there have no further changes to the Memorandum and Articles of Public Broadcasting Services Limited.

2.14 Broadcasting Act, 1991

A draft bill that formed part of the White Paper became the new Broadcasting Act (Act XII of 1991 - now Cap 350 of the Laws of Malta) The bill was moved for its first reading before the House of Representatives on 8 March 1991 and became law on 1 June 1991 after twenty-two parliamentary sittings that were dedicated to debating the new legislation.

In terms of the new law, the Broadcasting Authority was empowered to act as regulator with regard to all broadcasting services in Malta. Moreover, in terms of the 1991 Act, the Broadcasting Authority became the licensor of nationwide radio services and community radio services. Still this important function was coupled with a concurrent right by Government to license radio and television stations including the public broadcasting services.

> … the new Broadcasting Act 1991 established a concurrent licensing regime exercisable by the Authority and the Government, with the latter reserving unto itself and over time exercising the right to license broadcasting services – it did so with the Voice of the Mediterranean, the public service broadcaster's radio and television stations, Education 22, satellite broadcasting and digital terrestrial television. It was only in the last few years that Government has benevolently empowered the Authority to license digital radio and satellite broadcasts.[112]

The law established that when issuing Broadcasting licences, the Authority was to be guided by various considerations including first and foremost the principle of freedom of expression and pluralism and 'that a diverse system of public and private stations with their own particular character, would be the best system for the realisation of this principle.'[113]

[112] Aquilina (n57)
[113] Broadcasting Act 1991 (BAct 1991) art 11 (1)

This principle is further emphasised through the fact that while the Broadcasting Authority retained the right to provide itself or through broadcasting contractors sound and television services in Malta, the Authority –

> may not grant any licence or enter into any contract (for provision of broadcasting services on its behalf) … on an exclusive basis, and any provision granting such exclusivity whether contracted or granted before or coming into force of this Act shall be deemed to null and void…[114]

This is in sharp contrast with what had been provided in the 1961 Broadcasting Ordinance where contracts for the provision of broadcasting services could be 'conferred under a contract as an exclusive right and duty for the duration of the contract …'[115]

A National Broadcasting Plan published as the Second Annex to the 1991 Act provided further guidance about the allocation of various frequencies in order to achieve pluralism and ensure freedom of expression.

This Plan was implemented, eventually overtaken by the National Broadcasting Policy published in 2004[116], and then repealed in 2011.

In practice, at this preliminary stage, pluralism in broadcasting was achieved in two ways: (a) with regard to radio, through the issue of various licences that led to the introduction of privately owned and run stations; and (b) with regard to television, through the provision of cable television and liberalising reception of television signals through satellite.

While the BA became in terms of the 1991 Act, the licensor of nationwide and community radio services stations,[117] Public Broadcasting Services Ltd (PBS) at this stage

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[114] BAct 1991 art 3(5)
[115] BO 1961 art 3(2)
[116] *Infra,* p 78 *et seq*
[117] *See Supra* p 71. Regrettably a concurrent licensing regime was still exercisable by the Authority and by Government.

continued to provide both television and radio services as a contractor to the Broadcasting Authority in terms of art 3 (2) of that Act, but as pointed out above, any provision of exclusivity in terms of the contracts hitherto binding between the Broadcasting Authority and PBS was to be deemed as null and void. In terms of the 1991 Act, Government was also meant 'from a date or dates stipulated by the Prime Minister' to assign to the Authority -

> such rights and duties arising from any agreement between the Government of Malta and cable or other broadcasting operators as the Prime Minister may from time to time specify.[118]

The licence with regard to the "Government company" set up to provide "public broadcasting services" remained the prerogative of Government, in the sense that *Public Services Broadcasting Services Ltd,* even when the 1991 Act came into force was still a licensee of Government as was the case from the very beginning of broadcasting in Malta.

Article 10 (5) of the 1991 Act already provided that while no organisation, person or company could at that stage own, control or be editorially responsible for more than one broadcasting service[119] licensed in terms of that Act,

> Government may through a company designated by the Minister, by Notice in the (Government) Gazette as a company providing public broadcasting services, own, control, or be editorially responsible for more than one broadcasting service.[120]

When in terms of the Broadcasting (Amending) Act, 2011 – Act VIII of 2011 - the licensing remit of the Broadcasting Authority was ten years later formally extended from nationwide and community radio services to include as well nationwide television services, satellite radio services, satellite television services and such other services which

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[118] BAct 1991 art 3 (3)

[119] This restriction was largely relaxed in terms of the Broadcasting (Amendment) Act 2000 – Act No. XV of 2000 – in the sense that every such entity could own one terrestrial or cable radio broadcasting service, one terrestrial or cable television broadcasting service, and one terrestrial or cable, radio or television broadcasting service devoted exclusively to teleshopping.

[120] BAct 1991 art 10 (5)

may be broadcast or provided on or by an electronic communications network, [121] it was made even more clear and explicit that Government was however to be the licensor with regard to public broadcasting services.

In the author's opinion this is unfortunate and the bill as presented by Government to Parliament does not reflect what had been proposed by the Broadcasting Authority which had strongly recommended that even the public broadcasting services should be licensed by the Authority rather than directly by Government.[122] Still Government opted to retain its prerogative of licensing the public broadcasting services.

In fact, the law, as it now stands, provides:

> Stations owned or controlled by the Government Company (Public Broadcasting Services Limited) or for which the said company is editorially responsible shall be licensed by the Minister.[123]

Then, to slightly mellow the effect of that provision, it is further provided:

> For the purposes of enabling the Authority to carry out its regulatory duties in terms of law, the Minister shall, as soon as possible from the date of issue of any

[121] In terms of a general amending law for the enforcement of consumer protection powers (Act XV of 2006) the licensing remit of the Broadcasting Authority had already been extended to include 'licensing broadcasting content on digital radio services' (art. 16B of the Broadcasting Act as amended by the 2006 Act) Moreover the licensing remit of the Broadcasting Authority had already been extended to include licensing of 'all satellite radio and television programme content services' in virtue of the addition of a new Part IIIA to the Broadcasting Act (articles 16C to 16F) in virtue of the Broadcasting (Amendment) Act 2009 – Act VIII of 2009, *infra*

[122] See Kevin Aquilina, 'The Minister's Puppet', *The Times of Malta,* 27 March 2013, 16. In this article, Aquilina points out that government did not accede to the request of the Broadcasting Authority 'that the authority licenses the public service broadcaster' adding that 'the government decided to permit the authority to license only private commercial and political broadcasting stations as well as community stations.' Aquilina points out that during his eleven year working experience at the Broadcasting Authority, he found out that the public service broadcaster was the most difficult broadcaster to control from a regulatory point of view.

[123] The reference to 'Minister' is a reference to the Minister responsible for Culture. (Article 2 of Broadcasting Act – Cap. 350 of the Laws of Malta. The reference, however, has been changed to the Minister responsible for Broadcasting in virtue the Broadcasting (Amendment) Act, 2020 (Act LVI of 2020).

licence to the aforesaid Government company, notify in writing to the (Broadcasting) Authority a copy of such licence.[124]

Following the enactment of the law, the Labour Party (in Opposition) was allocated one of the radio frequencies and started operating its own radio station, initially on a trial basis in virtue of a temporary licence, which licence was issued on a more permanent basis on 11 May 1993. The station owned by the Labour Party was initially known as 'Super One Radio' and the name was eventually changed to 'One Radio'.

The Nationalist Party (in Government) followed suit and inaugurated its own radio station, Radio 101 (which later changed its name to NET FM), on the 28th September 1993. On the occasion of its inauguration, the Prime Minister and Leader of the Nationalist Party, Dr Eddie Fenech Adami again emphasised the principle that pluralism in broadcasting in Malta was to be considered as an emanation of the fundamental human right regarding freedom of expression.

Another radio licence was given to the Church which began broadcasting on a twenty-four hour round the clock basis on 14 March 1992 after initial transmissions for eight hours a day on the basis of a temporary licence.

Other radio licences had been given on 7 September 1991 to three commercial stations: Radio One Live, Island Sound Radio, and Bay Radio. On 29 March 1993, the Broadcasting Authority issued another licence for a radio station based in the sister island of Gozo – Radio Calypso. At that stage there was only one more frequency to be allocated

[124] Broadcasting Act – Cap 350 of the Laws of Malta – art 10 (4C). This provision reflects the original wording of the Broadcasting Act 1991 as amended by the Broadcasting (Amendment) Act 2011 – Act No. VIII of 2011. It is to be observed that before the 2011 Act which introduced the concept of general interest objective service, *infra,* the situation was regulated in terms of article 16A of the Broadcasting Act – an article that had been introduced in virtue of the Broadcasting (Amendment) Act of 2000 – Act V of 2000 – which article provided that the provisions relating to the requirement of licensing by the Broadcasting Authority were not applicable to 'the provision of any sound or television broadcasting services by the Government or by any person, body or authority under licence from or under arrangements with the Government; and to any licence granted prior to the 1st June 1991 (date of coming into force of the Broadcasting Act)'. Art 16A was deleted by the 2011 Act.

and since there were two pending applications, one by an NGO, *Moviment Azzjoni Soċjali – MAS - (Social Action Movement)* and the other by the University of Malta, the Broadcasting Authority split the remaining frequency between the two applicants by providing that the Social Action Movement carried out its broadcasts in the morning and until 4.30 p.m. when the University stepped in with own programmes which focused mainly on distance learning. A company that brought together these two entities – entitled Unimas – was formed to acquire the licence by the Broadcasting Authority and then the entities within that company transmitted in line with the schedule as split up by the Authority. This licence was at a later stage taken over wholly by the University and the radio was renamed as Campus FM

Another concept that was introduced through the 1991 Act was the licensing of community radios – radios that would broadcast on limited signal strength but which would reach communities in specific towns and villages. Licences were and are issued in respect of such stations, largely linked to different parish areas in Malta and which would put up programmes that focus on the feasts held in our different parishes.

Pluralism in the television sector kicked off on 1 March 1994 through a licence given a week earlier to the Labour Party that inaugurated its own television station – Super One Television, eventually re-named as One Television, as was done with radio.

The second private television station to follow was Smash TV which began its transmissions through the cable television system on 7 November 1994, and later began to transmit also terrestrially.

On the occasion of its thirty-fifth anniversary, the Broadcasting Authority on 29 September 1996 began operating its own cable channel – the Community Television Channel (Channel 12) with a strong focus on culture, the arts and heritage as well as offering space to different organisations that needed to reach out to the Maltese

community but did not have their own broadcasting facilities. Regretfully, due to lack of resources this channel was less than a year and four months since its inception, on 16th January 1998 hived off to the Public Broadcasting Services operator.

General Elections were held in Malta on 26 October 1996 and were won by the Labour Party. Dr Alfred Sant became Prime Minister. The discussion which then evolved within the Nationalist Party to analyse the electoral result led to the conclusion that one reason why the Party had suffered defeat is that although as a Party in Government it had introduced pluralism in broadcasting, it had failed to apply for its own television station while the Labour Party availed itself of a licence to broadcast through television. The Nationalist Party launched a campaign to gather funds for setting up its own television station and on 16 June 1997 applied to have such a licence.

A temporary licence was then granted on 15 September 1997, but the Party was for some time not allowed to avail itself of a broadcasting tower that was set up in the preceding years to allow broadcasters to affix their different transmitting panels on it rather than have them build a different tower for each station. The matter was brought up before our Courts of Justice.[125] Eventually the Party resorted to building its own tower to ensure that it can exercise its right to broadcast through television.

As a result of a crisis within the Labour Government brought about by its own former Leader (Dom Mintoff) voting against his Party line in Parliament, General Elections were again held on 5 September 1998 and the Nationalist Party was returned to power with Dr Eddie Fenech Adami becoming again Prime Minister. Significantly three weeks earlier, the Nationalist Party had on 13 August 1998 began its own television

[125] A prohibitory injunction was filed by the Nationalist Party against the Director of Wireless Telegraphy and acceded to by the Courts of Justice. See: *Eddie Fenech Adami et noe v Direttur tat-Telegrafija bla Fili* (Prim' Awla tal-Qorti Ċivili – Imħallef Lino Farrugia Sacco, 29 ta' Mejju 1998

transmissions through NET TV by making use of its own broadcasting tower. A licence to this effect was issued on 20 March 1998.

The introduction in Malta of pluralism in broadcasting can only be considered as revolutionary.

> It was a total and general revolution in the practice of democracy, the breaking down, once and for all, of having a monopoly in broadcasting, the accelerated evolution of practical pluralism of which we had no knowledge for many years. This has been a revolution carried out at a very fast pace to which we are now so accustomed that we have started to forget what the situation was like in Malta until only a few years ago.[126]

2.15 National Broadcasting Policy, 2004

Following the General Election of 2003, the Nationalist Party was again returned to power and another milestone in the history of broadcasting was to follow a year later. The 2003 General Election held on the 12th April was a very important one since it immediately followed the holding of a Referendum through which the people of Malta opted for Malta becoming a member of the European Union. Still in view of the fact the Labour Party had opposed Malta's membership of the European Union and furthermore had not accepted the Referendum result as one in favour of membership, the General Election needed to be held immediately afterwards to confirm the vote for EU membership. Malta then became a member of the European Union on 1st May 2004.

At a Ministerial level, following the 2003 General Election, responsibility for public broadcasting was split between two Ministries – the Ministry for Information Technology and Investment which was the Ministry responsible for the actual running and commercial viability of Public Broadcasting Services Limited, and the Ministry for

[126] Cutajar (n1) 109

Tourism and Culture which was responsible for the content and overall policy regarding broadcasting in Malta.

The National Broadcasting Policy was published in April 2004. In the foreword to the document, Minister Austin Gatt as Minister for Information Technology and Investment together with the author who was then Minister for Tourism and Culture observed:

> This is an innovative document. It is the first time that Government is attempting to establish clear and public policy outlines within which PBS – the nation's public broadcaster – is expected to operate. It may not cover all the ground that needs to be covered but it certainly fills a void that exists. Government does not view the document as final but believes that it should be regularly re-visited since experience and changes in the broadcasting world will require that it be altered from time to time.[127]

It is suggested that the Policy Document in some respects built further on the National Broadcasting Plan that was originally incorporated in the Broadcasting Act, as its Second Schedule, and which was subsequently repealed in virtue of Article 15 of the Broadcasting (Amendment) Act of 2011 – Act VIII of 2011.

The context against which one needs to view this document is the fact that Public Broadcasting Services had become a 'recurring yearly drain on public funds… which in the last three years have exceeded seven million liri (€ 16,100,000)'[128] which led Government to radically restructure the company to ensure on the one hand its financial viability, but at the same time to acknowledge the 'mission of PBS as Malta's public service broadcaster' and to provide funding for such purpose.

[127] Ministry for Information Technology and Investment, & Ministry for Tourism and Culture, Government of Malta, *National Broadcasting Policy,* (April 2004) 3
[128] Ibid 6

2.16 Core and Extended Public Service Obligations

The funding provided in 2004 was of Lm 500,000 (€1,150,000). This introduced the concept of providing funding for 'public service obligation content', and the National Broadcasting Policy went further by distinguishing -

> the public service obligations of PBS between a 'core PSO' and an 'extended PSO', the former defined as the broadcast of news, local sport coverage and programmes and programmes emanating from PBS's obligations at law, for which PBS will have to source funds from general advertising revenue and the latter defined as programming content that the Government in line with international and local obligations would like to be aired on PBS and for which the Government will pay.[129]

As explained *infra* this in turn led to PBS to commence issuing a 'Programme Statement of Intent' through which independent producers would submit proposals for different types of programmes, including programmes that would be covered by the Government grant to PBS to ensure public service obligation content.

Much of the reform that was being carried out in 2004 had been envisaged in a report published in November 1999 entitled 'Redefining the role of public broadcasting in Malta' following a study co-ordinated by the Centre for Communications Technology of the University of Malta, which study was commissioned in December 1998 by the Minister of Education.

The National Broadcasting Policy of 2004 spelt out a commitment by Government to make PBS Ltd the leading broadcasting service in the country in the light of the Prague Declaration (1994), and the 'public service obligation' concept was fashioned within the parameters set by the Prague Declaration in order to ensure meeting the 'Draft Minimum

[129] Ibid 6

Requirements for National Broadcasting' as recommended by the Parliamentary Assembly of the Council of Europe in 1975.[130]

The 'minimum requirements' include a full service for all the public with (a) multiple choice of programming, (b) a high educational and cultural element, (c) control, by properly balanced programming, of cultural, commercial and also information-pollution, and (d) high content of co-ordination and exchange with other European broadcasting productions.

The National Broadcasting Policy highlighted how the public service obligation concept would address meeting such minimum requirements as well as other international obligations, and provided for the drawing up of a contract between Government and the public broadcaster – which contract included the provision of funding as outlined above – precisely to ensure that public broadcasting in Malta would meet these obligations. As explained further in the Policy:

> A public service obligation contract can be simply defined as a contract between the Government and a public service broadcaster detailing programming content that the former would like the latter to air and for which the latter is paid a sum of money. It may additionally be said that the content is normally such that it would not attract advertising revenue as its primary scope and it is not commercial but cultural, educational or social oriented….. The money given for the PSO programming is a way of correcting … market limitations and restrictions.[131]

Furthermore, Government determined to divide its public service obligation between what was to be considered a core public service obligation, and what was to be considered as an extended public service obligation. While transmissions deemed to form part of the public broadcaster's core public obligation - including in particular daily

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[130] Council of Europe, Recommendations and Resolutions adopted by the Parliamentary Assembly of the Council of Europe in the field of Media and Information Society, Recommendation 748 (1975) on 'The role and management of national broadcasting', Annex – Draft Minimum Requirements for National Broadcasting, Text adopted on 23 January 1975 (19th Sitting) Parliamentary Assembly, Council of Europe, Directorate General of Human Rights and the Rule of Law, Strasbourg, 2015, 14

[131] NBP (n127) 14

news bulletins, coverage of sporting events, programmes in adherence with the Constitutional or legal requirements imposed on PBS and televised transmission of one-off parliamentary debates as would be the case with the first three sessions of the Budget debate – are meant to be funded through general advertising revenue, funds were provided for transmissions pertaining to 'extended public service obligations' which 'aim to ensure that PBS transmits programmes which would not necessarily be commercially viable but are important to ensure the cultural, social and educational development of society at large and to ensure that sections of society who would not normally have access to television broadcasting are given the space to do so.'[132]

Such transmissions are meant to include the transmission on radio of all parliamentary debates, of events of a national character as determined from time to time by Government, current affairs programmes and discussion programmes dealing with social, cultural, educational, environmental, economic, industrial or political issues, religious programmes, programmes that have children as their principal audience, drama programmes in Maltese with emphasis in favour of original drama, cultural programmes especially those programmes which enhance the Maltese language, heritage, history and culture, programmes that focus on Gozo, programmes that focus on Maltese communities abroad, general information programmes and programmes that are educational in nature.

2.17 Transmission of Parliamentary Debates

With regard to the transmission of parliamentary debates, since Parliament moved into its New Building in May 2015, live television coverage through the two main cable television providers was introduced and eventually on the insistence of the Speaker of the House of Representatives, this service began to be provided 'free to air'.

[132] Ibid 15

As a result of the enactment of the Parliamentary Service Act (Act XLII of 2016) an amendment to sub-article (4A) of article 10 of the Broadcasting Act entered into force, in virtue of which one of the broadcasting licences issued by the Broadcasting Authority is to be 'a parliamentary broadcast content licence issued to the Speaker of the House of Representatives'.

Moreover, in terms of the same Act, the following definition of "parliamentary broadcast content licence" has been added to sub-article (4E) of article 10 of the Broadcasting Act: -

> a licence to broadcast plenary and committee sessions of the House of Representatives and any other activity taking place in the Parliament building organised by or in conjunction with the Office of the Speaker, through a nationwide radio service and / or nationwide television service.

Notwithstanding this development, the public service broadcaster's obligation to transmit all sessions live on Radio Malta 2 was still kept in force, presumably to cater for persons who prefer to follow parliamentary sessions through radio rather than through television.

The National Broadcasting Policy provided that financing of the relevant programmes should be governed by the principles of transparency and accountability, and with this objective in mind, the Ministry for Tourism and Culture as the Ministry then responsible for broadcasting content entered into a five-year contract with PBS to set out in detail its transmission requirements in line with the parameters of the extended public service obligations. A sample of the contract that was to be signed between the Ministry responsible for broadcasting and PBS was annexed to the National Broadcasting Policy.

2.18 Three-pronged relationship between PBS and Government

This development in Malta's broadcasting scene while leading to a stronger emphasis on the principles and practice of how public broadcasting services should operate to ensure minimum requirements and standards expected by the general public, placed Government in a unique three-pronged relationship with the public broadcaster: as sole shareholder of the company providing public broadcasting, as licensor of the same company, and through the adoption of this policy, as the station's client in a contract of service to ensure and fund the provision of programmes that pertain to the station's extended public service obligations. To some extent, this three-pronged relationship justifies the distinction that at this stage existed between the Ministry responsible for the station's operational aspect, and the Ministry responsible for policy and content – in a sense drawing up the desired distinction between the operator and the regulator. In subsequent legislatures, however, that distinction was not retained since it was deemed that the Ministry responsible for broadcasting policy could not be effective enough to ensure the level of output required from the public broadcaster if the public broadcaster was for most intents and purposes responsible to a different Ministry.

The rationale behind the public service contract entered into between Government and Public Broadcasting Services are spelt out in the contract's opening premise which reads out:

> The Government declares that an independent Public Broadcasting Service is essential to a democracy, and the Government recognises PBS as the sole company catering for public broadcasting, with guarantees that its programmes are presented in a balanced and impartial manner as provided for by the Constitution of Malta, and acknowledges that PBS should lead in audience share and be a trend-setter. PBS should, as the national broadcaster, represent and fairly treat different views and values present in society. PBS should also carry programmes

> that fulfil the public service obligation, and Government shall support PBS in this regard, and for this end is entering into this Public Service Agreement.[133]

Furthermore, it is stipulated that the contract being entered into between Government and Public Broadcasting Services Limited was of a sole and exclusive nature.

It should be observed that the National Broadcasting Policy of 2004 was innovative not only by way of introducing the 'public service obligation' concept but also by way of introducing for the first time a Programmes Policy that was to be adopted by PBS. The opening paragraphs of that Programmes Policy serves as a mission statement for Malta's public service broadcaster:

> PBS Ltd exists to serve the general public as well as particular segments by striving to be the most creative, inclusive, professional and trusted broadcaster.
>
> As a result of this particular mission the schedule of PBS Ltd should provide a varied and high-quality range of programmes in the fields of information, culture, education and entertainment. These programmes, especially those which form part of its social obligation, should present a balanced picture of Maltese society, varied interests, values, views, tastes and religious beliefs in the context of an evolving and changing society. The programmes transmitted should promote Maltese heritage, culture, the arts and language; enhance human dignity, underpin the social cohesion and the quality of life and the environment.
>
> The news and current affairs programming of PBS Ltd should be characterised by high journalistic and ethical standards. Their core values should be accuracy, truthfulness, due impartiality, and editorial integrity.
>
> PBS should make the popular worthwhile and the worthwhile popular.[134]

Another new element introduced by the Broadcasting Policy of 2004 was to provide for clear procedures through which PBS would adopt a policy in favour of out-sourcing of programming while remaining responsible for the editorial content as well as for the aesthetic and technical quality of the out-sourced programmes, while retaining

[133] Ibid 38
[134] Ibid 50

that this policy was not to be interpreted to mean that there should be no in-house productions.

Five different methods of out-sourcing were identified: (a) independent producers giving PBS the programme ready to air; (b) producing the programme and transmitting live from other studios; (c) producing the programme themselves but using facilities available at PBS; (d) co-producing the programmes with PBS; and (e) buying the airtime from PBS and using part of that airtime commercially.

The policy in favour of out-sourcing needs to be seen in the context of the restructuring process that was carried out to render PBS more feasible and in this respect Government wanted to encourage competition with the private sector which in fact led to a number of production houses setting up shop and taking over the production of various programmes that would hitherto have been produced in-house by PBS.

The National Broadcasting Policy laid out the internal and external mechanism to be adopted by PBS to cover the policy of outsourcing. The most immediate impact of this mechanism was and remains that PBS began to issue on a regular basis a Programmes 'Statement of Intent' through which producers submit proposals to develop programme content in line with the programme genres and cost required by PBS. A Sample Programme Statement of Intent that was meant to cover the period October 2004 – January 2005 was published as Appendix 3 to the National Broadcasting Policy. One effect of introducing this system was that forward scheduling became essential.

In this Statement of Intent, it is specified that the television schedule was meant to be composed of three kinds of programmes: core public service obligation programmes, extended public service obligation programmes – in respect of which as discussed above Government began to make a yearly allocation of funds – and commercial programmes, with the initial percentage division between these different types of programmes being

set at 55% in favour of core and extended public service obligation programmes, and 45% in favour of commercial programmes. Interested parties could tender for any of the different types of programmes except for news bulletins.[135]

One more impact of the new National Broadcasting Policy was the setting up of an Editorial Board, appointed by Government, to act "alongside" the Board of Directors. While Editorial Boards did exist before the publication of this Policy document, their remit was normally limited to directing news policy. The idea of setting up an Editorial Board with a wider remit than that formerly exercised by such Boards was to create another balancing mechanism between programming content where the Editorial Board would have a determining say while budgetary and commercial responsibilities remained the main domain of the Board of Directors.

Apart from remaining responsible for the actualisation of the news policy set by the Board of Directors, the Board was to take responsibility – through the Programmes Manager – for the quality and the content of programmes broadcast on PBS stations whether they were produced in-house our out-sourced. An important function ascribed to the Editorial Board with regard to the new policy of out-sourcing was the actual drawing up of a draft schedule comprising programme genres and time slots but not actual programmes – in conjunction with the CEO, the Programmes Manager and the Advertising Manager, in the process indicating the type of programmes that would be offered for outsourcing, and then once proposals are submitted by producers following the publication of the Programme Statement of Intent, the Editorial Board judges and grades each proposal received in line with criteria that would have formed part of the published Statement of Intent and report back to the Board of Directors. The Board can

[135] Ibid 62

also discuss particular proposals with their proponents, provided that the consideration of the financial aspect of each proposal will always pertain to the Board of Directors.

The National Broadcasting Policy established that "the Editorial Board will be made up of three voting members appointed by the Minister responsible for PBS in consultation with the Minister responsible for broadcasting. There will also be three non-voting members: the CEO, the Programmes Manager and the News Manager."[136]

In terms of the National Broadcasting Policy, the Ministry for Culture as the Ministry then responsible for broadcasting issued Directives to Public Broadcasting Services Limited as to how to utilise the allocation of funds in respect of the public broadcaster's Extended Public Service Obligation. The Directives were issued after a consultation process which involved the general public, programme producers at a purposely organised seminar and through written submissions, the Broadcasting Authority, the Editorial Board and Management at PBS, the Commissioner responsible for Children, as well as through quantitative and quantitative research carried out on behalf of the Ministry by Ernst and Young to establish scientifically the perceptions and needs of the general public with regard to the output of Malta's public broadcaster. The first set of Directives was issued on the 24th April 2006 and included a precise analysis of how funds were utilised by the public broadcaster to fulfil his Extended Public Service Obligations in the preceding three years.

2.19 Satellite Radio and Television Programme Services

As of July 2009, the Broadcasting Authority was empowered to license all satellite radio and television programme content services. This development came about through the Broadcasting (Amendment) Act 2009 – Act VIII of 2009.

[136] Ibid 34

Even before this legal amendment came about, the Authority had a year earlier, on the 11th July 2008 issued its first satellite broadcasting licence to BuzzTV Ltd. 'At the time only the Minister responsible for communications was empowered to issue such a licence unless he delegated such a function to the Broadcasting Authority'[137] which is what he did in virtue of Legal Notice 175 of 2008.

Following the 2009 Law, all satellite radio and television programme content services required to be licensed if the person supplying a radio broadcasting service, whether for reception in Malta or elsewhere by means of a satellite device if that person is under the jurisdiction of Malta within the meaning of the European Union's Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

2.20 Incorporating provisions of EU Audiovisual Media Services Directive

A further legal development that aligned further Malta's broadcasting law with European Union Directives took place through the Broadcasting (Amendment) Act 2010 - Act IV of 2010, and Legal Notices 320 – 326 which followed suit. The 2010 Law brought into effect within the Broadcasting Act[138] the provisions of the European Union Audiovisual Media Services Directive.[139] A conference to discuss the theme *The New Media Landscape: Audiovisual Media Services Without Frontiers* was organised for stakeholders to ensure an adequate consultation process, which in turn led to the enactment of the relevant legislation.

[137] Broadcasting Authority, Malta, *Annual Report* (2011) 65
[138] Broadcasting Act – Cap 350 of the Laws of Malta – Part IIIB and Part IIIC, art 16 G – 16P
[139] Council Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27

Following the 2010 Act, it became the duty of the Broadcasting Authority to ensure that all audiovisual media service providers under the jurisdiction of Malta would comply with the various provisions of the EU Audiovisual Media Services Directive, including provisions against incitement to hatred based on race, sex, religion or nationality, as well as provisions prohibiting all forms of audiovisual commercial communications for cigarettes and other tobacco products, for alcoholic beverages if aimed at minors, and for medicinal products that are available only on prescription. The Audiovisual Media Services Directive which amended the former Directive on Television Without Frontiers rather than relying on strict regulation, 'promoted quality in programming through the liberalisation of broadcasting regulations (such as allowing product placement in programmes) thus making the European programmes more competitive on the international market.'[140]

Further legal developments took place through the Broadcasting (Amendment) Act, 2020 (Act No. LVI of 2020) which then gave effect to amendments to the AVMSD that have been adopted in 2018.[141]

2.21 General Interest Objectives

The switch over from the analogue signal to digital as in other European countries created new legal challenges, in particular for the public service broadcaster. A Policy and Strategy Document for Digital Broadcasting that meets General Interest Objectives was launched by Government in February 2009.

[140] BA (n 106) 65

[141] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 Novembeer 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

The purpose of that Document was to pave the way for the switch-over to digital broadcasting following the switching off the analogue signal on the 31st October 2011. That led to a digital platform for free-to-air stations and a multiplex licence was issued to the public service broadcaster in order to carry up to six stations including its own that would be considered general interest objective stations.

The legal framework for this new scenario was provided through the Broadcasting (Amendment) Act 2011 which established that the Broadcasting Authority was to appoint and license a network operator to run the general interest objective network which was in turn licensed by the Malta Communications Authority in terms of the Electronic Communications (Regulation) Act. The Authority would then also decide, following a call for applications, which licensees of general content objective services were to be carried by the network operator, 'proved that any public service television service which was broadcasting on the 1st December 2010 shall be automatically considered to qualify for the purposes of this provision as a general interest broadcasting service without the need of applying as aforesaid.'[142]

The same 2011 Act defined 'general interest objective' as 'a television broadcasting service which takes on the obligation of broadcasting a specified quantum of programmes which are of general interest and which are considered by the National Broadcasting Policy as in force from time to time to be part of the remit of a public service broadcasting service' which in turn may be either a generalist or a niche service.

The criteria for the selection of television services that fulfil general interest objective criteria to broadcast on the digital free-to-air platform were then published

[142] BAct, Cap 350 of the Laws of Malta, art 40 as substituted by the Broadcasting (Amendment) Act 2011 – Act No. VIII of 2011.

through Legal Notice 240 of 2011 published on the 21st June 2011[143], that is a fortnight after the publication of the main law.

2.22 Freedom to broadcast and to receive broadcasts is guaranteed

Another amendment to Malta's Broadcasting Act was a rather straightforward and simple but equally significant one, enacted on the 14 August 2014, through the Broadcasting (Amendment) Act 2014 – Act No. XXXII of 2014 to ensure that the principle that 'freedom to broadcast and to receive broadcasts is guaranteed' as well as the principle that 'freedom of reception is guaranteed' and that 'freedom of retransmission in Malta of audiovisual media services from other Member States for reasons which fall within the fields co-ordinated by the (European Union Audiovisual Media Services) Directive is guaranteed' can be regulated in terms of the Broadcasting Act itself but cannot be subjected to any other law. This amendment followed representations by the European Commission to the Government of Malta to ensure full compliance of Malta's legislation with the relevant European Union Directive.

It is against this historic and evolving background that the role and obligations of Malta's public service broadcaster can be analysed more deeply and within context.

[143] SL 350.32 – General Interest Objectives (Television Services) (Selection Criteria) Regulations (L.N. 240 of 2011)

3.1 Introduction

In this chapter, the author has chosen two countries with which to draw up a comparative analysis – the United Kingdom and Italy. In the former case, the comparisons are being drawn in view of the close links, not least at the historical level, between public broadcasting services in the two countries. With regard to Italy, the comparative analysis is being provided in view of Italy's proximity to Malta and the fact that the system followed in this neighbouring country as regards giving access to different political perspectives is one of the models that is from time to time recommended for consideration should Malta opt out of its present system of broadcasting services directly owned by the two mainstream political parties.

3.2 The British influence on Malta's broadcasting system

The close links between the system of public broadcasting in Malta and that in the United Kingdom has already been examined in Chapter Two. Those links result from the fact that Malta was a British Colony from 1800 until 1964, and broadcasting through a cable radio system in 1935 had been commenced on the initiative of the Imperial Government to counteract broadcasts reaching Malta from Italy.[1]

The British influence on our system of broadcasting in general emanates from the fact that broadcasting had commenced as a monopoly provided by the UK Rediffusion Group when Malta was still a British colony. Radio sets started making their way into Malta in the 1930s after the BBC began a regular system of broadcasts in the UK in 1922.

Moreover, television broadcasting was introduced to Malta after that Mr Harman Grisewood, then Chief Executive and Director General of BBC, was brought over to Malta

[1] Chapter Two, pp. 45 - 46

by the colonial administration in 1958 as a reaction to the impact of RAI on Malta which the Maltese had started receiving a year earlier. Mr Grisewood had concluded that Malta should have its own television station.[2]

Moreover, when Malta's first broadcasting bill was published in December 1960, the first person to be appointed to the post of Chief Executive (Designate) of the Malta Broadcasting Authority that was then being set up was Mr Kenneth Brown who had great experience of the BBC system.[3]

3.3 Comparative Analysis with UK model

It is for this reason appropriate to carry out a comparative analysis with an examination of the United Kingdom model and how the same has evolved.

When BBC (then known as British Broadcasting Company) started to broadcast by being given its 'first licence to operate eight radio stations', it was 'a private company owned by the British wireless manufacturers' where transmission of radio programmes was deemed essential to boost the sale of radios. It was then recommended by the Sykes and the Crawford Committees[4] that broadcasting 'was too important to be left in the hands of a commercial monopoly'[5] and BBC – now known as British Broadcasting Corporation, as known until this day and age – was established by Royal Charter in 1927. Since then attempts to place BBC on a statutory footing – even as recently as in 2004 – have so far been resisted on the basis that a Royal Charter protects better its 'special

[2] Ibid, 40
[3] Ibid, 42
[4] For an examination of the reports of these two committees, see Eric M. Barendt, *Broadcasting Law – A Comparative Study* (Clarendon Press, Oxford, 1990 pp. 10 - 11
[5] Irini Katsirea, *Public Broadcasting and European Law – A Comparative Examination of Public Service Obligations in Six Member States* (Kluwer Law International BV, The Netherlands 2008) 121

position and its independence from the House of Commons'. The Charter has been renewed periodically since 1927.[6]

The provision of public service broadcasting is the main thrust of the BBC, although as is the case in Malta that remit is no longer limited to BBC. None the less, the BBC remains the only public service broadcaster in the UK to benefit from the licence system.

> BBC is the leading public broadcaster in the United Kingdom and the only one to receive public funding. However, it is not the only public broadcaster. Channel 4 is also a public company, but it is funded through advertising. Both the BBC and Channel 4 receive frequencies for free in exchange for their public service obligations …. A unique feature of the English broadcasting landscape is that all terrestrial free-to-air broadcasters, not only the public ones, have public service obligations to fulfil.[7]

The latest full list of Public Service Broadcasters as provided by the UK Regulatory Body, OFCOM are BBC, ITV plc, Channel 4 Television Corporation, Channel 5 Broadcasting Ltd, STV Group and S4C. BBC then operates nine public service broadcasting channels: BBC One, BBC Two, BBC Three, BBC Four, BBC News, BBC Parliament, CBBC, CBeebies and BBC Alba. ITV plc runs two PSB channels – ITV and UTV, while the other public service broadcasters have one PSB channel each.[8]

The current BBC Royal Charter[9] has come into effect on 3 April 2017 and will remain in force until 31 December 2027. 'The BBC is granted a Royal Charter that must be renewed every ten years.'[10] The current Charter introduces a number of substantial changes from the Charters that regulated BBC previously.

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[6] Ibid, 122
[7] Ibid, 125
[8] OFCOM, PSB Annual Research Report 2017, 7, available at www.ofcom.org.uk/ - last reviewed on 31st May 2020
[9] *Copy of Royal Charter for the Continuance of the British Broadcasting Corporation,* December 2016, Cm 9365, (hereinafter referred to as the BBC Charter) London: HM Stationery Office
[10] John Stanton and Craig Prescott, *Public Law* (2nd edn, OUP 2020) 217

The Preamble to the current Charter emphasises both the continuity of Charters providing for the Incorporation of BBC since 1926 when 'on the 20th December 1926 by Letters made Patent under the Great Seal, Our Royal Predecessor His Majesty King George the Fifth granted to the British Broadcasting Corporation (the "BBC") a Charter of Incorporation' as well as the need to provide for change -

> it has been represented to Us by Our right trusty and well-beloved Counsellor Karen Anne Bradley, Our Principal Secretary of State for Culture, Media and Sport, that it is expedient that the BBC should be continued for the period ending on the 31st December 2027 and that the objects, constitution and organisation of the BBC should be reformed so as to enable the BBC to still better serve the interests of Our People…[11]

A crucial characteristic of the BBC was and remains that as Her Majesty the Queen decreed in the same preamble to the current Charter -

> We believe it to be in the interests of Our People that there should continue to be an independent corporation and it should provide such services, and be permitted to engage in other compatible activities, within a suitable legal framework.

In the actual text of the Charter, it is furthermore emphasised -

> The BBC must be independent in all matters concerning the fulfilment of its Mission and the promotion of the Public Purposes, particularly as regards editorial and creative decisions, the times and manner in which its output and services are supplied, and in the management of its affairs.[12]

3.4 Role of BBC as leading public broadcaster in the UK

Reference is now made to provisions in the Charter that deal specifically with the role of the BBC as 'the leading public broadcaster in the United Kingdom'.

Article 5 of the Charter refers to the BBC's Mission in the following terms -

[11] BBC Charter (n9), Preamble
[12] Ibid Clause 3 (1)

> The mission of the BBC is to act in the public interest, serving all audiences through the provision of impartial, high-quality and distinctive output and services which inform, educate and entertain.
>
> The Public Purposes are then listed in Clause 6 and read as follows –
>
> (1) To provide impartial news and information to help people understand and engage with the world around them;
>
> (2) To support learning for people of all ages;
>
> (3) To show the most creative, highest quality and distinctive output and services;
>
> (4) To reflect, represent and serve the diverse communities of all of the United Kingdom's nations and regions and, in doing so, support the creative economy across the United Kingdom; and
>
> (5) To reflect the United Kingdom, its culture and values to the world.

The payment of licence fees to provide exclusively for the financing of the BBC[13] is on the one hand meant to be one of the guarantors of the Corporation's independence from Government interference and on the other hand it is itself a source of the public service remit of the BBC in the sense that the BBC is there to serve its payers – the general public.

Different financing methods are used for public service broadcasting. With regard to the situation in the United Kingdom, Thomas Gibbons explains –

> PSB is financed in a number of ways in the UK. The BBC is primarily funded by a licence fee; it cannot obtain advertising or sponsorship but it may also provide commercial services, including programme sales and merchandizing, in support of public purposes. The Welsh Authority (S4C) is financed by tax revenue, which is supplemented by revenue from its commercial subsidiary. The licensed public service providers (Channel 3, Channel 4, and Channel 5) are commercial providers which obtain revenue from advertising and sponsorship, together with programmes sales and merchandizing. All these providers benefit from

[13] For detailed provisions regaring the funding of the BBC, reference is made to the BBC Framework Agreement, referred to *infra,* p 98 (n16)

subsidized broadcasting spectrum, relatively more so for the BBC and Channel 4, and from preferential ranking on Electronic Programme Guides (EPG).[14]

The current Royal Charter (also referred to as the 2016 Charter) has – as has been the practice with earlier Charters – been complemented by a Framework Agreement between the Government (through the Secretary of State for Culture, Media and Sport) and the BBC.

Reference to the Framework Agreement is made in the Charter itself:

'In anticipation of the grant of this Charter, the BBC has entered into a Framework Agreement with the Secretary of State for Culture, Media and Sport dated 7 November 2016. Further Framework Agreements may be made during the life of this Charter (and may amend or revoke the existing Framework Agreement).'[15]

The independence of the BBC is affirmed in the current Framework Agreement, also referred to as the 2016 Agreement.[16]

What however particularly distinguishes the current Charter and Framework Agreement from former Charters and Agreements with regard to the BBC, is that for the first time ever BBC has like other broadcasters been made subject to an independent regulator, to OFCOM which has even been empowered to license BBC.

In article 5 of the 2016 Framework Agreement, it is provided –

Ofcom must prepare and publish an Operating Framework which must contain provisions Ofcom consider appropriate to secure the effective regulation of the activities of the BBC as set out in the Charter and in this Agreement.

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[14] Thomas Gibbons, *Media Law in the United Kingdom* (3rd edn, Wolters Kluwer, The Netherlands 2018) para 231

[15] BBC Charter (n9) Clause 53 (3)

[16] HM Stationery Office, London, *An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation,* December 2016 (Cm 9366) (BBC Framework Agreement) Art 4

Identical reference to this Operating Agreement by Ofcom is found in Clause 46 (2) of the Charter and furthermore in sub-article (3) it is provided -

> Ofcom must set an operating licence for the UK Public Services, in accordance with the Operating Framework, which must contain regulatory conditions they consider appropriate for requiring the BBC –
>
> (a) To fulfil its Mission and promote the Public Purposes;
> (b) To secure the provision of distinctive output and services; and
> (c) To secure that audiences in Scotland, Wales, Northern Ireland and England are well served.

In line with these obligations, Ofcom developed an Operating Licence for the BBC's UK Public Services. The original version of that Operating Licence was issued on 13 October 2017. The Licence was updated three times and the current consolidated version of the Operating Licence as at 24 October 2019 provides the regulatory conditions how BBC is to fulfil its Mission and Public Purposes.[17]

Apart from incorporating within it the BBC's Mission and Public Purposes,[18] the Operating Licence goes into detail as to what Ofcom expects out of BBC to fulfil each of its five Public Purposes[19]. The Operating Licence moreover includes three schedules, the first to spell out in further detail what is expected out of each BBC television or radio channel, the second to provide definitions and interpretation, and the third to reproduce the list of existing UK Public Services provided by BBC.[20]

Gibbons, after referring to the 2006 Charter and Agreement which had introduced the concept of the 'BBC Trust, to substitute the former Board of Governors, where already

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[17] OFCOM, Operating Licence for the BBC's UK Public Services, (Consolidated version of the Operating Licence as of 24 October 2019, available at https://www.ofcom.org.uk/_data/assets/pdf_file/0031/173776/bbc-operating-licence-oct-19.pdf
- last accessed on 31 May 2020

[18] Ibid, articles 1.15 and 1.16

[19] Ibid, articles 1.24 to 1.39

[20] BBC Framework Agreement (n16) Paragraph 1 (2) and paragraph 2 of Part 1, Schedule 1.

BBC was brought 'under Ofcom's general powers to regulate standards in PSB (public service broadcasting)' points out –

> However, when the Charter was renewed in 2016, further and more far-reaching change was introduced. The BBC Trust model of governance had not worked satisfactorily, lacking clear lines of responsibility and being unable to hold top managers to account on behalf of the licence fee payer. The opportunity was taken to clarify further the BBC's Public Service mission and to replace its cumbersome internal regulatory arrangements. In place of the BBC Trust, the BBC now has a Board, with responsibility solely for governance. For the first time in its history, the function of regulating the BBC is now assigned to the independent regulator, Ofcom. In addition, there is strong emphasis on the public value of the BBC, what distinguishes it from other broadcasters in terms of creativity, quality, and distinctiveness.[21]

It could also be observed that in terms of the former 2006 Charter and Agreement, BBC was expected to 'develop purpose remits setting out priorities and means of judging performance'[22] and it was up to the Trust to develop and review those remits and elaborate on each of the public purposes. It is suggested that the fact that the task to develop such purpose remits and priorities has become the responsibility of Ofcom acting as an independent regulator, coupled with Ofcom's right to become the licensor with regard to broadcasting services provided by the BBC, except for the World Service, has been a step in the right direction since the correct distinction between the provision of the public broadcasting service and its regulatory structure has been created. 'The Office of Communications (Ofcom) is the UK's broadcasting, telecommunications and postal regulatory authority. It became the BBC's first external regulator in 2017.'[23]

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[21] Gibbons (n14) para 214

[22] Eric M Barendt, Jason Bosland, Rachel Craufurd-Smith, and Lesley Hitchens, *Media Law: Text, Cases and Materials* (Pearson, 2014) 102

[23] www.bbc.com/aboutthebbc/governance/regulation - last accessed 6 June 2020

3.5 Comparison with Malta

To the author's mind, this makes the fact that Malta's public broadcasting service remains licensed directly by Government rather than by the Broadcasting Authority which is the licensing body with regard to all the other broadcasting stations, more anomalous in the light of the stark contrast with the licensing system that has evolved in the United Kingdom, where the different treatment with regard to the BBC has been abandoned over three years ago.

As regards the BBC, the current Framework Agreement, in Schedule 3 thereof, furthermore contains a number of provisions dealing with Regulatory Obligations for the UK Public Service. Those obligations include those which the BBC imposes upon itself by setting, publishing, reviewing periodically and observing editorial guidelines designed to secure appropriate standards in the content of the UK Public Service.[24]

Such editorial guidelines are then expected to incorporate the more specific obligations set out in paragraphs 3 and 4 of Schedule 3 of the Framework Agreement, without restricting the general scope of BBC setting its own editorial guidelines.

Specific obligations include observing the 'standards set under section 319 of the (UK) Communications Act 2003 (Ofcom's "Standards Code").'[25] The relevant standards refer specifically to protection of persons under the age of eighteen, omission of material likely to encourage or incite any crime or disorder, that news is presented with due impartiality and reported with due accuracy, exercise of responsibility with respect to the content of religious programmes, protection of the general public from the inclusion of offensive and harmful material, and refraining from the use of techniques which seek to

[24] BBC Framework Agreement (n16) Schedule 3, Art. 2 (1)
[25] Ibid Schedule 3, Art. 3(1)

convey messages to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.[26]

Moreover, the BBC is obliged to 'observe the code in force under section 107 of the Broadcasting Act, 1996.'[27] The said section 107 refers to the duty of Ofcom to draw up, and from time to time review, a code giving guidance as to principles to be observed and practices to be followed in connection with the avoidance of (a) unjust or unfair treatment in programmes to which the section refers; or (b) to unwarranted infringement of privacy in, or in connection with the obtaining of material, included in, such programmes.[28] Moreover, by virtue of Part V of the UK Broadcasting Act, 1996, Ofcom has the duty to consider and adjudicate on complaints relating to such fairness and privacy issues[29]. The same obligations would subsist with regard to On Demand programme services provided by the BBC.

Other obligations impinging on the BBC in terms of the third Schedule of the Framework Agreement include making provision for party political broadcasts, establishing quotas for original productions, providing quotas for independent productions, securing competition between BBC producers and external producers (whether independent producers or not), drawing up a code for commissioning of

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[26] The standards objectives are laid out in section 319 (2) of the UK Communications Act, 2003. Then in terms of section 319 (3) of that Act, it is provided that 'the standards set by OFCOM under this section must be contained in one or more codes.' The said standards are at this stage contained in the OFCOM Broadcasting Code, the most recent version of which took effect on 1 January 2019. (Available at: https://www.ofcom.org.uk_data/assets/pdf_file/0016/132073/Broadcast-Code-Full.pdf - last accessed on 3 June 2020)

[27] BBC Framework Agreement (n16), Schedule 3, Art. 4 (1)

[28] Ibid, Schedule 3, Art. 4 (3) which replicates the wording of section 107 of the (UK) Broadcasting Act, 1996, (Chapter 55) and in the process makes the reference to "programmes to which the section refers" as a reference to "any programme broadcast by the BBC". The Code to be drawn up by Ofcom in terms of section 107, formerly known as the "Fairness Code" is now incorporated as Section 7 dealing with Fairness, within the Ofcom Broadcasting Code (n26).

[29] *See*: Section 110, UK Broadcasting Act, 1996, as amended by UK Communications Act 2003 (c21), s 411 (2). As a result of these amendments Ofcom took over this duty that was formerly exercised by the Broadcasting Standards Commission.

programmes as well as providing for retention and production of recordings. In respect of all these issues, the Framework Agreement refers to Ofcom's regulatory role, and to its obligation to issue general guidance in respect of all these obligations.

A very important characteristic of the British Broadcasting Corporation remains to this date its funding structure. BBC's main source of revenue consists of the fees payable by licence holders. Clause 49 of the Framework Agreement provides -

> The Secretary of State must pay to the BBC out of money provided by Parliament sums equal to the whole of the net Licence Revenue or such lesser sums as the Secretary of State may, with the consent of the Treasury, determine.

Such sums can be used by BBC to fund any activities properly carried on by the BBC except those carried on for the purpose of any commercial activity, the World Service, services required by Government Departments, or any service aimed primarily at users outside the UK. When it comes to the World Service, this is financed through the UK Ministry for Foreign and Commonwealth Affairs and Government Departments are expected to pay for those services which are provided at their request.

> Moreover, licence fees cannot be used to fund any –
>
> television, radio or online service which is wholly or partly funded by advertisements, subscription, sponsorship, pay-per-view system or any other alternative means of finance unless the Secretary of State has given prior approval.[30]

The provision of the World Service which is aimed primarily at users outside the UK is deemed separate from the provision of the UK Public Service. Moreover, the BBC World Service is not regulated by Ofcom. Instead, the BBC is responsible for setting its overall strategic direction, the budget and guarding its editorial independence. It must itself set and publish a Licence for the World Service, which defines its remit, scope, annual budget and main commitments, as well as "objectives, priorities and targets"

[30] BBC Framework Agreement (n16), Clause 49 (2)

which are agreed with the Foreign Secretary.'[31] According to that licence, all World Service output must meet the BBC's editorial standards as set out in the BBC's Editorial Guidelines.[32]

The objectives, priorities and targets agreed to between the BBC and the Foreign Secretary are listed in Schedule 1 of the BBC World Service Licence[33] include the following objectives –

1. Reach – To maximise the reach of all language services in line with its Remit and subject to value for money;
2. Quality – To be the world's most trusted provider of accurate and independent international news and current affairs;
3. Impact – to provide accurate, impartial and independent news and current affairs covering international and national developments, so that its audiences can engage in democratic processes as informed citizens, and to reflect the United Kingdom, its culture and values to the world; and
4. Value – To demonstrate value for money, transparency and seek alternative sources of funding where appropriate and in line with its remit.

Primarily, the World Service contributes to the BBC's fifth public purpose – to reflect the United Kingdom, its culture and values to the world. In line with the BBC Editorial Guidelines, the BBC is obliged to 'safeguard the editorial integrity and high quality of the World Service' and since Ofcom does not regulate the World Service, complaints with regard to that service are 'considered within the BBC complaints process.'[34]

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[31] www.bbc.com/aboutthebbc/governance/regulation (n23); *see also* BBC Framework Agreement (n16) Clauses 33 - 36

[32] http://www.bbc.co.uk/editorialguidelines/ - last accessed 6 June 2020

[33] www.downloads.bbc.co.uk/aboutthebbc/insidethebbc/manaagementstructure/structureandgovernance/world_service_licence.pdf - last accessed 6 June 2020

[34] BBC Editorial Guidelines (n32)

3.6 Other Public Service Broadcasters in the UK

The responsibility to provide public service broadcasting in the United Kingdom is not limited to the BBC.

> The UK has a unique system of public service broadcasting (PSB). Not only does it have in the BBC the world's most celebrated PSB institution, it also requires the major commercial broadcasters to commit themselves to PSB norms. Thus, the model is basically one of plurality of PSB provision, mainly for reasons of competitive quality; high quality programming is likely to emerge where there is no single monopoly provider.[35]

As has also become the case since April 2017 with regard to BBC (except for the World Service) when it then comes to the commercial broadcasters, PSB requirements are implemented 'through external regulation by Ofcom rather than through their internal structures.'[36]

The Regulatory Provisions of Ofcom are covered in Chapter 4 of the Communications Act 2003 (UK), (CA), and specifically sections 264 to 271 deal with the public service remit for television.

In terms of section 264 of CA, Ofcom has the duty to carry out a review and report periodically, on 'the extent to which the public service broadcasters have, during that period[37], provided relevant television services (taking them all together over the period as a whole) fulfil the purposes of public service broadcasting in the United Kingdom.' Moreover, Ofcom carries 'an obligation, with a view to maintaining and strengthening the quality of public service broadcasting in the United Kingdom, to prepare a report on the matters found on the review.' The last review carried out by Ofcom in fulfilment of

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[35] Tony Prosser, 'United Kingdom' in Susanne Nikoltchev (ed), *Iris Special: The Public Service Broadcasting Culture* (European Audiovisual Observatory, Strasbourg 2007) 103

[36] Ibid 108

[37] The period of time for the relevant review is determined by Ofcom itself in terms of section 264 (2) of the UK Communications Act, 2003 (Chapter 21) (CA) but cannot be of more than five years.

this obligation was published on 27 February 2020. The report is entitled 'Small Screen: Big Debate – a five-year review of Public Service Broadcasting (2014-18).[38]

Then the purposes of public service television broadcasting in the United Kingdom are defined as follows in section 264 (4) of this Act:

(a) the provision of relevant television services which secure that programmes dealing with a wide range of subject-matters are available for viewing;

(b) the provision of relevant television services in a manner which (having regard to the days on which they are shown and the times of day at which they are shown) is likely to meet the needs and satisfy the interests of as many available audiences as practicable;

(c) the provision of relevant television services which (taken together and having regard to the same matters) are properly balanced, so far as their nature and subject-matters are concerned, for meeting the needs and satisfying the interests of the available audiences; and

(d) the provision of relevant television services which (taken together) maintain high general standards with respect to the programmes included in them, and in particular with respect to –

i. the contents of the programmes;

ii. the quality of the programme making; and

iii. the professional skill and editorial integrity applied in the making of the programmes.

The law then provides that 'a manner of fulfilling the purposes of public service television broadcasting in the United Kingdom, is compatible with this subsection'[39] if the various public service broadcasters (taken together) ensure: (a) a public service for the dissemination of information and for the provision of education and entertainment; (b) that cultural activity in the United Kingdom, and its diversity, are reflected, supported

[38] http://www.ofcom.org.uk/_data/assets/pdf_file/0013/192100/psb-five-year-review-pdf - last accessed: 6 June 2020

[39] CA sec.264 (6)

and stimulated by the representation in the various public services of drama, comedy, music, feature films as well as through the treatment of visual and performing arts; (c) that civic understanding is facilitated and that there is fair and well-informed debate on news and current affairs; (d) that a wide range of sporting and other leisure interests are catered for; (e) that a suitable range of programmes on educational matters or of educative value is offered; (f) that the programmes broadcast include a range of programmes dealing with science, religion and other beliefs, social issues, matters of international significance or interest and matters of specialist interest; (g) that programmes dealing with religion include programmes providing news and other information about different religions and other beliefs; programmes about the history of different religions and other beliefs; and programmes showing acts of worship and other ceremonies; (h) that there will be suitable quantity and range of high quality and original programmes for children and young people; (i) that programmes provide for the different communities in the United Kingdom; and (j) that there will be an appropriate range and proportion of programmes made outside the M25 (London) area.

According to the CA, the relevant television services which taken together are expected to provide the entire remit of public service broadcasting are: the BBC, the television programme services that are public services of the Welsh Authority, every Channel 3 service; Channel 4, Channel 5, and the public teletext service.[40]

> Channel 3 (better known as ITV) is the successor to the old regional holders of broadcasting franchises; they have now merged in England and Wales to create a single company. It takes the form of an ordinary commercial company owned by shareholders and is funded by advertising. Channel 5 is similarly a single commercial national company. The status of Channel 4 is somewhat different; it is a publisher-broadcaster and commissions programmes from independent production companies, but does not make them itself. It is wholly funded by

[40] CA sec. 264 (11)

advertising revenue, but has the status of a statutory corporation with no shareholders; profits are ploughed back into programme commissioning.[41]

In terms of sec. 265 of the CA, the public service remit of the different public service broadcasters is differentiated in the sense that the remit for every Channel 3 service and for Channel 5 is 'the provision of a range of high quality and diverse programming', the remit for Channel 4 is to exhibit a distinctive character where the emphasis is on programmes 'of an educational nature and other programmes of educative value' apart from appealing 'to the tastes and interests of a culturally diverse society', and the remit for the public teletext service 'is the provision of a range of high quality and diverse text material.' Furthermore, one needs to refer to S4C *(Sianel Pedwar Cymru)* which is set up in terms of statute[42] to broadcast in Wales and is obliged to provide a substantial proportion of programmes in the Welsh language. S4C is run by 'S4C Authority' which 'is analogous to the former BBC Trust: members are appointed by the government in accordance with a public appointment process and they oversee a professional staff to manage the Authority's activities.'[43] The Welsh Authority's function[44] is to provide television programme services of high quality for reception wholly or mainly by members of the public in Wales and, 'in doing so, it must provide the service known as S4C as a public service for the dissemination of information, education and entertainment. That service is now provided wholly in digital form.'[45]

It should be added that in terms of the Broadcasting Act, 1990 (UK), an Independent Television Commission had been set up to license and regulate television programme services, other than those provided by the BBC and the Welsh Authority. That Commission was also empowered to license and regulate new broadcasting services

[41] Prosser (n35) 105
[42] Broadcasting Act 1990 (UK), s. 56 and Sch. 6
[43] Gibbons (n14) para 228
[44] CA 204
[45] Gibbons (n14) para 229

such as multiplex and digital programme services. Such services include pay television – including to mention one of the best-known examples in Malta through cable television – Sky News and other Sky Channels. The functions of the Independent Television Commission (ITC) were in virtue of the Communications Act 2003 taken over by Ofcom[46] - as it did with regard to the Broadcasting Standards Commission (BSC) set up in terms of the Broadcasting Act 1996.

It should be observed that the broadcasting services that are being referred to are provided by independent and commercial broadcasters and hence have no public service remit and their role is outside the purview of the present study. None the less it is worth pointing out these stations require to be licensed by Ofcom in terms of section 3(3) of the Broadcasting Act 1990, and of section 3(3) of the Broadcasting Act 1996 and are still subject to be regulated by Ofcom, in particular to ensure that the licensee is a 'fit and proper person' to hold the licence as well as to retain same licence.

One example of how Ofcom carries out this responsibility is to be found in its decision 'on fit and proper assessment of Sky' in the light of 'unlawful activities at newspapers owned by News Group Newspapers Limited (NGN)' in particular to establish whether the conduct of James and Rupert Murdoch in relation to events at NGN had or could have any impact on Sky.

Significantly the decision by Ofcom, although with reference to a commercial broadcaster who does not form part of the public service remit of broadcasting, still makes the salient point:

> Ofcom is responsible for protecting public confidence in broadcasting and the public interest in there being an appropriately rigorous regulatory regime,

[46] CA sec. 411(2) Sch. 19 (1)

through its powers and duties under the statutory scheme established by Parliament. [47]

Ofcom regulates independent television services in terms of section 211 of the Communications Act 2003, and regulates independent radio services in terms of section 245 of the same Act.

On setting up, initially Ofcom applied the Broadcasting Codes that had been issued by the ITC and BSC but in 2005 'it decided to make a fresh start and to introduce a new Code'[48] not least because of its wider remit. The Code is revised from time to time, with the latest edition being published in 2019. The new edition known as 'The Ofcom Broadcasting Code'[49] secures observance with the standards and objectives set out in the Communications Act 2003, as well as in terms of the Broadcasting Acts of 1990 and 1996, and furthermore seeks to give effect to the requirements in EC Directive 2010/13/EU ("The Audiovisual Media Services Directive") that take account of technological changes, in particular the development of on line services, as well as the provisions of the Human Rights Act 1998 (UK) and the European Convention on Human Rights.

The Code deals with protecting the under-eighteens, protecting the public against harmful and /or offensive material, proper portrayal of crime, disorder, hatred and abuse, religious programmes, due impartiality and due accuracy and undue prominence of views and opinions, elections and referendums, fairness, privacy, commercial references in television programming, and commercial communications in radio programming. Moreover, the Code includes in its schedules extracts from relevant UK legislation, from the EU Audiovisual Media Services Directive, the European Convention on Human Rights, Financial Promotions and Investment Recommendations, as well as

[47] Ofcom decision on fit and proper assessment of Sky, 20 September 2012 www.ofcom.lorg.uk/about-ofcom/latest/media/media-release/2012/ofcom-decsion-on-fit-and-proper-assessment-of-sky - last accessed 6 June 2020
[48] Katsirea (n5) 135
[49] Ofcom (n26)

Extracts from the BBC Charter and Agreement. Part Two of the Code includes what is referred to as the Cross-promotion Code and the On-Demand Programme Service Rules.

Moreover, Ofcom has published a compliance checklist for TV broadcast content 'to help applicants and new licensees understand the obligations and rules they must comply with as a condition of their Ofcom licence to broadcast.'[50] According to this document, Ofcom issues different types of licence for services on television and each licence is subject to conditions and requirements including the requirement to put in place adequate compliance procedures 'to ensure that the licensee can comply with its licence conditions and Ofcom's codes and rules.'[51] The Checklist then refers all broadcasters to the Broadcasting Code and other guidance documents issued by Ofcom.

3.7 Italy

As in other European countries, initially broadcasting through radio was under the control of the State. In 1924, the Fascist government then in power in Italy had given a private company an exclusive licence for broadcasting, and its programmes were tightly controlled. From 1944, this monopoly was vested in Radio audizioni Italia (RAI) [52]

The first attempt to regulate the Italian media landscape was made after World War II when in 1947, a Parliamentary Commission was established by statute to secure RAI's political independence.[53] Although RAI renamed in 1952 as *Radiotelevisione Italiana*

[50] https://www.ofcom.org.uk/__data/assets/pdf_file/0031/35779/TV-Compliance-Checklist.pdf, sec. 1.1 – last accessed 6 June 2020
[51] Ibid sec. 1.4
[52] Eric M Barendt, *Broadcasting Law – A Comparative Study* (Clarendon Press, Oxford 1995) 24
[53] Katsirea (n5) 81

no longer enjoys a broadcasting monopoly it is still considered as the exclusive concessionaire to provide Italian public service broadcasting.[54]

> The public service broadcasting framework in Italy is represented by several legal provisions according to which the public service is entrusted to a concessionaire on the basis of a 20-year agreement between the state, represented by the Ministry for Economic Development and the broadcaster, namely Radiotelevsione Italiana (RAI).[55]

3.8 Italian Consolidated Law on Audiovisual and Broadcasting Services (CLARMS)

As regards, the relevant legal provisions, reference is made to the Consolidated Law on Audiovisual and Broadcasting Services (CLARMS)[56], as last amended by the RAI Reform Law of December 28, 2015 (Law no. 220 of 2015). The Consolidated Law was issued by Government through a Legislative Decree, as authorised to do in terms of the so-called Gasparri Law.[57] The Gasparri Law – Law of 3 May 2004, n. 112, is entitled *'Norme di principio in materia di assetto del Sistema radiotelevisivo e della RAI-Radiotelevisione Italiana Spa, nonche' delega al Governo per l'emazione del testo unico della radiotelevisione'* (Rules of principle on the organisation of the radio and television system and of RAI-Radiotelevisione Italiana Spa, as well as delegation to the Government for the issue of the consolidated text of radio and television.)[58] Through section 16 of this law, Government was delegated to adopt, within twelve months from its date of entry, and after consulting

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[54] Il Gruppo Rai – La Struttura Aziendale (The RAI Group – The Company Structure) http://www.rai.it/dl/rai/text/ContentItem-9e40fc26-6bca-4fc7-a682-50d48a0f19e0.html?refresh_ce – last accessed: 10 June 2020

[55] Valentina Mayer, Italy (2019) The Media and Entertainment Law Review, 1st edn, (ed: R Bruce Rich and Benjamin E Marks)

[56] Legislative Decree of July 31, 2005, no. 177, as amended by Legislative Decree no. 44/2010 (Laws of Italy) – For full text *cf.* Decreto Legilativio 31 luglio 2005, n1. 177 – 'Testo unico deella radiotelevisione', pubblicato nella Gazetta Ufficiale n. 208 del 7 settembre 200t, Supplemento Ordinario n. 150. (CLARMS) (www.camera.it/parlam/leggi/deleghe/testi/05177dl.htm - last accessed on 15 June 2020)

[57] Maja Cappello and Roberto Mastroianni, 'Italy' in Susanne Nikoltchev (ed), *Iris Special: The Public Service Broadcasting Culture* (European Audiovisual Observatory, Strasbourg 2007) 125

[58] Published in the Official Gazette of the Italian Republic (GURI) no. 104 of 5 May 2004 – Ordinary Supplement no. 82 – available at www.camera.it/parlam/leggi/04112.htm - last accessed on 16 June 2020

the Communications' Authority (AGCom) a legislative decree containing the Consolidated Law (CLARMS).

In Article 45 (2), CLARMS provides what is expected out of RAI as the concessionaire company entrusted exclusively with public service broadcasting, by providing –

The general public broadcasting service …… guarantees -

a. The broadcasting of all public service television and radio broadcasts of the concessionaire company with full coverage of the national territory, insofar as permitted by the state of science and technology;

b. An adequate number of hours of television and radio broadcasts dedicated to education, information, training, cultural promotion, with particular regard to the enhancement of theatrical, cinematographic, television works, also in the original language, and recognised musical works of high artistic level or largely innovative; this number of hours is defined every three years by resolution of the Authority (for guarantees in Communication)[59]; entertainment programmes for minors are excluded from the calculation of these hours;

c. …..

d. access to programming, within the limits and in the manner indicated by law, in favour of the parties and groups represented in Parliament and in regional assemblies and councils, of the associations of local self-government organisations, of national unions, of religious creeds, political movements, political and cultural bodies and associations, legally recognised national associations of the co-operative movement, social promotion associations registered in national and regional registers, ethnic and linguistic groups and other groups of significant social interest that request (access to programming);

e. …

f. ….

[59] Ibid Sec. 2 cc (for definition of 'Authority')

g. the free transmission of messages of social utility or public interest that are requested by the Prime Minister's Office and the transmission of adequate information on the viability of Italian roads and motorways;

h. the transmission, at appropriate times, of content intended specifically for minors, which take into account the needs and sensitivity of early childhood and developmental age;

i. the preservation of historical radio and television archives, guaranteeing public access to them;

l. …

m. …

n. the creation of digital interactive services of public utility;

o. …

p. …

q. …

r. …

s. the realisation of distance teaching activities.

Article 46 of CLARMS then indicates how these broad obligations are to be implemented even at the regional level as well as in the autonomous provinces of Trento and Bolzano.

> The principle whereby public service broadcasting should reflect the changing values of Italian society is thus not only a general trend in the operation of *RAI*, but also a binding legal provision enshrined in the broadcasting regulations in force.[60]

Moreover, RAI's public service remit was meant to be set out every three years in a contract of service with the Ministry of Communications (Mincom) according to guidelines adopted by the Ministry and AGCom.

The legal basis for this contract is provided in Article 45 (1) of CLARMS:

[60] Cappello and Mastroiani (n57) 126

Il servizio pubblico generale radiotelevisivo e' affidato per concessione a una società per azioni, che, nel rispetto dei principi di cui all'articolo 7, lo svolge sulla base di un contratto nazionale di servizio stipulato con il Ministero e di contratti di servizio regionali e, per le province autonome di Trento e di Bolzano, provinciali, con i quail sono individuati i diritti e gli obblighi della societa' concessionaria. Tali contratti sono rinnovati ogni tre anni.

(The general public broadcasting service is entrusted by way of concession to a company which, while adhering to the principles enunciated in article 7, provides its service on the basis of a national contract of service entered into with the Ministry and on the basis of contracts of service on a regional basis as well as for the provision of provincial services for the autonomous provinces of Trento and Bolzano, through which the rights and obligations of the concessionaire company are determined. Such contracts are renewed every three years.) (Author's translation from the original Italian text above quoted)

In virtue of the RAI Reform Act, 2015,[61] the words 'general public radio and television service' wherever they occur, have been replaced by the words 'public radio, television and multimedia service'. It has, furthermore, been provided that the Ministry of Communications needs to refer the concession agreement to the Council of Ministers. Moreover, the term of the concession agreement has been extended from three to five years since the words 'are renewed every three years' have been replaced with the words 'are renewed every five years within the framework of the concession which extends to RAI-Radiotelevisione italiana Spa, recognition of its role as operator of the public radio, television and multimedia service.'[62]

A number of observations can be drawn from the provisions of art. 45 (1) of CLARMS. The reference to a concessionaire company – in the Italian text *'per concessione a una società per azioni'* emphasises two principles, firstly that that Government has chosen to farm out the obligation of providing public service broadcasting, and secondly that the company in question will be a private company with a shareholding structure. This

[61] Legge 28 dicembre 2015 n. 220 – Riforma della RAI e del servizio pubblico radiotelevisivo (GU n 11 del 15-1-2016) (RAI Reform Law) – available at www.gazzettaufficiale.it/atto/stampa/serie_generale/originario - last accessed 20 June 2020. English translation of this law is available at -www.altalex.com/documents/news/2016/01/18/riforma-rai - last accessed 20 June 2020

[62] Ibid sec. 1 (a) and (b)

provision was at the basis of a major reform through which RAI was privatised – changed from a Government bureaucratic entity into a private company[63] that can compete better with the commercial broadcasters that as in other European countries have become part of the broadcasting landscape.

Another important observation is that the public service broadcaster that became the concessionaire referred to in art. 45 (1) of CLARMS must also adhere to the principles enunciated in art. 7 of the same Code.

The principles referred to in article 7 are general principles regarding information and other public service tasks in the broadcasting sector. Those general principles include (a) the truthful presentation of the facts and events, in such a way as to favour the free formation of opinions, in any case not allowing the sponsorship of the news; (b) the daily transmission of newscasts; and (c) the access of all political subjects to the transmission of information and electoral and political propaganda in conditions of equal treatment and impartiality. In sub-article (4) thereof it is then provided that 'this consolidated law identifies the *additional and specific* public service tasks and obligations that the company which is the concessionaire of the general public radio and television service (RAI) is required to fulfil as part of its overall programming.' (Emphasis added by author) In that respect the consolidated law is referring to the additional duties imposed on RAI as the public service broadcaster in virtue of articles 45 – 50 of the same law (CLARMS).

The general principles enunciated in article 7 with regard to the provision of information must be followed by all broadcasters, including the commercial broadcasters, apart from the additional obligations that pertain solely to the public service broadcaster. The rationale behind such principles is provided in sub-section (1) of section 7 which establishes that the activity of provision of information through

[63] Cappello and Mastroiani (n57) 127

broadcasting, irrespective of who may be the provider, is to regarded as a general interest service which must be offered in line with these principles *('costituisce un servizio di interesse generale ed è svolta nel rispetto dei principi di cui al presente capo')*. This wording echoes the expression that had been used, fifteen years earlier, by the Constitutional Court of Italy.

> … the Italian Constitutional Court, ever since its seminal judgement no. 59/1960, has consistently held that nation-wide television broadcasting is a "public utility in the general interest". While the argument was mainly used to justify the maintenance of the statutory monopoly on television broadcasting, this "general interest" language is, at least to some extent, used nowadays, even in respect of private broadcasters.[64]

3.9 Contract of Service between RAI and the Ministry of Communications

Reference is at this stage due to some of the provisions of the Contract of Service entered into between RAI and the Ministry of Communications. The Contract which is in force, has been published in the Government Official Gazette of 23 May 2017 and can be downloaded from the RAI website[65], is that in respect of the years 2018 – 2022.

In general terms:

> The National Contract of Service sets out the general obligation for *RAI* to provide broadcasting output of a certain quality. Namely *RAI* undertakes to consider viewers' preferences, to respect media pluralism, to promote cultural development, to draw inspiration from the values of society, to ensure correct use of the Italian language, to update its programming and to promote regional information, which is carried out by the third public service channel *Rai Tre*.[66]

[64] Ibid 134
[65] RAI, Contratto di Servizio 2018 – 2022 (www.Contratto_di_Servizio_Rai_2018-2022(dl/doc/1521036887269_Contratto%202018%20testo%20finale.pdf) – last accessed 20 June 2020
[66] Cappello and Mastroianni (n57) 126

Reference is made to Article 6 of the Contract of Service 2018 – 2022 that deals specifically with the quality of information to be provided by the public service broadcaster.

Article 6 (1) denotes that RAI must provide information on the basis of the principles of equilibrium, pluralism, completeness, objectivity, impartiality, independence and openness towards the different political and social formations. Moreover, RAI is to guarantee the ethical duty of journalists and the operators of the public service to uphold and respect professional ethics since journalists and operators are obliged to marry together the principles of liberty and of responsibility, to respect the dignity of the human being, and to ensure an adequate, effective and loyal contrast of different points of view.

Article 6 (3) emphasises that RAI, through the truthful presentation of facts and events while placing them in their proper context, as well as through objectivity and impartiality with regard to the information provided, offers adequate information that leads to the free formation of opinions that are not conditioned by stereotypes; favouring the development of a critical, civil and ethical faculty by the general population.

The mission and role of the public service broadcaster is defined under the Heading 'General Principles' in Article 2 as guaranteeing a wide range of programmes and an offer of balanced and various transmissions of all genres, with the aim of satisfying in the national and European context, the democratic, cultural and social needs of the people, to guarantee quality of information, pluralism, inclusive of cultural and linguistic diversity, thereby respecting the right and duty of being informed.

Among the specific principles which are emphasised throughout the text of the Contract of Service, the author is struck by the references not only to the national identity

of the country but also to the values and ideals of the European Union[67], to the country's constitutional principles[68], to the protection of minors and to the human, cultural and professional dignity of women[69]. In this respect RAI has an obligation to remove any obstacles which as a matter of fact limit equal opportunities.

Other specific obligations emanating from the contract of service binding on RAI as a public service broadcaster include making ample provision for culture, creativity, developing the viewers' mental and critical faculties, paying importance to history, heritage, the environment, classical and other genres of music, choreography, providing space for emerging artists, sports, tourism as well as diffusing knowledge about constitutional principles, rights linked to citizenship and seeing to increasing a sense of belonging by Italian citizens in the European Union.[70]

Moreover, similarly to the provisions relating to the external services that in the UK are provided by the BBC, RAI has specific obligations to provide for programmes that are transmitted outside of Italy where one of the intentions is to keep alive a sense of belonging and a bond between Italians residing out of their country and their country of origin.[71]

3.10 Pronouncements by Italian Constitutional Court

'With its three television channels, RAI – Radiotelevisione Italiana Spa, a joint-stock company, is currently the only public broadcaster in Italy.'[72] While RAI no longer is a monopoly and the Constitutional Court in Italy has in its judgements evolved from ruling in 1960[73] in favour of its monopoly on the basis of the scarcity of frequencies

[67] RAI Contratto di Servizio 2018 – 2022 (n65) Sections 3.2(a), (b), (f), 4.2 (f), 8.2 (g), 11.1, and 25.1 (h)
[68] Ibid sec. 3.2 (e), and 4.2 (f)
[69] Ibid, sec. 2.3 (g)
[70] Ibid, sec. 3 and 4
[71] Ibid, art. 12
[72] Katsirea (n5) 83
[73] Italian Constitutional Court, Judgment no. 59/1960

available for broadcasting to ruling in 2002 in favour of pluralism while retaining that 'public broadcasting is indispensable for the attainment of pluralism.'[74] In this respect the Court has moved to secure pluralism through an interplay between an internally pluralistic public sector and an externally pluralistic private sector.

3.11 Italian Communications Authority – AGCom, and Parliamentary Commission

At the regulatory level, all broadcasting stations in Italy are subject to the *Autoritàper le Garanzie nelle Comunicazioni* (AGCom) which is the Italian Communications Authority.

> AGCom enforces the broadcasting principles established by law. It is the guarantor of the market competition rules in the communications sector. It issues the plan for the allocation of frequencies, monitors the creation of dominant positions and ensures the correct application of the antitrust laws. It also oversees the services offered by the broadcasters to ensure their quality and the respect of the rules related to advertising, politics and the protection of minors.[75]

While AGCom is a regulatory authority with regard to all broadcasting services, be they of a public or private nature, when it comes to RAI, it is furthermore subject to the Parliamentary Commission for the Direction and Supervision of Public Service Broadcasting *(Commissione Parlamentarre per l'indirizzo e la vigilanza del servizio pubblicio raiodtelevisivo)* (the 'PSBC') set up in terms of Law 103 of 14 April 1975[76], and made up of twenty members from the Chamber of Deputies and twenty members from Senate. The powers of the PSBC include ensuring that the public broadcaster respects public broadcasting principles such as pluralism and fairness.[77] Moreover this Commission

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[74] Katsirea (n5) 88
[75] Ibid 84
[76] Legge 14 aprile 1975, n. 103 – Nuove norme in materia di diffusione radiofonica e televisiva (GU n.102 del 17 aprile 1975) – available at www.camera.it/_bicamerali/rai/norme/listitut.htm last accessed: 20 June 2020
[77] Katsirea (n5) 85

delegates the seven members of RAI's Board of Directors and gives, by a two-thirds majority, its binding opinion on the appointment of the Chairperson of the Board.[78]

The enactment of Law 103 of 1975 had followed calls from the Constitutional Court for a shift in broadcasting governance from the executive to Parliament.[79] Through its judgment, the Italian Constitutional Court 'held that broadcasting was an essential service in a democratic society that should be controlled by parliament, not the executive.'[80] The law was subsequently repealed in virtue of Law 112 of 2004, which however had kept in force those provisions of Law of 103 of 1975 through which the Parliamentary Commission was set up. The 2004 Law provided that the RAI's Board of Directors would be appointed by the company's Shareholders' General Meeting. The functions of Parliamentary Commission to oversee public service broadcasting were re-affirmed in CLARMS (Legislative Decree n.177 of 2005).

The present composition of RAI's Board of Directors has been revised in the RAI Reform Law (Law n.220 of 2015) which while establishing that the Board will be composed of seven members, provides that all board members are to be of 'recognised integrity, prestige and competence'. Moreover, 'the composition of the board of directors is defined by promoting the presence of both genders and an adequate balance between components characterised by high professionalism and proven experience in the legal, financial, industrial and cultural fields, as well as taking into account the authoritativeness required by the assignment, the absence of conflicts of interest or ownership of offices in competing companies.'

The members of the Board of Directors are identified as follows: two are elected by the Chamber of Deputies, and two elected by the Senate; two are appointed by the

[78] Roberto Mastroianni and Amedeo Arena, *Media Law in Italy* (2nd edn, Wolters Kluwer, The Netherlands, 2014) para 303
[79] Constitutional Court of Italy, Judgment no. 225 of 1974
[80] Katsirea (n5) 87

Council of Ministers on a proposal from the Minister of Economy and Finance; and one is designated by the assembly of employees of RAI from among the company employees.[81]

3.12 Comparison with Malta

The most significant comparison to be drawn between the law of Malta and that of Italy with regard to public service broadcasting is precisely the fact that while in Italy, the public service broadcaster provides its services on the basis of a concession agreement with Government which is similar to the situation in Malta where the public service broadcaster provides its services on the basis of a licence issued directly by Government rather than by the broadcasting regulator, in Italy the ultimate control of public service broadcasting has shifted from the Executive to Parliament, with adequate safeguards to ensure political consensus as is evident from the safeguard that the Parliamentary Commission overseeing public service broadcasting needs to approve by a two thirds majority the appointment of the Chairperson of the public service broadcaster.

The Parliamentary Commission's supervisory powers include inviting for a hearing RAI's President and other officials[82] as well as giving direction to ensure that the public service broadcaster conforms to the fundamental principles governing the broadcasting sector, namely independence, objectivity and a pluralistic attitude towards diverse cultural, social and political views.[83]

The model of shifting towards a system of parliamentary oversight of the functions of the public service broadcaster is one of the models to be considered in the author's

[81] RAI Reform Law (n61), sec. 2, amending CLARMS (n56) sec. 49. *Also see:* Statute of RAI, art. 21 – available at www.The_Statute(dl/doc/1533290900193_Statuto.pdf) – last accessed: 20 June 2020
[82] Mastroianni and Arena (n79) para 304
[83] Ibid para 302. *See:* Sections 3 – 7, CLARMS (n56)

opinion when addressing the future challenges facing Malta's own public broadcasting services.

4.1 The Constitution of Malta

The duties and obligations of the public service broadcaster need to be examined within their relevant legal framework. Primary and secondary sources of legislation will be examined.

The first primary source to refer to is the Constitution of Malta, in virtue of which the Broadcasting Authority is set up.

In Article 119 (1) of the Constitution it is provided -

> It shall be the function of the Broadcasting Authority to ensure that, so far as possible, in such sound and television broadcasting as may be provided in Malta, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.

It is clear from the foregoing that the Constitution does not provide for any distinction between public and private broadcasting services, and therefore its provisions are equally applicable to both forms of broadcasting. When the Constitution of Malta was enacted in 1964 on Malta achieving Independence, the need for making such a distinction was not yet felt, and the wording of this Article of the Constitution has to date, that is for the past fifty-six years, remained unchanged.

As examined in Chapter 2, the Broadcasting Authority in Malta had already been set up, even if with a somewhat different composition, in 1961 in virtue of the Broadcasting Ordinance. The Authority was then set up to provide itself, or through 'persons contracting with it for the provision of such services on its behalf', sound and

television services in Malta.[1] Pluralism of broadcasting services followed no less than thirty years later in 1991.

Since the Broadcasting Authority became a constitutional watchdog and its set up as well as function are entrenched in Malta's Constitution, its appointment is regulated by the Constitution. Various provisions are provided in the Constitution in order to assert and safeguard its independence from Government or any other source. In particular members of the Broadcasting Authority 'shall not, within a period of three years commencing with the day on which (they) last held office, or acted as a member, be eligible for appointment to or to act in any public office.'[2] Moreover a person serving on the Authority cannot be removed from office unless it is 'for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour.'[3]

Moreover, in the exercise of its function to ensure impartiality, 'the Broadcasting Authority shall not be subject to the direction or control of any other person or authority.'[4] This provision, however, is not applicable to the Courts of Justice that have through various judgements[5] established that in the appropriate circumstances they would have the right to review whether or not the Broadcasting Authority lived up to its constitutional obligation of safeguarding impartiality.

While the main function of the Broadcasting Authority was and remains to ensure impartiality in all sound and television services in Malta, that function 'shall be without

[1] Chapter 2, p 60 *et seq*
[2] Constitution of Malta (CM) art 118(4)
[3] CM art 118 (6)
[4] CM art 118 (8)
[5] *See in particular: Dom Mintoff v. Montanaro Gauci (Court of Appeal, 22 May 1971), and Dr George Borg Olivier noe v. Professor Dr Carmelo Coleiro (Court of Appeal, 26 February 1976)*

prejudice to such other functions and duties as may be conferred upon it by any law for the time being in Malta.'[6]

Other functions and duties are at this stage conferred on the Authority in terms of the Broadcasting Act (Chapter 350 of the Laws of Malta). This Act is the second primary source of legislation providing the legal framework within which public service broadcasting services are provided in Malta.

Before examining the relevant provisions of the said Broadcasting Act, however, it needs to be pointed out that there are other provisions in the Constitution of Malta which can be considered as forming part of the legal framework within which the duties and obligations of the public service broadcaster in Malta will be examined.

In particular reference is made to Articles 40 and 41 of the Constitution which safeguard freedom of conscience and freedom of expression.

> In so far as the two freedoms are concerned – freedom of conscience and worship and freedom of expression – the Constitution does not refer to any particular medium. This means that as these two constitutional provisions are drafted, they apply to any medium whatsoever. Freedom of conscience, worship and expression are therefore guaranteed on all media, both the traditional media such as print and broadcasting media, as well as the new media.[7]

It is suggested that the fundamental human right of freedom of expression as safeguarded in Article 41 of the Constitution of Malta, and in Article 10 of the European Convention on Human Rights provides the guiding light for the correct interpretation of the various provisions of the laws, regulations and other legal enactments pertaining to broadcasting. As will be examined, *infra,* this is borne out by various provisions of the Broadcasting Act which make specific as well as indirect reference to the fundamental human right of freedom of expression.

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[6] CM art 119(2)

[7] Kevin Aquilina, *Media Law in Malta,* (Kluwer Law International BV, The Netherlands 2014) para 43

Article 41 (1) of the Constitution provides that 'freedom of expression' includes 'freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)'.

Then Article 41 (2) provides:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub-article (1) of this article to the extent that the law in question makes provision –
>
> (a) that is reasonably required –
>
> ……
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, …….. or regulating …… wireless broadcasting, television or other means of communication, …..
>
> …….
>
> and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Article 41 of the Constitution of Malta compares with Article 10 of the European Convention on Human Rights which provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information

received in confidence, or for maintaining the authority and impartiality of the judiciary.

4.2 The European Convention on Human Rights

The European Convention on Human Rights (ECHR) is itself part of the legal framework of Malta not only because the Government of Malta is a signatory to the said Convention and allows citizens of Malta the right of individual petition to the European Court of Human Rights, but also because in virtue of the European Convention Act (Act XIV of 1987),[8] the provisions of the said European Convention became part of the Laws of Malta and are enforceable as such. Article 3 of the European Convention Act provides that:

> (1) The Human Rights and Fundamental Freedoms[9] shall be, and be enforceable as, part of the Law of Malta.
>
> (2) Where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void.

The European Convention Act is deemed as one of three laws – the other two being the European Union Act[10] and the Diplomatic Privileges and Immunities Act[11] which 'although…. classified as ordinary law, in reality (is) superior ordinary law since if there is a conflict between any one of these three ordinary laws and any other ordinary law, it is these three ordinary laws which prevail over the other ordinary laws.'[12]

In terms of the same Act, the Courts of Malta have been given jurisdiction to hear and determine applications where any person 'alleges that any of the Human Rights and

[8] Cap 319 of the Laws of Malta
[9] These include 'those rights and freedoms as set out in articles 2 to 18 (inclusive) of the Convention, as per definition of the phrase 'Human Rights and Freedoms' in art 2 of the European Convention Act, Cap. 319 of the Laws of Malta.
[10] Cap 460 of the Laws of Malta
[11] Cap 191 of the Laws of Malta
[12] Aquilina (n 7) para 39

Freedoms, has been, is being or is likely to be contravened in relation to him'[13]. Moreover, 'any judgment of the European Court of Human Rights …. may be enforced by the Constitutional Court in Malta, in the same manner as judgments delivered by that court and enforceable by it, upon an application filed in the Constitutional Court and served on the Attorney General containing a demand that the enforcement of such judgement be ordered.'[14]

Reference can also be made to Article 38 of the Constitution which provides for protection of privacy of home or other property, as well as Article 39 containing provisions to secure protection of the law.

While the right to privacy is one of the arguments that could be brought up to counterbalance freedom of expression which includes the right to impart information in the public interest even with regard, in the right circumstances, to matters which impinge on one's privacy, it is suggested that one of the limitations to the protection of one's privacy contained in Article 38 (2) (b) of the Constitution – that refers to anything done under the authority of any law 'that is reasonably required for the purpose of promoting the rights or freedoms of other persons' should be interpreted as weighing in favour of freedom of expression – undoubtedly one of the more important rights that deserves to be promoted since that is not only reasonably justifiable but also required in a democratic society.

The provisions to secure protection of the law contained in Article 39 of the Constitution of Malta are relevant for the purpose of examining the duties and obligations of broadcasters in general, be they public or commercial, since the said provisions while establishing that the general rule for court proceedings is that these are

[13] European Convention Act, Cap 319 of the Laws of Malta, (ECA) art 4
[14] ECA art 6 (1)

to be held in public, that rule can be waived where the Court or other adjudicating authority may consider it –

> necessary or expedient in circumstances where publicity would prejudice the interests of justice or …. in the interests of …. the protection of the private lives of persons concerned in the proceedings.[15]

4.3 Broadcasting Act, Cap 350 of the Laws of Malta

After examining the relevant provisions of the Constitution of Malta and the European Convention Act, the latter being superior to other ordinary law, it is appropriate to proceed with an examination of the relevant provisions of the Broadcasting Act.[16]

As indicated,[17] the Broadcasting Act makes specific as well as indirect references to the fundamental human right of freedom of expression.

Article 11 (1) (a) of this Act establishes that the principles of freedom of expression and pluralism 'shall be the basic principles that regulate the provision of broadcasting services in Malta' and that these principles constitute the first consideration by which the Broadcasting Authority in Malta stands to be guided 'when issuing broadcasting licences'. 'Freedom to broadcast and to receive broadcasts is guaranteed' in terms of article 10 (1) of the Act. Furthermore, 'freedom of reception' as well as 'freedom of retransmission' of audiovisual services from other Member States of the European Union are guaranteed in terms of Article 16 I of the Act.

The distinction between commercial and public service broadcasting is made in the Broadcasting Act. Since the focus of this thesis is on the duties and obligations of the public service broadcaster in Malta, it is important to examine where the law specifically

[15] Constitution of Malta, art 39 (4)
[16] Cap 350 of the Laws of Malta
[17] p 71 *supra*

refers to such broadcaster and how the law distinguishes same from the private broadcaster.

With regard to the kind of radio and television broadcasting licences that are issued by the Broadcasting Authority, Article 10 (4) of the Broadcasting Act provides -

> Licences may be of particular classes or description and shall in particular include licences for:
>
> (a) nationwide television services;
>
> (b) nationwide radio services;
>
> (c) community radio services;
>
> (d) satellite radio services;
>
> (e) satellite television services;
>
> (f) such other services which may be broadcast or provided on or by an electronic communications network as defined in article 2 of the Electronic Communications (Regulation) Act as the Authority may by regulation prescribe.

With regard to the first class of licences, that is nationwide television services, the law then distinguishes between (a) a general interest broadcast content licence that can be issued to any company other than stations owned or controlled by a Government company where Government remains the licensor; and (b) a commercial broadcast content licence that can be issued to any broadcaster.[18]

Public broadcasting services are specifically mentioned in sub-article 4D of article 10 where it is provided as follows -

> The Government may, through a company designated by the Minister by order in the (Government) Gazette, as a company providing public broadcasting services, own, control or be editorially responsible for nationwide television and radio services…

[18] BAct, Cap 350 of the Laws of Malta, (Cap 350) art 10 (4A)

This means that as the law stands to date, in Malta public broadcasting services are provided through a company which is owned by the Government, 'provided that the Government may not own any broadcasting services or participate in their ownership, control or be editorially responsible for any such services other than through such company, and that no other company in which the Government has a controlling interest may own voting shares in a company providing any broadcasting services.'[19]

Moreover, in sub-article 4C of the same article, it is stipulated that the Minister 'as soon as possible from the date of issue of any licence to the aforesaid Government company, notify in writing to the (Broadcasting) Authority a copy of such licence,' This is done to enable the Authority to 'carry out its regulatory duties in terms of law.' Furthermore, the same sub-article emphasises that such licensee is bound by the provisions of article 119 of the Constitution of Malta (regarding the obligation of due impartiality) as well as by the provisions of the Broadcasting Act and all subsidiary legislation made thereunder.

The fact that we are referring to one Government company does not mean that we are referring to one station. Article 10 (4C) itself refers to 'stations owned or controlled by the Government company.'

While sub-article 4D of article 10 of the Broadcasting Act refers to public broadcasting services within the context of the Government company which is designated directly by Government to provide such nationwide television and radio services, sub-article 4E provides the following definition -

> "general interest objective service" means a television broadcasting service which takes on the obligation of broadcasting a specified quantum of programmes which are of general interest and which are considered by the National Broadcasting

[19] Cap 350 art 10 (4D) Proviso

Policy as in force from time to time to be part of the remit of a public service broadcasting service.

Moreover, a general interest objective service may either be a generalist service (transmitting a wide range of programme genres) or a niche service (predominantly transmitting programmes of a limited number of genres of a specialist subject matter).

In theory, when one considers the definition of "general interest objective service" in sub-article 4E, it could be argued that more than one television broadcasting service could be considered as forming 'part of the remit of a public broadcasting service' should it be so established in the National Broadcasting Policy.

4.4 National Broadcasting Policy

Since that definition makes reference to the National Broadcasting Policy, it is appropriate to point out that this Policy published in April 2004 and which is to date the Policy that is still in force[20] makes it abundantly clear that the only stations to provide public broadcasting services are the stations owned by the Government. Public Broadcasting Services Limited is indicated from the very outset as 'Malta's only public broadcaster' and as 'the only station which carries a public service obligation.' Whereas the National Broadcasting Policy makes use of the singular not only with reference to the 'only public broadcaster' but also with reference to 'the only station', the public broadcaster operates two television stations: TVM and TVM2, as well as three radio stations: Radio Malta, Radio Malta 2, and Magic Malta.

[20] In a reply to a Parliamentary Question, the Minister for the Interior and National Security asked to place on the Table of the House of Representatives a copy of the National Broadcasting Policy as then in force, in a sitting on 20th October 2014, placed a copy of the National Broadcasting Policy as had been issued in 2004 (PQ number 11482, XII Legislature, HOR of Malta) As then as results from PQ 13195, (XIII Legislature, HOR of Malta) the same Policy was still in force on 9 March 2020. *See also:* Chapter Two, pp 51 – 61 for further examination of National Broadcasting Policy.

It is worth observing that the Broadcasting Act,[21] provides as follows in article 11 -

> 11 (1) When issuing broadcasting licences, the Authority shall be guided by the following considerations –
>
> (a) that the principles of freedom of expression and pluralism shall be the basic principles that regulate the provision of broadcasting services in Malta;
>
> (b) that a diverse system of public and private stations with their own particular character, would be the best system for the realisation of the basic principles above referred to;
>
> ……

The opening paragraphs of the Foreword to the National Broadcasting Policy, signed by the author who was then Minister for Tourism and Culture, together with the Minister of Information Technology and Investment establish the extent of the remit of a public service broadcasting service in rather precise terms -

> … Government re-affirms that PBS (Public Broadcasting Services Limited) should remain Malta's public broadcaster affording the nation a varied programme schedule including programming content that would otherwise not be aired due to its commercial non-viability. As a corollary of this statement, the Government, both as policy maker as well as sole shareholder of PBS, considers that PBS should have a broadcasting policy that is public, clear and transparent.

The document which in view of its nature provides an important part of the legal context within which public service broadcasting operates in Malta then proceeds to precisely set out such a policy for PBS. The document 'attempts to define the obligations of PBS arising from its role as a public broadcaster and also to establish how this relationship between Government and PBS will be played out.'[22]

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[21] Cap 350 of the Laws of Malta

[22] Ministry for Information Technology and Investment, & Ministry for Tourism and Culture, Government of Malta, *National Broadcasting Policy,* (NPB) (April 2004) 2

Following the Foreword, the first section of the National Broadcasting Policy outlines the vision that is to be pursued -

> The vision being projected for PBS is being based itself on three principles – that a strong public service broadcaster is essential to a democracy, that media organisations are multi-faceted and that media organisations are also consciousness industries.

Furthermore, it is emphasised that 'a very strong public service broadcasting organisation is in itself an important feature of a democracy. This importance is increased in view of the strong presence in our mediascape of media owned by the political parties. In this scenario it is only PBS that can guarantee news and current affairs presented in a balanced and impartial way solely based on news value criteria.'[23]

Apart from being the provider of balanced and impartial news and current affairs programmes, another justification that is given for having a public service broadcaster in Malta is by being given the means to offer distinction in its programme quality, as well as by having a 'leading share of audiences by its service to generalist and niche audiences' since 'one cannot serve the public if there is no public that follows.' In this respect the Policy makes the point that since media organisations are 'anchored in the public domain and public interest' it follows that 'media organisations of the public service kind cannot be run as if they are only a business.'[24]

4.5 Public Service Obligation Contract

In view of these considerations, the National Broadcasting Policy provided, for the first time ever, for the concept of a public service obligation – for which Government would provide the required funding – and in respect of which a Public Service Obligation Contract would be drawn up between Government and the public service broadcaster. A

[23] Ibid 4
[24] Ibid 4

sample of the contract that was to be entered between of the one part, the Government of Malta, and of the other part Public Broadcasting Services Limited was published as Appendix 1 to the National Broadcasting Policy. Interestingly enough, even in that sample contract, the very first premise set out is that -

> The Government declares that an independent Public Broadcasting Service is essential to a democracy, and the Government recognises PBS as the sole company catering for public broadcasting, with guarantees that its programmes are presented in a balanced and impartial manner as provided for by the Constitution of Malta, and acknowledges that PBS should lead in audience share and be a trend-setter.[25]

Since obligations arise both *ex lege* as well as *ex contractu,* it is evident that the contract regularly entered between Government and PBS forms part of the legal context within which to examine the role and obligations of Malta's public service broadcaster.

The main thrust of the contract is that Government provides funds to the public service broadcaster to ensure and enable that the latter fulfils its Public Service Obligation (PSO) which is in turn subdivided into: "core PSO" and the "extended PSO".

> The contract provides the following definitions of these terms:
>
> The "core PSO" shall be deemed to refer to and include the broadcast of news and local sport, and shall be funded by PBS from general advertising revenue.
>
> The "extended PSO" shall be deemed to refer to and include programming content that the Government would like to be aired on PBS, and shall be funded by the Government …[26]

The contract establishes that such services cannot be provided on a profitable basis and therefore after that Government sought to identify a service provider 'to be compensated for any economic loss as a result of operating under the Public Service Obligations placed upon it by Government', Government identified PBS to carry out such

[25] Ibid 38
[26] Ibid 39

Obligations against an agreed payment and in turn PBS was willing to provide the said Services for the agreed payment.

Following the preliminary premises, the contract establishes in its very first clause -

> The Government hereby provides PBS with a sole and exclusive Public Service Obligation Contract to operate the Services hereinafter referred to as the Contract, and PBS hereby accepts the grant of such Contract. Provided that at all times PBS shall act according to and in full compliance with its Public Service Obligations as stipulated hereunder.[27]

The 'minimum criteria to qualify as a Public Service Obligation Programme' in respect of services to be provided by PBS are then spelt out in a table as follows:

a. the transmission of events of a national character as determined from time to time by Government;

b. current affairs programmes and discussion programmes dealing with topics of a social, cultural, educational, environmental, economic, industrial or political nature;

c. programmes dealing with religious topics and the transmission of Mass on Sundays and some holy days of Obligation;

d. programmes that have children as their principal audience;

e. drama programmes in Maltese with preference being given to original drama in Maltese;

f. programmes that are cultural in nature but especially those that enhance the Maltese language, heritage, history, culture and the arts;

g. programmes that are focused on Gozo and in particular that highlight Gozitan society, culture and way of life;

h. programmes that focus on Maltese communities abroad;

i. general information programmes; (and)

j. programmes that are educational in nature.

[27] Ibid 39

The sample contract furthermore provided for an Appendix to contain specific details of programmes that were meant to fulfil the requirements of services expected out of PBS in terms of its extended Public Service Obligation.

4.6 Programmes Policy

Apart from the contract entered into between Government and PBS, another source of obligations for the public service broadcaster in Malta is the Programmes Policy which is reproduced as Appendix 2 to the National Broadcasting Policy.

The introductory paragraphs of the Programmes Policy clearly emphasise both the role and the obligations that the public service broadcaster is obliged to follow -

> PBS Ltd exists to serve the general public as well as particular segments by striving to be the most creative, inclusive, professional and trusted broadcaster.
>
> As a result of this particular mission the schedule of PBS Ltd should provide a varied and high-quality range of programmes in the fields of information, culture, education and entertainment. These programmes, especially those which form part of its social obligation, should present a balanced picture of Maltese society and reflect the public's varied interests, values, views, tastes and religious beliefs in the context of an evolving and changing society. The programmes transmitted should promote Maltese heritage, culture, the arts and language; enhance human dignity, underpin the social cohesion and the quality of life and the environment.
>
> The news and current affairs programming of PBS Ltd should be characterised by high journalistic and ethical standards. Their core values should be accuracy, truthfulness, due impartiality, and editorial integrity.
>
> PBS should make the popular worthwhile and the worthwhile popular.[28]

The Programmes Policy then proceeds to establish a policy that 'whilst news bulletins should be produced in-house, all other programmes should, as much as possible, be out-sourced to independent producers.' The policy is extended to both

[28] Ibid 50

commercial and public service obligation programmes, whether core or extended, with news bulletins providing the only exception.

The methodology to be used for outsourcing of programmes, as well as the internal and external mechanism 'to ensure that it (PBS Ltd) will be provide(d) with the high quality and varied programming that it needs in order to serve the Maltese public in line with its public service remit as explained in its programme policy' are detailed in the same Policy which also provides for the regular issue of Programme Statements of Intent through which independent producers and media houses submit proposals for programmes which 'should help provide the Maltese public with an innovative, entertaining, informative and educational schedule.'[29]

4.7 Programme Statement of Intent

A Sample Programme Statement of Intent was provided as Appendix 3 of the National Broadcasting Policy, and significantly this sample reproduces *verbatim* the introductory paragraphs of the Programmes Policy as quoted above.

PBS is expected to retain editorial control over its outsourced programmes as well as the right to 'decide on the technical and aesthetic quality of such productions' which means that 'the ultimate responsibility and therefore control will always belong to PBS.'

The Programme Statement of Intent is an invitation to producers 'to submit proposals for programmes that they would be interested to produce' for TVM which is the television station owned by PBS. The Statement of Intent provides that TVM's schedule is composed of three kinds of programmes:

- The core public service obligation programmes. These include the news bulletins, programmes covering local sports, programmes emanating from

[29] Ibid 61

the legal and constitutional obligations of PBS Ltd and the transmission of specific Parliamentary debates.

- The extended public service obligation programmes. These are the programmes which would normally be defined as not commercially viable but important to ensure the cultural, social and educational development of society at large and to enable sections of society which would not normally have access to television broadcasting to acquire the space to do so….
- Commercial programmes. A variety of programmes fall into this category. These include entertainment programmes such as films, variety programmes, and comedies etc as well as programmes with a strong advertorial content.

Interested parties are regularly invited to tender for any of the above type of programmes except for news bulletins. The Programme Statement of Intent issued for the October 2004 schedule specified that the schedule was meant to be divided in the following ratios: 55% core and extended PSO programming and 45% commercial programming.

As pointed out in the National Broadcasting Policy, 'the obligation of PBS Ltd to broadcast public service obligation programmes emanates from international commitments such as the *Prague Declaration (Resolution)* and the *EU Television Without Frontiers Directive.'*[30]

An examination of the legal context within which to determine the role and obligations of the public service broadcaster in Malta entails a reference to these two sources.

[30] Ibid 5

4.8 Prague Resolution

The Prague Resolution to which the Policy refers (even though the Policy document uses the term 'Declaration') and to which the Government of Malta is a signatory has definitely had its influence on the drawing up of the same Policy. This was Resolution No. 1 dealing with 'The Future of Public Service Broadcasting' adopted by the 4th European Ministerial Conference on Mass Media Policy, meeting in Prague, the Czech Republic on 7 and 8 December 1994.

The commitment 'to maintaining the principles of public service broadcasting, acknowledging that the function may be fulfilled by publicly or privately organised entities'[31] was already made at the First European Ministerial Conference on Mass Media Policy held in Vienna on 9 and 10 December 1986. The same Conference had furthermore recognised 'that one fundamental purpose of public service broadcasting is to provide programmes for both large and small audiences.'

Public Service Broadcasting was then addressed more specifically at the Prague Conference. At that conference, the Ministers of the Council of Europe States, undertook 'to guarantee at least one comprehensive wide-range programme service comprising information, education, culture and entertainment which is accessible to all members of the public' as well as 'to define clearly, in accordance with appropriate arrangements in domestic law and practice and in respect for their international obligations, the role, missions and responsibilities of public service broadcasters and to ensure their editorial independence against political and economic interference.'[32]

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[31] Council of Europe, European Ministerial Conferences on Mass Media Policy and Council of Europe Conferences of Ministers responsible for Media and New Communication Services, Texts Adopted. 1st European Ministerial Conference on Mass Media Policy (Vienna, 9 and 10 December 1986) *The future of television in Europe* (Council of Europe, Media and Internet Directorate General of Human Rights and Rule of Law Strasbourg 2015) 5

[32] Council of Europe, European Ministerial Conferences on Mass Media Policy and Council of Europe Conferences of Ministers responsible for Media and New Communication Services, Texts Adopted. 4th

The Prague Resolution then listed the principal public service requirements to be provided by public service broadcasters as follows -

- 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;
- to provide a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed;
- to broadcast impartial and independent news, information and comment;
- 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;
- to develop and structure programme schedules and services of interest to a wide public while being attentive to the needs of minority groups;
- 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 pluri-ethnic and multicultural societies;
- to contribute actively through their programming to a greater appreciation and dissemination of the diversity of national and European cultural heritage;
- 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 cinemas sector; (and)
- to extend the choice available to viewers and listeners by also offering programme services which are not normally provided by commercial broadcasters.

European Ministerial Conference on Mass Media Policy (Prague, 7 and 8 December 1994) *The media in a democratic society,* Resolution No. 1 – The Future of public service broadcasting (Council of Europe, Media and Internet Directorate General of Human Rights and Rule of Law Strasbourg 2015) 23

The Resolution moreover refers to the necessity of providing public service broadcasters with 'the means necessary to accomplish their missions.' Public subsidies are one of the means identified as a 'secure funding framework' in favour of public service broadcasters. The concept through which Government identified PBS to carry out Public Service Obligations against an agreed payment and in turn PBS was willing to provide the said Services for the said payment, falls squarely within the remit of the Prague Resolution.

Much as public broadcasting services can be, as in Malta's case, provided by a public organisation, their independence remains paramount in terms of the Prague Resolution -

> Participating states undertake to guarantee the independence of public service broadcasters against political and economic interference. In particular, day to day management and editorial responsibility for programme schedules and the content of programmes must be a matter entirely for the broadcasters themselves.[33]

The Resolution moreover provides for having appropriate structures such as pluralistic internal boards and other independent bodies to guarantee the independence of public service broadcasters, as well as to ensure that such broadcasters are held 'directly accountable to the public.'

4.9 Television Without Frontiers Directive

As regards the European Union Directive on Television Without Frontiers, Malta's National Broadcasting Policy points out that PBS is also obliged to observe this Directive.[34] The Policy indicates that the Directive rests on two basic principles: (a) the

[33] Ibid 24
[34] NPB (n22) 13

free movement of European television programmes within the internal market, and (b) the requirement that television channels, where practicable, reserve over half their broadcasting time for European works ("broadcasting quotas")

The National Broadcasting Policy refers then to 'certain important public interest matters' safeguarded by the Directive 'such as cultural diversity, the protection of minors … and the right of reply' pointing out that 'Malta is in compliance with this Directive and the Broadcasting Authority regularly issues guidelines and regulations in this area that ensure compliance.'[35]

4.10 Audiovisual Media Services Directive

It is worth pointing out that this Directive adopted in 1989[36] was amended in 1997 and in 2007. Thereafter it was codified by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, which means that the remit of the original Directive has been extended beyond the traditional remit of television, and that the same Directive has now morphed into what is known as the Audiovisual Media Services Directive.[37]

[35] Ibid 13

[36] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. *OJ* (1989) L 298/23

[37] *OJ* (2010) L 95/1. Moreover, this Directive has been further amended in 2018 to take account of increasing audiovisual content on video-sharing platforms. *See: Infra,* p. 341 et seq.

While this Directive generally applies to both public service as well as private broadcasters, in its preamble it makes specific reference to the 'public interest role to be discharged by the audiovisual media services.'[38]

Moreover, the Directive points out -

> Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services.[39]

An indirect but clear reference to the concept that financial support can be given to public service broadcasters in return for such broadcasters fulfilling their public service obligations – in particular with reference to investing in works of European origin – can be found in the following two paragraphs in the Preamble to the Directive -

> (73) National support schemes for the development of European production may be applied in so far as they comply with Union law.
>
> (74) The objective of supporting audiovisual productions in Europe can be pursued within the Member States in the framework of the organisation of their audiovisual media services, inter alia, through the definition of a public interest mission for certain media providers, including the obligation to contribute substantially to investment in European production.

The Audiovisual Media Services Directive moreover affirms that 'the co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.'[40] In the same Paragraph, the Directive referred to the Resolution of the Council of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting[41] which reaffirmed that the fulfilment of the

[38] Audiovisual Media Services Directive (AVMSD) *OJ* (2010) L 95/1, Preamble, Para 2
[39] Ibid Preamble, Para 5
[40] Ibid Preamble, Para (13)
[41] *OJ* C 30/1, 5.2.1999

mission of public service broadcasting requires that it continues to benefit from technological progress.

The Council Resolution of 25 January 1999 concerning public sector broadcasting went beyond re-affirming the reference quoted in the Audiovisual Media Services Directive regarding technological progress. The same Resolution after –

> considering the fact that public service broadcasting, in view of its cultural, social and democratic functions which it discharges for the common good, has a vital significance for ensuring democracy, pluralism, social cohesion and linguistic diversity
>
> affirmed that –
>
> the provisions of the Treaty (of Amsterdam) establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far 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.[42]
>
> The same Resolution concluded by re-affirming -
>
> public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences.[43]

The Resolution of the Council of the European Communities as the European Union was still known at that stage could assert that the provisions of the Treaty of Amsterdam did not prejudice the competence of Member states to provide funding in respect of public broadcasting services, as a result of a specific Protocol to the Treaty of

[42] AVMSD (n38), Para (2)
[43] Ibid Para (7)

Amsterdam[44], on the system of Public Broadcasting in Member States. That Protocol provided 'interpretative provisions' to the Treaty in virtue of which the competence of Member States 'to provide for the funding of public service broadcasting' was established in view of the special remit of public broadcasting services in European Member States as outlined above.

4.11 Other provisions of the Broadcasting Act

Reference has been made *supra*[45] to the issue of broadcasting licences by the Broadcasting Authority and in particular to issuing licenses to provide for a diverse system of public and private stations in order to ensure the principles of freedom of expression and pluralism.

That reference in turn has led us to an analysis of the National Broadcasting Policy as well as to European provisions that have influenced the drawing up of that Policy in order to provide a more comprehensive view of the legal context within which our public broadcasting services operate.

It is suggested that other provisions of the Broadcasting Act are relevant in examining this legal context. In terms of article 3(2) of that Act, the Broadcasting Authority has reserved 'the right to provide itself or through broadcasting contractors, …. sound and television broadcasting services in Malta.' Even if this provision, much as it can be explained within the historic context of how broadcasting developed in Malta, is now anachronistic, should the Authority for any reason opt to avail itself of its right to provide itself broadcasting services, such services would by definition form part of public

[44] Amsterdam Protocol, now Protocol No. 29 to the Treaty of Lisbon; Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ C 30/1

[45] *Supra* pp 147 - 148

broadcasting services in Malta. Moreover, these services would not require a licence from the Government.

Significantly, when the Broadcasting Authority was set up in 1961, its role was more that of a broadcaster than of a regulator. In fact, the object of the Broadcasting Ordinance of the same year was 'to make provision for sound and television broadcasting services in Malta and to set up a Broadcasting Authority for that purpose.' The fact that the same Ordinance provided for the 'position and obligation of persons contracting with it for the provision of such services on its behalf' emphasises its historical role as broadcaster.[46] Although the exclusivity to provide sound and television broadcasting services was removed in 1966[47] and the Authority became the licensor of various private broadcasting services while Government became the licensor of the public broadcasting services following the 1991 law[48] the Authority still retained its role as broadcaster when it had set up a Community Channel in 1996[49], but after closing that channel less than a year and four months later, it ceased to act as a broadcaster except with regard to the scheme of political broadcasts[50] that it draws up in anticipation of local, European and national elections, which scheme is then broadcast by the public broadcasting service operator.

Furthermore, article 12 of the Broadcasting Act provides for such power that the Broadcasting Authority can 'if it so chooses' – that is in its sole discretion – exercise for the purpose of providing itself sound and television services in Malta. The Authority in terms of article 12 has the power –

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[46] *See:* Chapter Two, p 63
[47] Ibid p 69
[48] Cap. 350 of the Laws of Malta
[49] *See* Chapter Two, p 93
[50] Art. 13 (4) of BAct, Cap. 350 of Laws of Malta. *See also:* p 170 *infra*

(a) to establish, install and use stations for the provision of broadcasting services;

(b) to arrange for the provision and equipment of, or if need be itself provide and equip studios and other premises of television and sound broadcasting purposes;

(c) collect and diffuse news and information in Malta and from any part of the world; and

(d) to advance the skills of persons in broadcasting by providing or assisting others to provide facilities for training, education and research.

Another interesting provision in the Broadcasting Act that relates specifically to public broadcasting services is found in the proviso to sub-article (2) of article 13. In terms of this proviso when it comes to various important requirements which may be imposed in the broadcasting licence of general interest broadcasting services, such requirements including that all news is presented with due impartiality, that proper proportions of programmes are in the Maltese language and reflect Maltese cultural identity, that programmes are designed to appeal to the interest, tastes and outlook of the general public, and that due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy, the Authority 'shall be able to consider the general output of programmes provided by the various broadcasting licences and contractors, together as a whole' but the Authority cannot do that in the case of public broadcasting services.

It is suggested that this proviso was inserted in the law to allow private stations, in particular those owned by the two major political parties, to balance each other out – not least with regard to the impartiality requirement.

The Authority is allowed to consider the general output of programmes provided by different broadcasting stations as a whole to establish if in their totality they provided the audience with due impartiality – on the basis that the partiality of one station can be

balanced by the partiality of another station – or for that matter if enough Maltese language programmes have been offered to the public on the basis of the output of programmes of all stations considered together.

When this proviso was becoming part of the laws of Malta – that is when the Bill to provide for the new Broadcasting Act was published in 1991, 'the Broadcasting Authority wrote to the Prime Minister on 27 March 1991 in order to express its concern on the proviso in question' stating, *inter alia* -

> With regard to the observance of accuracy and impartiality in news services, the Authority firmly believes that all news programmes in whatever form must be accurate and impartial in themselves….. The Authority, therefore, recommends that the proviso to section 13(2) should be suitably amended.[51]

Be that as it may, the proviso was not amended in line with the recommendations of the Authority. Still, the public broadcasting services are obliged to fulfil all the requirements indicated in article 13 (2) of the Broadcasting Act and the Broadcasting Authority cannot justify any infringement of the impartiality requirement or of any other requirement enlisted in the same sub-article on the basis that the public broadcasting service output could be seen together with that of other stations.

The fact that in Malta there are broadcasting services owned by the two major political parties has brought about a situation where the Authority allows the two stations to balance each other although both stations remain bound to present all news with due accuracy. The ownership of broadcasting stations by political parties is a controversial one and will be examined, *infra,* at more length within the context of present and future challenges facing the broadcasting sector in Malta.[52] Such balancing between the commercial stations is allowed in terms of the first proviso to Art. 13 (2) of the Broadcasting Act, but that same proviso exempts from its remit and applicability the

[51] Aquilina (n7) para 222
[52] *Infra* Chapter Nine pp 414 - 420

public broadcasting services that need to be balanced and impartial in their own right and must observe without exception all the requirements impinging on broadcasters.

Another relevant provision of the Broadcasting Act that relates to public broadcasting services, although in this case they are not mentioned by name, is to be found in sub-article (4) of article 13 thereof, in terms of which -

> It shall also be duty of the Authority to organise from time to time schemes of political broadcasts (including political spots) which fairly apportion facilities and time between the different political parties represented in Parliament; to produce properly balanced discussions or debates that afford access to persons from different interest-groups and with different points of view, and also to produce commentaries or other programmes about questions relating to current public policy, wherein persons taking part can put forward differing views and comments.

While in terms of sub-article (5) of the same article, the Broadcasting Authority can order any 'person or all persons providing broadcasting services in Malta' to provide, free of charge, recording and other facilities as may be necessary to produce such programmes, 'as well as to transmit, free of charge, on such days and at such times as the Authority shall direct, the same programmes', in practice these orders are given exclusively to the provider of public broadcasting services.

> Programmes in adherence with the Constitutional or legal requirements imposed on PBS as well as 'the televised transmission of one-off parliamentary debates' are in any case enlisted as constituting part of the core public service obligation imposed on PBS through the Public Service Obligation Contract outlined in the National Broadcasting Policy.[53] Moreover, 'the regular transmission on radio of all parliamentary debates' is considered as part of the extended public service obligations in terms of the same Contract.[54]

This obligation has been kept in force even after the setting up of Parliament TV following the enactment of the Parliamentary Service Act of 2016.[55]

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[53] NPB (n22) 14
[54] Ibid 15
[55] *See* Chapter Two pp 99 - 100

4.12 Digital Platform

The switchover from analogue to digital on 31st October 2011 brought along with it new obligations for the public broadcasting services in Malta. A new digital platform was required to carry the free-to-air broadcasters.

In virtue of article 13 of Act VIII of 2011, article 40 of the Broadcasting Act which had hitherto dealt with the "must carry" obligations of the cable television system operator with regard to all television broadcasting services (apart from teleshopping) receivable terrestrially and free of charge by the general public in Malta, was substituted to provide for an obligation on the Broadcasting Authority to 'appoint and license a network operator … to run the general interest objective network licensed by the Malta Communications Authority in terms of the Electronic Communications (Regulation) Act.'[56]

'Must carry' obligations are now issued in terms of the Electronic Communications (Regulation) Act.[57] Article 47 (1) (h) of that Act provides that the Minister responsible for communications, may, either on the recommendation of the Malta Communications Authority or on his own initiative after consultation with the Authority, 'regulate television and radio distribution services including must carry rules, and the obligation to make channel capacity for public, governmental or educational use.'

In virtue of these powers, the Electronic Communications Networks and Services (General) Regulations[58] provide specifically for 'must carry' obligations in Regulation 49 thereof:

> 49. (1) The (Malta Communications) Authority may impose reasonable "must carry" obligations for the transmission of specified radio and television broadcast

[56] BAct, Cap 350 of the Laws of Malta, art 40 (1)
[57] Cap 399 of the Laws of Malta
[58] S.L. 399.28

channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users on undertakings providing electronic communications networks used for the distribution of radio or television broadcasts channels to the public where a significant number of end-users of such networks use them as the principal means to receive radio and television broadcasts:

'Provided that such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent.

(2) The Authority may determine, in a proportionate and transparent manner, the appropriate remuneration, if any, in respect of measures taken in accordance with sub-regulation (1):

Provided that in doing so the Authority shall ensure that in similar circumstances there is no discrimination in the treatment of undertakings providing electronic communications networks.

(3) The Authority shall review "must carry" obligations on a regular basis.

In terms of Regulation 3 within the same Regulations, "television and radio distribution services" are defined as meaning 'the delivery of television and, or radio broadcasts or other television services to a subscriber through an electronic communications network.'

A counterpart to the "must carry" obligations 'to meet clearly defined general interest objectives' are the "must offer" obligations as resulting from art 40 (5) of the Broadcasting Act:

40. (5) Notwithstanding the provisions of any other law, general interest objective service licensees broadcasting on the general interest objective network shall offer free of charge their broadcasting content to such electronic communications networks as the Authority may from time to time direct and approve.

Although the reference above is to the Broadcasting Authority which therefore still has the function of approving such electronic communications networks, their licensing pertains to the Malta Communications Authority which in turn imposes on such networks the 'must carry' obligations. This overlap between the functions of the Malta

Broadcasting Authority and the Malta Communications Authority raises the issue that in the future legislation to merge the functions of the two authorities may well be considered, as has been done in other European countries, not least in the United Kingdom.

Aquilina argues in favour of moving towards the concept of a single convergent regulator and points out that 'governments are realizing the need to create a single authority, with powers to integrate telecommunications, television, radio and print regulators'[59] The issue is addressed, *infra,* at more length within the context of present and future challenges facing the broadcasting sector.[60]

Interestingly enough, article 40 (6) of the Broadcasting Act provides that should disputes arise between the network operator and a general interest objective licensee, 'such disputes shall be referred to a standing arbitral tribunal to be composed of one person appointed by the Broadcasting Authority who shall preside, one person appointed by the Malta Communications Authority and one person appointed in agreement between the Broadcasting Authority and the Malta Communications Authority.'

Significantly, while the Broadcasting Authority was to decide, following a call (and if necessary subsequent calls) 'which licensees of general content objective services approved by it shall be carried by the network operator', it was provided that 'any public service television service which was broadcasting on the 1st December 2010 shall be automatically considered to qualify for the purposes of this provision as a general interest broadcasting service without the need of applying as aforesaid.'[61]

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[59] Kevin Aquilina, 'The Role of the Broadcasting Regulator in the Era of Convergence' in *Law and Practice,* Malta Chamber of Advocates, Issue 7, December 2003, pp. 33 - 41

[60] *Infra* Chapter Nine pp 384 - 400

[61] Cap 350 of the Laws of Malta, art. 40 (2) Proviso

PBS Limited apart from being singled out to have its television stations automatically qualified to be considered as general interest broadcasting services was chosen to be the operator of the digital platform set up to carry six general interest objective broadcasting stations.

Art 40 (3) of the Broadcasting Act provides that when making regulations 'to establish criteria for evaluating an application for a general interest nationwide television broadcasting service, the Prime Minister, after consultation with the Authority, shall consider the following criteria -

(a) general criteria concerning quality programming across the full range of public tastes and interests;

(b) programming of an educational and cultural nature;

(c) news and current affairs programming;

(d) a comprehensive and accurate information service in the interests of a democratic and pluralistic society.

4.13 General Interest Objectives

Legal Notice 240 of 2011 entitled General Interest Objectives (Television Services) (Selection Criteria) Regulations 2011 was issued precisely in terms of article 40 (3) of the Broadcasting Act. These regulations 'set out the criteria to be adopted by the Broadcasting Authority in the selection of television stations that fulfil a general interest objective, whether such services are generalist or niche.' The television stations that are then assigned such a status are carried by the 'network operator' which service is provided by the public broadcasting service.

The criteria set out in these regulations form part of the legal context within which the public service broadcaster operates in Malta in view of the fact that as pointed out

above, in terms of the Broadcasting Act, the public service television station then transmitting was to be automatically considered as a general interest broadcasting service and is therefore bound by all the mandatory criteria for generalist general interest objective television services envisaged in article 3 of these regulations.

The mandatory criteria for generalist general interest objective television services include broadcasting a minimum of programme content of a continuous duration of sixteen hours to cover a broadcasting timetable between 7.00 a.m. and 11.00 p.m. on a daily basis and offering a wide range of quality programming that addresses a broad range of genres.

'Thirty-five per centum of the output' (of such television stations) 'during the mandatory broadcasting timetable shall consist of a selection from at last five genres which are considered to fulfil a core or extended public service obligation'.[62] The full list of genres is published as Schedule A to this Legal Notice.

What is significant to the author is that the concept of a public service obligation in broadcasting – which in turn was subdivided into core and extended public service obligations – was made use of for the first time in the National Broadcasting Policy published in 2004. As explained *supra* that provided for Government to enter into a contract with the public service broadcaster to ensure and enable that the said public service broadcaster fulfils its Public Service Obligation, and while the public service broadcaster was expected to fund itself the broadcast of news and local sport constituting the core PSO from general advertising revenue, Government entered into an obligation with the public service broadcaster to fund such programming content as was held to

[62] General Interest Objectives (Television Services) (Selection Criteria) Regulations, 2011 – (*L.N. 240 of 2011*) clause 3 (2)

constitute the extended public service obligation in terms of the contract entered into between Government and the public service broadcaster.

The question immediately arises whether in terms of Legal Notice 240 of 2011, generalist general interest objective television services are or not being placed at par with the public service broadcaster.

The table of programmes to be provided by PBS to reach the '*minimum* criteria to qualify as a Public Service Obligation Programme(s)' significantly overlaps with the list of programme genres published as Annex A to Legal Notice 240 of 2011 – which genres form part of the '*mandatory* criteria' for generalist and niche general interest objective television services.

One important difference which can however be highlighted is that with regard to general interest objective television services, reference is being made to a selection 'from at least five genres' with regard to generalist stations and 'from a limited number of genres' with regard to niche stations, whilst the public service broadcaster has to cater for *all* the genres that are covered in the relevant table of programmes contained in its contract with Government. This issue is spelt out in the agreement entered into between Government and PBS which provides that 'the Services shall *at all times,* during the period of this agreement, satisfy *all* the …. minimum criteria to qualify as a Public Service Obligation.'[63]

Another difference is that the public service broadcaster is bound by a precise methodology regarding how to outsource programmes following the issue of a 'Programme Statement of Intent' in part to ensure that it is abiding by its public service obligation requirements. The public service broadcaster is bound by precise procedures through which it makes a public call for programmes to fulfil both its public service

[63] NPB (n22)) 39

obligations as well as its commercial requirements and needs to report back to Government about how it makes use of the allocation of funds to cover the extended public service obligation.

At the very outset it was proclaimed -

> The Government will be subsiding the extended PSO obligation of PBS but believes that such financing should be governed by the principles of transparency and accountability.[64]

Commercial broadcasters are not only not bound by all of the minimum criteria, but are also at far greater liberty as regards how they choose programme content that satisfies the number of genres which they choose from the list of public service obligations.

One final difference regards the ratio of programming time to be afforded to public service obligation requirements. While generalist general interest objective stations have to dedicate thirty-five per cent of their output to such programmes, the ratio of such programming on the television station run by the public service broadcaster 'should approximately be between 50% and 55%' and the ratio is five per cent higher for the main radio station run by the public service broadcaster. Moreover, with regard to the public service broadcaster, it is stipulated that

> roughly one third of the time used for PSO programming should be dedicated to core public service programming while approximately two thirds should be dedicated to extended public service programming. [65]

The ratio of programming output in favour of programming which fulfils a core or extended public service obligation is set at the highest level with regard to a niche general interest objective television service, since such a service shall 'predominantly transmit programmes from a limited number of genres which are considered to fulfil a

[64] Ibid 17
[65] Ibid

core or extended public service obligation' and 'Sixty per centum of the output (whether first run or repeat) during the mandatory broadcasting timetable shall consist of such programmes.'[66]

The fact that public service obligations would not be limited to the public service broadcaster was envisaged in the National Broadcasting Plan which sought, however, to emphasise the different ethos that animates different broadcasters:

> Quite naturally one can say that such programme genres also exist on other stations, even commercial ones. This, in itself, does not eliminate their public service nature, as all broadcasters, even commercial ones, should feel that they have social obligations.
>
> The mentioned programme genres when broadcast on a public service station should have a particular dimension resulting from the fact that they should be animated by an ethos that most probably will not animate a commercial broadcasting organisation. Programmes broadcast by PBS should be a sign of its mission to serve the general public as well as particular segments by striving to be the most creative, inclusive, professional and trusted broadcaster in Malta.[67]

Ultimately what needs to be reiterated from the perspective of legal context is that the public service broadcaster in Malta being considered a generalist general interest objective television service provider is bound by all the mandatory criteria applicable to such providers in terms of clause 3 of L.N. 240 of 2011, including such obligations as 'broadcasting at least 30 minutes of weekly programming accessible to people with hearing disability', producing 'at least one current affairs programme per week during the period October to June of each year' and with some exceptions, not going beyond 'an annual average of thirty five per centum of the total mandatory broadcasting time' with regard to repeat programming.[68]

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[66] S.L. 350.32 – General Interest Objectives (Television Services) (Selection Criteria) Regulations (L.N. 240 of 2011), clause 4 (3)
[67] Ibid 16
[68] Ibid, clause 3 (5), (6) and (7)

Over and above these obligations, the public service broadcaster is then bound by all other obligations which are specifically applicable to it in terms of law, regulations, public policy, international obligations, and its contract with Government.

4.14 Network Operator

Moreover, once the public service broadcaster in Malta also became the network operator to provide the digital platform to carry six general interest objective broadcasting stations, the public service broadcaster assumed new obligations in view of that role, not least an obligation to provide 'an uninterrupted service'[69] in favour of the general interest objective broadcasting stations which it must carry. It is moreover the Broadcasting Authority that 'shall approve the conditions and fees imposed on the contract entered into between the network operator and the general interest objective service.'[70]

4.15 Superior benchmark

The public service broadcaster in view of its being 'animated by an ethos that most probably will not animate a commercial broadcasting organisation' must rise to higher standards and expectations.

Within the context of the different laws and regulations relating to broadcasting in Malta, the implication of this principle is that the public service broadcaster must like all commercial broadcasters abide by all such regulations – be it with regard to advertising, protection of minors and vulnerable persons, classification of programmes for different age groups, promotion of racial equality or coverage of sensitive matters (as

[69] BAct, Chapter 350 of the Laws of Malta, (Cap 350) art 40 (6)
[70] Ibid, art 40 (7)

in the case of a human tragedy) in news – to give some examples covered in the different regulations enacted in terms of the Broadcasting Act. Not only must the public service broadcaster scrupulously abide by all such regulations but must provide the superior benchmark and example for all others to follow.

There is no regulation or obligation that could be said to pertain to a commercial broadcaster but not to the public service broadcaster. All regulations refer to broadcasters, without distinction between the commercial broadcasters and the public service broadcaster. Occasionally a distinction is made between television and radio services depending on the nature of the regulations, but never to offer the public service broadcaster any advantage over the commercial broadcaster.

For instance, in the very first set of regulations enacted in terms of the Broadcasting Act, we come across the following definition of 'broadcaster':

> "broadcaster" means any person providing television broadcasting services as provided for in the Broadcasting Act, and also includes any person, body or authority providing such services under licence from or under arrangements with the Government.[71]

4.16 Standards and Practice Applicable to News Bulletins and Current Affairs Programmes

On the contrary, when it comes to regulations relating to news bulletins and current affairs programmes, the public service broadcaster is bound by two *additional* (even if only recommended) requirements over and above those which are binding on all broadcasters.

The matter is dealt with in the 'Requirements as to Standards and Practice Applicable to News Bulletins and Current Affairs Programmes'[72]. Section 17 of the said

[71] S.L. 350.01 – Television Programmes (Classification Certificates) Regulations, s 2
[72] S.L. 350.14

Requirements is entitled 'The Public Service Broadcaster' and in turn refers to the rules contained in Sections 18 and 19 which 'are not enforceable by the Broadcasting Authority but may be applied by the public service broadcaster'. The fact that these two sections 'are not enforceable by the Authority but may be enforced by the Public Service Broadcaster'[73] is one of two points of criticism levelled against these Requirements by Prof. Kevin Aquilina in his monograph 'Media Law in Malta', precisely for leaving the matter to the discretion of the public service broadcaster that has issued its own guidelines on the matter[74], but are still not yet fully in force.

Both rules seek to emphasise the absolute need for the public service broadcaster to come across as the provider of a service that is to be renowned for its impartiality, fairness and integrity, and this obligation carries with it consequences not only at the station level but also for the station's producers, presenters and reporters.

The two sets of requirements are the following:

> 18.1. Producers of news and current affairs programmes should have no outside interests or commitments which could damage the public service broadcaster's reputation for impartiality, fairness and integrity.
>
> …..
>
> 19.1. Those known to the public primarily as presenters of, or reporters on, news programmes or programmes about current affairs broadcast on the public service broadcaster must be seem to be impartial. It is important that no off-air activity, including writing, the giving of interviews or the making of speeches, leads to any doubt about their objectivity on-air. If such presenters or reporters publicly express personal views off-air on controversial issues, then their on-air role may be severely compromised. It is crucial that in both their work with the public service broadcaster and in other non-public service broadcasting activities such as writing, speaking or giving interviews, they do not:
>
> i. state how they vote or express support for any political party;

[73] Aquilina (n7) para 291
[74] *Infra* p 180

ii. express views for or against any policy which is a matter of current party political debate;

iii. advocate any particular position on an issue of current public controversy or debate;

iv. exhort a change in high profile public policy.

4.17 PBS Guidelines on Impartiality

In April 2012, the public service broadcaster issued of its own accord *Guidelines on the Obligation of Due Impartiality* dealing with news, current affairs programmes, and programmes dealing with controversial issues. In virtue of these Guidelines, all PBS employees, which term is extended to include 'all employees of PBS associated with news gathering and news presentation, including news co-ordinators, newscasters, directors, editors, cameramen and journalists' are prohibited from associating themselves 'with a political party or undermine the perception of the impartiality, integrity, independence and objectivity of PBS.'[75] 'These Guidelines, although they represent a positive development, do not go as far as the Authority's News and Current Affairs Requirements, as contained in Sections 18 and 19, which require the public service broadcaster to be impartial.'[76]

It is suggested that these requirements which are specific to the public service broadcaster could also be seen in the context of the main broadcasting legislation of Malta, the Broadcasting Act, which as indicated when the various relevant provisions of this Act were being examined *supra* distinguishes between commercial broadcasters and the public service broadcaster when it comes to the obligation of offering an impartial service, with regard to the obligation of ensuring a proper proportion of programming content to be in the Maltese language and to reflect Maltese cultural identity and with regard to the obligation 'that the programmes broadcast contain a substantial proportion

[75] Public Broadcasting Services Limited, *Guidelines on the Obligation of Due Impartiality* (2012) para 4
[76] Aquilina (n7) para 295

of matter closely designed to appeal to the interest, tastes and outlook of the general public.'[77]

4.18 More stringent requirements

The fact that the public service broadcaster is subject to more stringent requirements and obligations than commercial broadcasters can be said not only with regard to the Broadcasting Act and regulations enacted thereunder, but also with regard to any other legislation that refers to the media in general or specifically to broadcasting. This means that whether one is referring to the law that regulates the Media, the law dealing with different forms of advertising, with providing information on financial services, or relating to data – to give a few examples – the law is to be followed by all broadcasters without exception.

The specific provisions which are then applicable only to the public service broadcaster are those which provide the legal context within which the public service broadcaster operates and define its unique role and obligations in society precisely in view of its unique nature. Rather than a privileged status, it is a status of utmost responsibility relating to the public service broadcaster's ethos and social role.

That utmost responsibility, as will be analysed in Chapter Five, includes, as a crucial and fundamental component thereof, the obligation of the public service broadcaster to ensure impartiality. This duty will be examined with particular reference not only to the relevant legal provisions but also with reference to relevant themes that relate to the concept of impartiality as pronounced in different judgments that have been handed down by Malta's Courts of Justice. While retaining a thematic approach,

[77] BAct, Cap. 350 of the Laws of Malta, Art. 13 (2), paragraphs (c) to (f)

judgments will, as far as possible, be examined in a chronological order to better assess how the interpretation of this duty has evolved over the past fifty-six years.

5.1 Function entrusted by the Constitution of Malta

As examined in Chapter Four, the duty to ensure 'due impartiality… in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties' is the function bestowed on the Broadcasting Authority in terms of the Constitution of Malta.[1]

The function is without prejudice 'to such other functions and duties as may be conferred upon (the Broadcasting Authority) by any law for the time being in force in Malta'[2]. Still, the function to ensure that, so far as possible, in such sound and television broadcasting services as may be provided in Malta, due impartiality is preserved, is entrenched in the Constitution in the sense that a bill for an Act of Parliament that seeks to amend this provision

> shall not be passed in the House of Representatives unless at the final voting thereon in that House it is supported by the votes of not less than two-thirds of all the members of the House.[3]

Borg refers to the Authority's duty to ensure impartiality in the following terms -

> … the impartiality which the Authority has to ensure is not only a political one but also in matters relating to industrial controversies or current public policy. Consequently, even if issues not directly related to politics, but which are controversial, are discussed, due impartiality must be ensured. Besides, the

[1] Constitution of Malta (CM) art 119 (1)
[2] CM art 119 (2)
[3] CM art 66 (2)

remit to monitor impartiality applies to all services not just public broadcasting.[4]

5.2 Broadcasting Act, 1991 (Cap. 350 of the Laws of Malta)

In the Broadcasting Act 1991[5], the duty of the Authority 'in so far as general interest broadcasting services are concerned and where the Authority allows news and current affairs programmes to be broadcast by such services …. to satisfy itself that, so far as possible…. due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy' is established in art. 13 (2) (f).

In a proviso to the said sub-article (2) of article 13 of the Broadcasting Act, it is established that except in the case of public broadcasting services, when *inter alia* it comes to the obligation of ensuring impartiality 'the Authority shall be able to consider the general output of programmes provided by the various broadcasting licensees and contractors, together as a whole.'

This proviso indicates that the obligation to ensure impartiality does not have to be programme or even station specific since impartiality could be provided through the overall output of all the programmes put up by the different broadcasters considered together in their totality. The whole purpose of introducing the concept of pluralism in Malta's broadcasting law was precisely to ensure that the people would have access to the widest possible range of programmes that appeal to their different interests, as well as to all different points of view. Impartiality is achieved through the entire output of all broadcasters considered as one whole, and in that sense, it becomes easier to achieve.

[4] Tonio Borg, *A Commentary on the Constitution of Malta* (Kite 2016) 620
[5] Cap 350 of Laws of Malta

It could be argued that this proviso may not necessarily be totally aligned with the provision of the Constitution of Malta that refers to 'such sound and television broadcasting services as may be provided in Malta' without distinction between the private and public broadcasting services. Having said that, the fact that the Constitution refers to 'services' does, in the author's opinion, allow for the interpretation that the services can be considered in their totality.

This issue is now the subject of legal contestation before the First Hall of the Civil Court (Constitutional Jurisdiction) in the case *'Lovin Malta Limited et v l-Avukat tal-iStat'* (Application number 47/2021 ISB) where applicants are on the basis of Article 116 of the Constitution *(actio popularis)* requesting the Court to declare the said proviso to be invalid and therefore declared null and void on the basis that it infringes Article 119 of the Constitution. The case has been filed on 1 February 2021 and the date for first hearing has been set for 10 June 2021. Media.Link Communications Company Limited, owned by *Partit Nazzjonalista,* which is the holder of a broadcasting licence has expressed an interest to intervene *in statu et terminis* in this case. At the date of writing of this thesis, the presiding Judge, Mr Justice Ian Spiteri Bailey has on 17 May 2021 ordered the notification of the application filed by Media.Link Communications Company Limited to both parties in the pending suit allowing them a week's time to file their reply to that application, in order to provide at a later stage about the matter.

The major political parties which own their respective radio and television stations, on their part, appear to welcome the freedom of not having to be impartial in their own services and tend to balance each other out, adding weight to the argument that in their totality, sound and television broadcasting services provided in Malta provide an impartial service.

> In effect, the Authority has retained the right to monitor such private stations, but as regards political impartiality since both political parties own their own

> radio and television stations the practice has been that of closing one eye on such a matter, contenting oneself with the fact that one station neutralizes the other. The final remit is that of ensuring that broadcasting time is fairly apportioned between political parties.[6]

The Constitution refers to 'persons belonging to different political parties' without adding the requisite that such parties need be 'represented in Parliament', although that requisite has been added in article 13 (4) of the Broadcasting Act which refers to the duty of the Broadcasting Authority –

> to organise from time to time schemes of political broadcasts (including political spots) which fairly apportion facilities and time between the different political parties represented in Parliament….

While in the past, the Broadcasting Authority would from time to time organise such schemes and facilities and time would be apportioned between the different political parties represented in Parliament generally in proportion to the number of seats held by the parties in Parliament, over the recent years the Authority is limiting such schemes to pre-electoral periods, that is when people are called upon to vote in a General Election to elect a new Parliament, in European Parliament and Local Council elections, or in anticipation of a referendum on a specific issue. In all these schemes, the Authority would ensure that time and facilities are also allocated to small and new parties, as well as to independent candidates. In such schemes the Authority would by and large give equal time to the mainstream parties but then take into account the number of candidates fielded by the smaller or new parties to allow those entities reasonable access to the broadcast media.

The issue that the Broadcasting Act provides for 'political parties represented in Parliament' while the Constitution refers to 'political parties' without adding the

[6] Borg (n4) 620

parliamentary requisite was raised in an *'actio popularis'* filed by Dr Wenzu Mintoff and Saviour Balzan in representation of the *Alternattiva Demokratika.*

Mintoff and Balzan argued that article 13 (4) of the Broadcasting Act was to be declared null and void on the basis that it ran counter to the provisions of the Constitution, precisely for adding the requisite 'represented in Parliament' with regard to political parties.

In a ground breaking judgment,[7] the First Hall of the Civil Court upheld this request on the basis that the wording of article 119 (1) of the Constitution did not match that of article 13 (4) of the Broadcasting Act, but also on the basis that –

> 'In the exercise of its functions under article 119 (1) of this Constitution the Broadcasting Authority shall not be subject to the direction or control of any other person or authority.'[8]

The Court held that while it wanted to make it clear that it was not pronouncing itself to the effect that to ensure due impartiality in matters of political controversy, the Authority had to allow political parties not represented in Parliament to take part in schemes of political broadcasts, but whether such participation by such parties was or not necessary should be left in the discretion of the Authority. It was therefore in violation of the Constitution to have a law that obliged the Authority not to allow such parties take part in schemes of political broadcast, since in the exercise of its functions to ensure impartiality, the Authority could not be subject to the direction or control of any other person or authority, and that meant not even of Parliament through an ordinary law.

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[7] *Dr Wenzu Mintoff et noe v Chairman ta' l-Awtorita' tax-Xandir et,* Civil Court, First Hall, per Mr. Justice Giannino Caruana Demajo, 16th April 1996

[8] Article 118 (8) of the Constitution

When the matter was referred to the Constitutional Court, in its judgment the Court did not deem it necessary to declare article 13 (4) of the Broadcasting Act null and void on the basis that it could still be interpreted to the effect that in the exercise of its functions, the Broadcasting Authority could and was to ignore any provision of the ordinary law to the extent that such provision was inconsistent with the Constitution. In this respect, the Authority was to remain the final arbiter with full liberty to act as it deemed required to ensure that its obligations in terms of article 119 (1) of the Constitution were fulfilled, irrespective of any provision of the ordinary law.

On this basis, the Constitutional Court, unlike the First Hall, refrained from declaring article 13 (4) of the Broadcasting Act as null and void since it could still be interpreted in a "given way in accordance with the mandates of the Constitution". The Court pointed out that this provision of the law did not exclude the participation of all political parties irrespective of whether they were not represented in Parliament in such schemes as the Broadcasting Authority was still able to organise. In this sense, the Constitutional Court pointed out that article 13 (4) of the Broadcasting Authority should not be given a literal and restrictive interpretation. The Court directed the Broadcasting Authority to exercise its discretion and act in terms of the Constitution and that if it failed to act within the parameters of article 119 if the Constitution, the Authority's actions would be subject to the scrutiny of the Court even if the Authority would have acted in conformity with any duty imposed on it in terms of the ordinary law. Finally, the Court ordered that a copy of its judgment be sent to the Speaker of the House of Representatives since the Court understood that there could be room for legislative intervention to ensure the clarity and certainty of the law.[9]

[9] *Dr Wenzu Mintoff et noe. V Chairman ta' l-Awtorita' tax-Xandir et,* Constitutional Court, per Chief Justice Joseph Said Pullicino, Mr Justice Carmel A Agius, and Mr Justice Joseph D Camilleri, 31 July 1996

5.3 Allowing access to different interest groups

Allowing access to different interest groups is furthermore reflected in another duty that is incumbent on the Authority, again in terms of article 13(4) of the Broadcasting Act, that is the duty –

> to produce properly balanced discussions or debates that afford access to persons from different interest-groups and with different points of view, and also to produce commentaries or other programmes about questions relating to current public policy, wherein persons taking part can put forward differing views and comments.

Over the past years, it has become accepted practice for such programmes to be produced directly by the various broadcasting stations or by independent media houses which are outsourced to provide these programmes by the different stations. In particular the public broadcasting services regularly provide a wide range of discussions, debates and other forms of current affairs programmes and this duty pertaining in terms of law to the Broadcasting Authority is carried out by the public broadcasting services.

In any case, it must be emphasised that in terms of law, the public broadcasting services are specifically excluded from being considered in the context of the output of other stations. That means that when it comes to these services, the duty to ensure impartiality is an absolute one, and unlike other broadcasting licensees and contractors, public broadcasting services cannot claim that their programme content is balancing the output of other stations. Their own programme content needs to be balanced in its own right. Public service broadcasting services have a strict and absolute obligation to ensure that due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy.

Preserving due impartiality is the duty to ensure that the people can receive through the broadcast media, without hindrance or censorship, different points of view especially with regard to matters of political or industrial controversy or relating to current public policy. As shall be examined, this obligation on broadcasters can be enforced not only by the Broadcasting Authority but, where required, by the Courts of Justice. Throughout the years a number of judgments highlight the meaning and significance of what preserving due impartiality is all about as well as the utmost importance that is given to ensuring that such due impartiality is observed.

Judgments will be examined with reference to different themes that relate to the notion of impartiality, and without deviating from a thematic approach, wherever possible judgments will be presented in chronological order. In the author's opinion that makes it easier to assess how the interpretation of our Courts of Justice with regard to the concept of 'due impartiality' has evolved, not necessarily always in the right direction, over the last fifty-six years.

5.4 Toni Pellegrini noe. v Edward S Arrigo noe.

The first case dealing with the duty to ensure impartiality was decided by the First Hall of the Civil Court (per Mr Justice Maurice Caruana Curran) on March 10, 1964. One of the significant factors about this case is that it was decided upon before Malta achieved Independence on September 21, 1964 and that meant that the Court was pronouncing itself with regard to the duty to ensure impartiality within the context of the Broadcasting Ordinance 1961[10] that was then in force but not on the basis

[10] Chapter 2 pp 44 - 49

of the present Constitution that had not been enacted. At that stage there was another Constitution[11] which had no provisions with regard to broadcasting.

Article 7 (2) (g) of the Broadcasting Ordinance 1961 none the less provided through wording which is practically identical to that now found in Article 13 (2) (f) of the present Broadcasting Act that the Broadcasting Authority was to ensure that 'due impartiality is preserved as respects matters of political or industrial controversy or relating to current public policy.' It was added that nothing in that paragraph was to prevent, *inter alia,* 'political talks made in accordance with a scheme approved by the Authority which fairly apportions facilities and time between persons holding different points of view.'[12]

The case was instituted by the Hon. Toni Pellegrini, as Head of the Christian Workers' Party in connection with a political broadcast of ten minutes that Toni Pellegrini had to deliver as part of a scheme of political broadcasts which the Authority had drawn up, allocating time between the different political parties on the basis of their numeric strength within the Malta Legislative Assembly. The Broadcasting Authority had to draw up this scheme on its own initiative since it had not managed to have the agreement of the political parties represented in the said Assembly. As explained *supra*[13] the drawing up of schemes of political broadcasts which fairly apportion facilities and time between different political parties represented in parliament is one of the duties incumbent on the Broadcasting Authority.[14] The parties

[11] Ibid p 81 where reference is made to the 1961 *Blood Constitution* – The (Malta (Constitution) Order in Council 1961

[12] Proviso (i) to art. 7 (2) (g) of Broadcasting Ordinance, 1961 (Ordinance no. XX of 1961). The proviso can be compared to art. 13 (4) of the present Broadcasting Act, Cap. 350 of the Laws of Malta, which establishes that 'it shall be the duty of the Authority to organise from time to time schemes of political broadcasts (including political spots) which fairly apportion facilities and time between the different political parties represented in Parliament.'

[13] *Supra* p 165

[14] The matter is now regulated in terms of art. 13 (4) of the BAct, Cap. 350 of the Laws of Malta

do not pay for such broadcasts or even for the use of facilities to produce such broadcasts. Moreover, the Authority has –

> the right to order any person or all persons providing broadcasting services in Malta for reception in Malta to provide, free of charge, such recording and other facilities as may be necessary for the production of the said programmes for radio and television, as well as to transmit, free of charge, on such days and at such times as the Authority shall direct, the same programmes:
>
> Provided that the powers of the Authority under this sub-article may only be exercised in so far as that exercise is reasonably justifiable in a democratic society.[15]

Toni Pellegrini as plaintiff argued that the broadcast which he was entitled to make on February 27, 1964 had not been aired on television in the same way that it had been pre-recorded, and that this had had an effect on the message which he wanted to convey. What had happened was that through a technical mishap the first thirteen or fourteen words of his broadcast were not heard since one of the technical persons on duty had inadvertently failed to fade in the sound of the broadcast immediately that the picture of plaintiff went on the air.

As Leader of the Christian Workers' Party, Toni Pellegrini was opposed to Malta becoming an independent nation and for that reason it mattered to him that the words, "Before we left for London ten days ago, you could only hear the Nationalists stating" which preceded the words "Now we have Independence – let us all move in the same direction" were not heard.[16] The broadcast in question was meant for both radio and television, but while there was no mishap at all with the radio transmission,

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[15] Art. 13 (5) Cap. 350.

[16] In Maltese: The words "*Qabel tlaqna lejn Londra għaxart ijiem ilu ma kontx tisma' ħlief lin-Nazzjonalisti jgħidu"* which preceeded the words *"Issa ġiet l-Indipendenza – ejja niġbdu ħabel wieħed"* were not heard.

a seven second lapse between the commencement of the television screening thereof and the voice of the speaker being audible meant that for seven seconds, viewers could notice that Toni Pellegrini was saying something or other, but could not hear him. Mr Pellegrini argued that the words not heard changed the meaning of his message from one wherein he was merely quoting the message of the Nationalist government (to then explain why he disagreed with it) to one where he was making that message his own.

While the Court established that this was a genuine technical error for which the Broadcasting Authority did seek to provide a remedy consisting of an apology and the repeat of the first paragraph of plaintiff's message, the Court still needed to deal with the matter since the plaintiff was insisting on a repeat of his entire broadcast.

This was the first case before the Courts of Justice dealing with the legal obligation of ensuring impartiality and a number of important legal issues needed to be established.

One of the arguments raised by defendants is that such technical errors do occur and are part and parcel of what one can expect out of broadcasting. With reference to this argument, the Court retorted that 'even traffic accidents and cases of breakdown of machinery are expected in this day and age but equally the Courts are daily called upon to enquire as to who is to bear the legal responsibility for them'.

The Court established that the scheme of political broadcasts created by the Broadcasting Authority and the allocation of air time in favour of plaintiff created a contractual obligation between the parties.

Establishing a right of judicial review on the basis of that contractual obligation, as will be examined in Chapter Six that deals with jurisdictional and other procedural

issues, the Court then ruled that the breach of contract was of a *'de minimis'* nature not least because the rest of the broadcast had still clearly brought out the message that was intended by the plaintiff as Leader of the Christian Workers' Party. As a result, plaintiff had not suffered any prejudice even if the incident in question was an unfortunate one, and that the Court held that the remedy offered by the Authority was a sufficient one since contracts have to be carried out in good faith and according to the rules of equity.

The Court made this evaluation on the basis of the rest of the script of the political broadcast including such expressions as *"Din il-propaganda tan-Nazzjonalisti timpressjona biss il-boloħ"* (This propaganda by the Nationalists impresses only the foolhardy) which made the message of the plaintiff intelligible notwithstanding the inaudibility of the first seven seconds of his speech. In other words, the message that the plaintiff wanted to convey to the public was still conveyed clearly. The involuntary elimination of seven seconds from a ten-minute broadcast led the Court to refer to the concept of *'de minimis'*.

Even witnesses produced by plaintiff to testify that they had not understood his message were not completely in agreement with each other, and one of the plaintiff's own witnesses, Caruana, testified that he had understood the message as transmitted on television. Not surprisingly, the Court referred to plaintiff as somewhat too demanding *("kien xi daqsxejn esiġenti iżżejjed")* to request a total repetition of the entire broadcast, which would, if accorded, result in unjustified enrichment in his favour at the cost of the Broadcasting Authority.

The Court significantly added that had there been a serious breach as would have been the case if the omissions were longer or more repetitive and such as to prevent viewers from being able to follow and understand the message given by Toni

Pellegrini, the Court would not have hesitated to order that the broadcast in question be re-transmitted *'biex tiġi konservata il-vera imparzjalita''* (in order to secure true impartiality).

The judgment generated interest and was duly reported in the print media but did not generate any further debate.

This judgment stands as final since an appeal entered from it by the Broadcasting Authority as well as a cross appeal entered by plaintiff were both declared as inadmissible for procedural reasons that will be examined in Chapter Six.[17]

5.5 Dom Mintoff noe. v. Dr Antoine Montanaro Gauci noe.

No cases regarding impartiality in broadcasting came up for judicial review by the Courts of Justice for the next six years. The next case to come up for review is once again with regard to a scheme of political broadcasts, in this case not in anticipation of a referendum, but in anticipation of the 1971 General Election.

This case decided by the Court of Appeal on 22 May 1971 deals with the rules that need to be followed to safeguard political impartiality when it comes to a scheme of broadcasts that was set up by the Broadcasting Authority to cater for the 'pre-nomination of candidates for General Election' phase. Normally schemes of political broadcasts are either drawn up when Parliament is still in session in which case the weighting with regard to air time allocated to the different political parties matches the weighting of the parties in Parliament, or schemes drawn up during an election campaign when the nominations of candidates contesting in the name of the different

[17] *Toni Pellegrini noe. v Edward G. Arrigo,* Court of Appeal, per Mr. Chief Justice Sir Anthony Mamo, Mr Justice T Gouder, and Mr Justice J Flores, 11 January 1965.

parties would have been submitted and the weighting of air time is in proportion to the total number of candidates submitted by each party up till the close of nominations.

The Broadcasting Authority had drawn up a scheme which allocated equal time to the Malta Labour Party, to the Nationalist Party and the Progressive Constitutional Party – using the argument that it could not apply the weighting of number of seats in Parliament since Parliament was dissolved, and it could not yet apply the weighting of number of candidates fielded by the parties since the scheme was drawn up before the nominations of candidates were received by the Electoral Commission.

5.5.1 The Mintoff case at First Hall of the Civil Court stage

The First Hall of the Civil Court decided the case on 17 May 1971 and acceded to plaintiff's request to issue a definitive decree of prohibitory injunction against defendant on the basis that defendant had failed to fulfil his functions and obligations in accordance with the law, after rejecting defendant's plea that the actions of the Broadcasting Authority could not be reviewed by the Courts.

Mr Mintoff was complaining against the Broadcasting Authority for not applying the system of weighting either with regard to the number of seats in Parliament or to the number of candidates fielded for election on the pretext that this was a scheme of 'pre-nomination' broadcasts, that is where Parliament is dissolved but where the Electoral Commission has not yet received the list of candidates presented by each party. Plaintiff argued that this was prejudicial to him since the scheme was giving equal access to the Progressive Constitutional Party when it was known that that Party was a smaller one as compared to the two mainstream parties. As a result, plaintiff argued that the 'pre-nomination' scheme was in violation of the

Constitutional provision that stipulates that 'broadcasting facilities and time are *fairly* apportioned between persons belonging to different political parties.'[18]

The First Hall of the Civil Court agreed that it should have been well known to the Authority that while it was likely that the Malta Labour Party and the Nationalist Party would field a similar number of candidates for election to Parliament, this was not the case with regard to the Progressive Constitutional Party and in that respect the Broadcasting Authority had failed from using its discretion in an appropriate manner. The Court held that the Broadcasting Authority's decision on the allocation of broadcasting time and facilities was not carried out fairly, was prejudicial to plaintiff and as a result the Authority had not carried out its duties and functions according to law.

On that basis, the Court acceded to plaintiff's request and issued a prohibitory injunction against the Authority, thereby refraining the Authority from going ahead with its 'pre-nomination' scheme of political broadcasts.

After establishing its right of review[19], the Court pointed out that plaintiff did not manage to prove that there was any bad faith on the part of the Authority, or that the Authority was intentionally trying to give an advantage to the Progressive Constitutional Party and indirectly to the Nationalist Party – so much so that the Nationalist Party had also objected to the "pre-nomination electoral broadcasts" as suggested by the Authority. Nor did plaintiff prove that the Authority was influenced by some other authority or entity.

Having said that, the Court decided that there was an improper distribution of air time between the different political parties. The Court decided that while the

[18] Art. 119 (1) of CM.
[19] Chapter 6 pp 243 - 249

Authority had acted in good faith, it had none the less deviated from carrying out its functions according to law.

5.5.2 The Mintoff case at Court of Appeal stage[20]

With regard to the case at issue, the Court of Appeal agreed with the First Hall of the Civil Court that the Authority had to take into account the particular circumstances of the country and the intense political sensitivity at the time for when the programme in issue was intended.

If as a matter of fact, the programme over which plaintiff had recourse to the Courts of Justice, violated the principle of fair apportionment of facilities and time between the Party represented by plaintiff and the Progressive Constitutional Party, the Courts would intervene to rectify the situation notwithstanding that the Authority had shown to have acted in good faith and had, contrary to what was alleged against it, proved that it had not acted under pressure or influence from any other source.

The argument that the programme over which plaintiff complained was being described as a 'pre-nomination (of candidates)' introductory filler rather than a 'pre-General Election' programme did not obscure the fact that, as was known publicly, an election campaign was already underway in the country.

The Court of Appeal agreed with the First Hall of the Civil Court that the programme in question, at the very least, failed from providing for a fair allocation of time and facilities between the Malta Labour Party and the Progressive Constitutional Party. The Court added that although the Authority was arguing that Parliament had been dissolved and that the deadline for submission of nomination of candidates for

[20] *Dom Mintoff noe. v. Imħallef Dottor Antoine Montanaro Gauci noe.,* Court of Appeal, per Mr. Chief Justice Sir Anthony Mamo, Mr Justice Prof. J J Cremona, and Mr Justice J Flores, 22 May 1971.

the next general election had not yet been reached, it should still have been manifest to the Authority that the Progressive Constitutional Party had no representation in the former Parliament and could not be considered at the same level of the Party represented by plaintiff, or for that matter, of the Nationalist Party.

The Court of Appeal did not even accept the argument that the time allocated for each "talk" in the 'pre-nomination' scheme was rather brief, since that did not prevent the Authority for making the fair allocation of time and facilities with respect to the other Parties, as required to do in terms of the Constitution.

While precise or absolute mathematical proportionality could not be expected, the Court of Appeal emphasised that by treating on an equal footing the Malta Labour Party and the Progressive Constitutional Party, the Authority had exceeded the reasonable latitude that one could have tolerated.

On the basis of the foregoing, the Court of Appeal agreed with the First Hall of the Civil Court that the programme complained of and as drawn up by the Authority did not satisfy what was required by law.

5.6 Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro noe.

Two cases relating to the issue of right of reply as regards broadcasts by the Prime Minister or by Ministers were decided in the above names by the Court of Appeal on 26th February 1976[21] and 9th April 1976[22]. The two cases will be dealt with together since they relate to the same issue and since they have established important

[21] *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro noe.,* Court of Appeal, per Acting Chief Justice Mr Justice Maurice Caruana Curran, Mr Justice Victor R. Sammut, and Mr. Justice Giovanni O. Refalo, 26 February 1976

[22] *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro noe.,* Court of Appeal, per Acting Chief Justice Maurice Caruana Curran, Mr Justice Victor R Sammut, and Mr Justice Giovanni O. Refalo, 9 April 1976

principles regarding when and how the Courts of Justice will intervene to grant a right of reply with regard to Ministerial Broadcasts to safeguard the concept of impartiality.

In its judgment of the 26th February 1976, the Court of Appeal established the following principles -

(a) There are strict limits that need to be observed when Ministerial broadcasts, including those by the Prime Minister, are allowed, and such limits even resulted from policy statements that had been issued by the Broadcasting Authority;

(b) A right of reply would result whenever there is an element of controversy or of political criticism or propaganda, since impartiality needs to be observed whenever there are issues of political controversy or even of current public policy;

(c) That the manifestation of public interest with regard to the subject covered in the broadcast as resulting from the doctrine of impartiality and fair apportionment of time and facilities (between persons belonging to different political parties) is rendered effective through the right of the community "as a whole" to have a diversity of "sources" of information and education in the political field, as opposed to having a partisan service;

(d) That this results in a heavy obligation on the Broadcasting Authority which obligation needs to be carried out objectively and treated as an affirmative obligation towards the existing democratic society in Malta;

(e) In carrying out its obligation, the Authority enjoys certain discretional limits but while acting within those limits, the Authority cannot fail …. in a relevant manner from what is expected of it in exercising its prudential judgment, taking particular account of the political sensitivity of the timing of the broadcast;

(f) Wherever there is a right of reply, that right should be serious, real and effective.

The Court of Appeal in its judgment of the 9th April 1976 approvingly referred to the above principles and added that when it had established in its judgment of 26th February 1976 that the right of reply, when applicable, must be "serious, real and effective" it had no intention of simply paying lip service to some abstract legal theory,

but really wanted to affirm that the right must be serious, real and effective as relating to the concrete circumstances of each case, examined on its own merits.

The Court added -

> In political matters, the Broadcasting Authority must defend impartiality wherever required and "against all comers"….. The right of reply is the very guarantee of impartiality which it must defend as required by the Constitution. The time given for reply is no mere detail without any importance, or some loophole in order that the value of that right is reduced to naught or next to naught, but in specific cases, is the very essence of the right of reply and (must be considered) as at par with that right, in such a way that once that right is established, when the Authority does not allocate time that is suitable to address the circumstances of the case, the Authority would become like the debtor who does not honour his debt in full, and in terms of law it is as though he has not paid anything.

In view of the foregoing, the Court pointed out that it should be understood once and for all that while the right of reply was not automatic 'a priori', and nor could it be said that once such right was granted, it had necessarily to extend for the same length of time as that of the broadcast that would have given rise to it (although equality of time may be required wherever appropriate) on the other hand, on the basis that each case needed to be examined and decided upon its own particular remit, the Authority could be failing in a relevant manner from its Constitutional duty to ensure impartiality with regard to matters of political controversy or relating to current public policy, in three ways: (a) by not granting the right when there is such a right; (b) by frustrating that right by granting insufficient time in view of all the circumstances of the case; or even (c) by not granting the right of reply within a reasonably short period.

In each case, the Authority would be failing in a relevant manner from what is expected of it in terms of law and the Constitution. The Court as a result has the right which it considers also as an obligation, to examine the adequacy of the time allotted

for the right of reply, and wherever required, would even determine the exact time required in order to ensure impartiality as required in terms of the Constitution.

Having established such principles in the most clear-cut terminology possible, the Court of Appeal proceeded to examine the Address to the Nation by the Prime Minister as well as the Ministerial statements in respect of which the Nationalist Party had sought redress. The Court established that there were propagandistic tones that went beyond the strict limits within which ministerial broadcasts should be confined. Moreover, the broadcasts contained direct or indirect comparisons between the performance of the Government in office and that of the former Government. Interestingly, the Court went as far as affirming that -

> in the concept of right of reply, one must not only take account of statistics but also of their interpretation since different inferences could be drawn from the figures quoted in the context of the general picture in the country and their political basis.

The Court made it clear that it was examining not only the content of the broadcasts complained of, but also the way *(dawn iċ-ċirkostanzi kollha ta' kontenut u mod)* in which those broadcasts were aired including factors such as date and time of transmission, 'peak viewing' slot, and the fact that the Address to the Nation by the Prime Minister was aired again the following day. Taking account of these circumstances and considerations, the Court held that the Broadcasting Authority should have allocated a right of reply of at least half the time in comparison to that given to the Prime Minister, and ordered the Authority to provide such a remedy.

5.7 Need for inaccuracies in broadcast complained of?

It is to be regretted that despite such clear guidelines emanating from this judgment by the Court of Appeal, in a subsequent case[23], the Civil Court in dealing with a request for a right of reply with regard to an end of the year broadcast by the Prime Minister (on 31st December 1977) interpreted former judgments in the sense that a right of reply should only be allowed –

> where there were inaccuracies in the broadcast that the Court would hold should be corrected or with regard to which another person had to give his views on the same subject.

In the author's opinion, the Civil Court in this case was right only to the extent that it held that end of year broadcasts were as subject to scrutiny by the Courts as would be Ministerial statements or other political broadcasts held throughout the rest of the year. The idea that the Broadcasting Authority or the Court need to take it upon themselves to rule about the accuracy or otherwise of the statements in respect of which a right of reply is requested is fallacious.

The Broadcasting Authority and, where necessary the Courts, need only examine if the broadcast over which a complaint is raised refers or not to an issue of political controversy. Moreover, if the issue is one of current public policy, the element of controversy is not even required. Ultimately impartiality is about allowing the general public to have access to different points of view and about broadcasting facilities being 'fairly apportioned between persons belonging to different political parties.'[24]

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[23] *Dr Edward Fenech Adami noe v Dr Gerald Montanaro Gauci noe,* Civil Court, First Hall, per Mr. Justice Vincent Scerri, 9 October 1978

[24] CM art. 119 (1)

In this case, the Court took it upon itself to conduct a meticulous examination of what was stated by Prime Minister Dom Mintoff in his broadcast to determine whether what he said was accurate or not – a role which in the author's opinion – should not have been exercised by the Court.

The absurdity of this line of reasoning is exemplified best in the following extract from the Court's judgment -

> The Honourable Prime Minister carried on to state that it is the wish of the Party to build a socialist state that takes care of the poor, cares for the meek and persons who are hard up - a thought which is at the basis of the Party of the Honourable Prime Minister – this is well known by anyone following the policies of the Labour Party in Malta – a matter which is no way contentious.[25] The Honourable Prime Minister in this regard does not draw any comparison with the Party headed by the Honourable plaintiff (the Leader of the Opposition and of the Nationalist Party) and that is why the Honourable plaintiff cannot expect to be given a right of reply to what was stated by the Honourable Prime Minister.[26]

If such sentiments do not constitute the very essence of political controversy, the author wonders what could be considered as politically controversial. The Court adopted this line of reasoning to justify not granting a reply with regard to various other references made by the Prime Minister in his end of year broadcast, including a reference to the setting up of labour corps, to the 'need' that 'serious trade unions' team up with government, the creation of workers' committees, and the introduction of the student worker scheme with regard to which the Court acknowledged that it was true that 'a certain number of students could disagree with the new system…… but one

[25] It is presumed that the Court was not expressing its opinion about whether the policies followed by the Labour Party in Government were contentious, but was stating that it was not contentious that the Prime Minister's party was following such policies and that the Prime Minister had every right to state that he was following same!

[26] *Dr Edward Fenech Adami noe v Dr Gerald Montanaro Gauci noe,* Civil Court, First Hall, per Mr. Justice Vincent Scerri, 9th October 1978, 12

had to see if the Prime Minister had exceeded the limits imposed upon him by law when making this point in his speech.'[27]

The Court in its concluding remarks pointed out -

> It is the considered opinion of this Court that a right of reply should be given if and when the person who had delivered his speech would have exceed the limits of partiality, and in order to establish that, one would need to examine the speech as a whole to determine if the speaker would have exceeded the limits of what is tolerable, always keeping in mind that one should allow a certain latitude to the speaker who would be giving an end of year message, in order to make references to the performance of his Government throughout the year which he would be reviewing.[28]

In the author's opinion, there simply should be no element of partiality and therefore any reference to so called 'limits of partiality' is a dangerous and legally fallacious concept. Moreover, this judgment is completely not in line with the clear guidelines issued by the Court of Appeal two years earlier, as well as with what the Court of Appeal had observed in pointing out that comparisons could be implicit and that in considering a right of reply one not only had to look at statistics but also at their interpretation, keeping in mind -

> the explanations that can be given to the inferences that can be made from quoted figures in the general context of the country and their political basis.[29]

5.8 Definition of what constitutes 'political controversy'

In the Court case here referred to and decided by the Court of Appeal on 9th April 1976,[30] the First Hall of the Civil Court had on 2nd March 1976 already gone to

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[27] Ibid 19
[28] Ibid 20
[29] *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro noe.,* Court of Appeal, per Acting Chief Justice Maurice Caruana Curran, Mr Justice Victor R Sammut, and Mr Justice Giovanni O. Refalo, 9 April 1976
[30] Ibid

considerable length to define what constitutes 'political controversy' by stating that such would be the case whenever a Minister deals with 'issues as regards which in the country 'as a whole' and especially in the camp of the Official Opposition, that has an important role to play in a democratic society, there would be two opinions or even more' or whenever a Minister 'sits too much on the laurels of his Party *(ikanta wisq il-lodi tal-partit tiegħu)* or criticises other Parties, criticism which can easily be even implicit and a little concealed' adding

> it may well be that he considers what he states to be true, but neither the Authority nor the Court could assume the burden of judging whether what the Minister said is true or not. The point at issue is that in such cases, there should be a serious, real and effective opportunity of giving a reply in order that the public may then reach its own conclusions or at least it would have exercised its right of having a diversity of information.

It is not clear why in the subsequent 1978 judgment, the Court chose to depart from such clarity of thought as well as established guidelines and resort to a rather dangerous line of 'reasoning'. In any case it is suggested that the 1978 judgment cannot be relied upon as a valid interpretation of our law.

5.9 BA reluctance to offer a 'serious, real and effective' right of reply

It is moreover unfortunate that no less than forty years after that the Court of Appeal issued its clear guidelines[31], the Broadcasting Authority remains reluctant to offer a 'serious, real and effective' right of reply in respect of whenever the Prime Minister chooses to address the nation, although the practice of Ministerial Statements through the broadcasting media has fallen into disuse.

[31] Ibid

A case in point regards a New Year Day Message by the Prime Minister broadcast on 31st December 2015 and repeated on 1st January 2016. The Nationalist Party complained to the Broadcasting Authority that the Prime Minister had referred to various issues over which there was political controversy and which in any case related to matters of current public policy in respect of which the Authority is equally bound to guarantee impartiality. Moreover, the Nationalist Party complained about the format of the broadcast which apart from making use twice over of prime-time television viewing slots also took the form of an 'advertorial' to the extent that the Prime Minister pretended to be recording the broadcast from the kitchen area within the residence of an ordinary working-class family when in reality it was established to be a case of playacting.

The Broadcasting Authority in its decision[32] with regard to this complaint strangely enough ruled that 'the format and style of the production do not pertain to its regulatory authority'. In the author's opinion, this means that the Authority deliberately failed to take cognisance of what it should have taken cognisance of. With regard to actual content, the Broadcasting Authority said that the subject matter 'had already been discussed in public broadcasting services and therefore different points of view had already reached the public in an ample manner'. In this respect, it is felt that the Authority deliberately also took cognisance of what it should not have considered since the fact that the different points of view had already been discussed in different broadcasting services should have been considered irrelevant. The fact that the Authority was admitting that there were different points of view with regard to the content of the New Year Day Message should have led the Authority to grant a right of reply for at least a portion of the time allotted to the Prime Minister.

[32] Broadcasting Authority, Annual Report, 2016, 19

In the author's opinion, it would have been desirable, over forty years down the line from the Courts of Justice establishing clear guidelines on when a right of reply should be acceded to, for the Broadcasting Authority to render the concept of right of reply more effective rather than less so. If for no other reason, for the fact that in most European countries, the concept of addresses to the nation over broadcast media by Heads of Government is deemed anachronistic.

5.9.1 BBC Editorial Guidelines

For instance, section 10.4.15 of the BBC Trust's Editorial Guidelines provides –

> In exceptional circumstances, such as a decision to go to war, the BBC may be required to provide time for a broadcast by the Prime Minister or relevant senior minister. In such circumstances, it is also necessary to consider requests from the leaders of the main opposition parties for a reply.

When the author enquired directly with BBC Trust about Christmas messages by the Prime Minister of the United Kingdom, the author was informed that 'the Prime Minister and other party leaders release these messages, which are published by their own offices and are reported by the BBC and other media.'

These messages are distinct from Party Political Broadcasts and one immediately notices that such messages are released not only by the Prime Minister but also by other Party Leaders and are then all reported by the BBC and other media.

In view of such developments, the author argues that in a modern democratic society, impartiality requires an automatic and effective right of reply in favour of the Opposition with regard to any broadcast by the Prime Minister or Government Minister.

5.9.2 European case-law

Apart from considering the right of reply in broadcasting as a requisite of impartiality, it is interesting to consider how the concept of right of reply has been referred to in judgments of the European Commission on Human Rights and the European Court of Human Rights.

In *Ediciones Tiempo S.A. v Spain*,[33] the European Commission of Human Rights observed that 'the right of reply is to safeguard the interest of the public in receiving information from a variety of sources and thereby to guarantee the fullest possible access to information.'

In this case the publishers of *Tiempo* were contesting an order to carry a right of reply with reference to an article dealing with serious irregularities in the management of a public company called Mercorsa. The publishers argued that being ordered to carry a right of reply infringed their freedom of expression, and that, at least, there should be an examination of the veracity of the reply. The Commission observed that Article 10 of the ECHR 'cannot be interpreted as guaranteeing the right of communication companies to publish only information which they consider to reflect the truth, still less as conferring on such companies powers to decide what is true before discharging their obligation to publish… replies ….'[34]

Acknowledging that the right of reply was an interference with the publishers' freedom of expression, the Commission observed that the interference was necessary since 'the Commission considers, in the first place, that in a democratic society the right of reply is a guarantee of the pluralism of information which must be respected.'[35]

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[33] EcomHR, *Ediciones Tiempo S.A. v. Spain* [1989] App. no. 13010/87
[34] Ibid, p 254
[35] Ibid, p 253

This judgment has been considered as a 'seminal decision'[36], and as pointed out by Oster, 'the European Court of Human Rights later emphasised that the right of reply of an aggrieved person is itself protected by Article 10 ECHR'.[37]

This has been emphasised in *Kaperzynski v Poland*[38] where the Court pointed out that the obligation to carry a right of reply should be seen 'as a normal element of the legal framework governing the exercise of the freedom of expression'. None the less, in this case deficiencies in the Press Law of Poland, as had been determined by Poland's own Constitutional Court, and the fact that applicant was subjected to a penal sanction, including suspension of applicant's right to exercise his profession as a journalist, were of relevance to the ECtHR to rule in favour of applicant although he had used his editorial discretion not to carry a requested right of reply. Even if the ECtHR held that a criminal measure as a response to defamation cannot of itself be considered as inconsistent with Article 10 ECHR, still 'the chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident'.

In the same judgment, the Court re-affirmed –

> 'According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment….. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of tolerance, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".'[39]

[36] Jan Oster, *Media Freedom as a Fundamental Right,* Cambridge University Press 2015, 80
[37] Ibid 81
[38] ECtHR, *Kaperzynski v Poland* [2012] App. no. 43206/07
[39] Ibid para 54

Affirming that in terms of Article 10 ECHR, there can be little scope 'for restrictions on political speech or on debate on questions of public interest', the Court referred approvingly to *Lombardo and Others v Malta*[40] where it was recalled –

> 'The limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance……. Moreover, the limits of journalistic criticism are wider still with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.'[41]

In *Melnychuk v Ukraine*[42] the ECtHR considered the application in question as inadmissible on the basis that applicant was given an opportunity to exercise his right of reply to criticism of his books by a newspaper's critic but had used that reply to use obscene and abusive remarks about the critic. 'Given the content of the reply, it was no surprise that the complaint was manifestly ill-founded, declaring it inadmissible.'[43] None the less, the ECtHR still affirmed a State's positive obligation under Article 10 ECHR to protect applicant's freedom of expression by having a 'reasonable opportunity to exercise his right of reply' and significantly pointed out –

> 'The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and for each individual's self-fulfilment. The Court considers that the right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate.'

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[40] EctHR, *Lombardo and Others v Malta* [2007] App. no. 7333/06
[41] Ibid para 54
[42] ECtHR, *Mehychuk v Ukraine* [2005] App. no. 28743/03
[43] Ronan Ó Fathaigh (2012) *The Recognition of a Right of Reply under the European Convention,* Journal of Media Law, 4:2, 322-332, DOI: 10.5235/JMI.4.2.322

The reference to political debate would be certainly relevant within the context of providing through the media in general, and certainly through public broadcasting services, the full plethora of different views and opinions not only on any issue where there is controversy but also about any issue of current public policy.

In *Eker v Turkey*[44] the Court went further than it had done in the *Melnychuk* case since 'the Court seemed to hold that the right of reply not only includes a right to rectification or correction of inaccurate facts, but may also include opinions concerning the article's author ….. where the reply's "tone" is similar to the original article.'[45].

Importantly, in the *Eker* case, the ECtHR made reference to the exceptional expedited procedure in which the Magistrate's Court in Turkey had to rule on publication orders concerning the right of reply within three days and observed –

> 'This requirement to deal with cases swiftly could be considered necessary and justifiable in order to enable untruthful information published in the media to be contested, and to ensure a plurality of opinions in the exchange of ideas on matters of general interest. News was a perishable commodity and to delay its publication, even for a short period, might well deprive it of all its value and interest.'

Referring to case-law of the ECtHR, Ó Fathaigh is of the opinion that 'an unenumerated 'right of reply' has now been recognised under Article 10, and its reach has been extending rapidly, and somewhat unnoticed.'[46]

While the above pronouncements are relevant particularly in view of the emphasis that the ECtHR is placing on the right of access to media as incorporated within freedom of expression, it should be emphasised that in the field of obligations assumed by a public service broadcaster, particularly in view of the obligation of

[44] ECtHR, *Eker v Turkey* [2017] App. no. 24016/05
[45] Ronan Ó Fathaigh, *Eker v Turkey: The Right of Reply under the European Convention,* European Human Rights Cases, Issue 1
[46] Ó Fathaigh (n43) 332

ensuring impartiality, the concept of 'right of reply' has far wider scope than that which would be related to safeguarding the reputation of any particular individual or entity. In public service broadcasting, the concept must be seen in the context of ensuring that on any issue of political or industrial controversy or even relating to current public policy, whether or not there would be controversy, the public is entitled to receive information that comprehends the widest possible array of different points of view, in order that members of the public may then be able to reach a truly informed opinion.

5.10 Obligations of Authority following enactment of 1991 Broadcasting Law

As discussed in Chapter Two dealing with the history of broadcasting in Malta, pluralism was introduced through the new 1991 Broadcasting Law which is now Cap. 350 of the Laws of Malta. The law provided the Authority with new powers and obligations to guarantee pluralism.

In particular the new law provided that when issuing broadcasting licences, the Authority shall be guided by the following considerations –

(a) that the principles of freedom of expression and pluralism shall be the basic principles that regulate the provision of broadcasting services in Malta;

(b) that a diverse system of public and private stations with their own particular character, would be the best system for the realisation of the basic principles above referred to.[47]

The Court of Appeal had occasion to reflect on the impact of the new broadcasting set up and pluralism on the Authority's constitutional obligation to ensure impartiality in a case regarding the transmission of dialogue sessions with the Prime Minister to explain a fiscal system that Government had introduced instead of

[47] BAct, Cap. 350 of the Laws of Malta, Article 11 (1) (a) and (b)

VAT, and over which there was political controversy since the Opposition was opposed to the new system.

The Court of Appeal held -

> A reading of all the (new Broadcasting) Act *toute ensemble ictu oculi* cannot but reflect modern legislation that that calls upon the Authority and its licensees – included therefore PBS Ltd – that are entrusted with the means of mass communications as mature entities and open to the opinions of all (concerned) which had to be inspired by the consideration that "the principles of freedom of expression and pluralism shall be the basic principles that regulate the provision of broadcasting services in Malta" (sub-paragraph 1 (a) of article 11). And if these principles were binding and created obligations on licensees of private stations, *multo magis* these had to be binding and obligatory on public broadcasting stations.[48]

The Court affirmed that on the basis of these principles, the duty to ensure impartiality was not only binding directly on the Authority, but had a quasi-horizontal effect by becoming directly binding on licensees of broadcasting stations, and then even more so on public broadcasting services in view of the fact that they are financed by the State.

The social obligations pertaining even with regard to private broadcasting stations had already been emphasised by the Court of Appeal in the *Radio Live FM* case regarding the suspension of a broadcasting licence on the basis that the licence holder had effectively transferred his shares to another person and had lost effective control over the radio station in question.

In the *Radio Live FM* case[49], the Court of Appeal held -

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[48] *Hon. Dr Eddie Fenech Adami noe. v Dr Joe Pirotta noe et,* Court of Appeal, per Mr Chief Justice Joseph Said Pullicino, Mr Justice Carmel A Agius, and Mr Justice Joseph A Filletti, 17 July 1997.

[49] *Joseph Grima noe v Joseph Pirotta noe,* Court of Appeal, per Mr Chief Justice Joseph Said Pullicino, Mr Justice Carmel A Agius, and Mr Justice Noel V Arrigo, 18 June 1996

> While a private broadcasting station is also a commercial operation and like any other entity is regulated by economic factors, and susceptible to market and competition forces, the station remains essentially a public service that can only have as its *raison d'etre* the wellbeing of the community. In view of this aspect, the licence holder cannot operate motivated only by personal profit-making motives and led solely by market forces while ignoring the obligations that he has towards the users of that service and society in general.

Still from a reading of this judgment it could still be argued that the Court of Appeal was only referring to indirect obligations since it was referring to these obligations in the context of the right of the Broadcasting Authority's right to suspend or even terminate a broadcasting licence when the licensee failed to abide by his licence conditions, subject to right of licensee to lodge an appeal to the Court of Appeal. As a result, this case did not look into the potential juridical interest of other interested parties, apart from that of the licensee and of the Broadcasting Authority.

5.11 Obligation of impartiality extended directly to all broadcasting licensees

In *Hon. Dr Eddie Fenech Adami noe. v Dr Joe Pirotta noe et* (1997)[50] the Court of Appeal went further and held that as a result of pluralism it was not necessary for the Authority to give its approval in a pre-emptive manner with regard to each programme that had political content or that dealt with current public policy.

As a result, the obligation to ensure balance and impartiality was *directly* extended to all broadcasting licensees and in particular to the provider of public broadcasting services. Once such programmes as was the case in question went on the air, the Authority had the obligation to act out of its own initiative and could not argue by way of defence that an interested party did not lodge a complaint or did not specify

[50] n48

precisely what same party was complaining about once asked to do so by the Authority.

The Court added -

> The Constitution imposes that the Authority always fulfils its functions, even in circumstances where it may not be possible for someone to bring a complaint to its attention. Act XII of 1991 (the Broadcasting Act), moreover foresees a powerful and proactive Broadcasting Authority with responsibilities to motivate free and pluralistic broadcasting respecting the criteria of balance and impartiality as provided in the Constitution. The Authority therefore has the duty to intervene in time to prevent imbalance or partiality coming about, rather than simply providing a corrective remedy when these result.

With regard to the public broadcasting services, the Court was surprised with the attitude that the public broadcasting services had adopted in the proceedings. The Court compared its attitude to that of Pilate, by trying to absolve itself of any responsibility for the effects of its own behaviour, when such attitude could also be considered as violating the fundamental right of freedom of expression.

The Court added that once programmes were as a result of pluralism transmitted on the responsibility of the licensee, that broadcaster –

> assumes their paternity and therefore equally the obligation that (such programmes) do not violate article 119 of the Constitution with regard to the requirement of balance and impartiality as well as the provisions of Act XII of 1991 in terms of which it has received the licence to broadcast.

When the new Broadcasting Act was enacted in 1991, it included the National Broadcasting Plan as the Second Schedule to that Act. Article 20 of that Plan imposed precise legal obligations on the provider of public broadcasting services, not only with regard to the Broadcasting Authority but regard to society as a whole. The Court quoted extensively from that article which provided -

> The public broadcasting media have the particular responsibility of providing news and current affairs programming which respect the Constitutional requisites of adequate impartiality, and which shall also be in line with journalistic principles aimed at ensuring a comprehensive and accurate information service in the interests of a democratic and pluralistic society….[51]

5.12 National Broadcasting Plan no longer in Broadcasting Law

It is to be observed that the Second Schedule to the Broadcasting Act was eventually deleted through article 15 of Act VIII of 2011.

When the Parliamentary Secretary, Dr Mario de Marco, was introducing the bill that led to Act VIII of 2011, he explained that in view of rapidly changing technology, it was felt that it was no longer necessary to retain the National Broadcasting Plan as part and parcel of the main law since there should be a more flexible method as to how to provide for and regularly update such Plan.[52]

To the author's mind the fact that the said Plan no longer forms part of our main law, does not mean that the public broadcasting services are in any way less bound by the same principles highlighted by the Court of Appeal in its judgment which furthermore included references to other provisions of the Broadcasting Act that deal with the impartiality requirement.

When the Court of Appeal referred to Article 20 of the Second Schedule to the Broadcasting Act (Act XII of 1991), it correctly pointed that that –

> One could not examine article 20 of the Second Schedule to Act XII of 1991 in isolation from the rest of the provisions of the same law, but this (article) had to be considered in the context of all of the law *toute ensemble*. This article had to be considered within the remit of article 11 (1) (c) to which the Second Schedule under the heading 'National Broadcasting Plan' is attached. Article 11 provides

[51] BAct, 1991 (Cap. 350 of the Laws of Malta) Second Schedule, Article 20
[52] Debates of HOR, Sitting 336, 6 April 2011.

> that when issuing broadcasting licences, the Authority should be inspired and guided by the considerations indicated in the various paragraphs that follow, amongst which paragraph (c) (of sub-article (1)) thereof.

In fact, article 11 (1) (c) provided the following consideration to be taken into account in the issuing of broadcasting licences -

> that private stations shall be allowed to operate in such a way so as to ensure a distribution of programming that appeals to general as well as to specific and various interests….

In the original text of the law, after the words 'various interests', there were also added the words 'and in line with a national broadcasting plan for the allocation of various frequencies.'

Moreover, in the original law, it was further provided -

> …The Second Schedule to this Act shall be such National Broadcasting Plan and shall be drawn up, and from time to time reviewed, by the Minister (responsible for Culture) in conjunction with the Minister responsible for Wireless Telegraphy.

When the Second Schedule to the Act was deleted by virtue of article 15 of Act VIII of 2011, Article 11 (1) (c) was amended to read as follows -

> that private broadcasting services shall be allowed to operate in such a way so as to ensure a distribution of programming that appeals to general as well as specific and various interests. The Minister shall prepare and publish Government's broadcasting policy and update it from time to time.

This means that Government had from the very enactment of the Broadcasting Act of 1991 reserved the right to review from to time the National Broadcasting Plan, now re-named National Broadcasting Policy, even if it originally formed part of the actual law, as the Second Schedule thereof.

Moreover, through article 4 of Act No. XV of 2000[53], sub-article (1A) was added to article 11 which provides -

> The Minister may in conjunction with the Minister responsible for wireless telegraphy, from time to time, amend or substitute the Second Schedule to this Act.

Although in virtue of Act No. VIII of 2011[54], the Second Schedule was deleted, the power of the Minister responsible for broadcasting together with the Minister responsible for Wireless Telegraphy to amend or substitute the said Schedule was retained. To the author's mind, what is now required is either that the legislator re-inserts the Broadcasting Plan in the main law, maintaining the right (introduced through Act No. XV of 2000)[55] to revise the said Schedule from time to time, by means of delegated legislation rather than by having to present an amending bill in Parliament, or simply provide for such Plan to be issued and regularly updated as a Legal Notice without the need for such Plan to be re-inserted in the main law. In either case, the Plan would have the full force of law, and in either case the procedure for its publication and bringing same into effect would not require resorting to Parliament.

It needs to be added that while the original Broadcasting Plan was mainly focused on providing guidelines to ensure pluralism through the judicious allocation of different frequencies, the purpose of having a Broadcasting Policy as was introduced in 2004 was to cover the broader broadcasting picture dealing with such issues as the remit of different broadcasting services and how public service obligations will be fulfilled.

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[53] Broadcasting (Amendment) Act 2000 (Act XV of 2000)
[54] Broadcasting (Amendment) Act 2011 (Act VIII of 2011)
[55] n53

In fact, between 2004 and 2011 when the Broadcasting Plan was deleted from our law, Malta had both a Broadcasting Plan – which was the Second Schedule to the Broadcasting Act, and a Broadcasting Policy which was issued in 2004 and which is still followed today.[56]

While it can be said that, as a result of the foregoing, at this stage there is no Broadcasting *Plan* that has the force of law, equally it follows that the Broadcasting *Policy* now has the force of law in view of the reference thereto in article 11 (1) (c) of the Broadcasting Act, as amended by Act VIII of 2011.

Suffice it to point out, that specifically in this regard, the Broadcasting Policy in the section headed 'The Obligations of PBS' points out –

> The legal obligations of PBS are enshrined in the Constitution and in Broadcasting Act (Chapter 350).
>
> *(Document quotes article 119 of the Constitution)*
>
> It is not the purpose of this document to examine how these principles have been interpreted by the Courts. This document merely affirms that these principles, as interpreted by our Courts, impose an obligation on PBS that is to be implemented at all times.
>
> *(Document gives a brief synthesis of the Broadcasting Act)*
>
> As in the case of the Constitution, it is not the purpose of this document to go into the details of the various obligations that this Act imposes on broadcasters. Nevertheless, it should be noted that PBS has to abide both by its legal obligations as well as by its licensing conditions.[57]

[56] *See* Chapter Four pp 150 - 157

[57] Ministry for Information Technology and Investment, & Ministry for Tourism and Culture, Government of Malta, *National Broadcasting Policy,* (April 2004) 9

Moreover, the National Broadcasting Policy approvingly quotes the World Radio and Television Council where the said Council asserted that public broadcasting programming should provide 'unbiased, enlightening information'.[58]

By way of conclusion with regard to the obligation carried by the public broadcasting services to provide an impartial service, four observations need to be made.

Firstly, even before the Court of Appeal's judgment in *Hon. Dr Eddie Fenech Adami noe. v Dr Joe Pirotta noe et,* on 17 July 1997, our Courts had already established that the public broadcasting services carried such an obligation on an *indirect* basis, on the basis as their acting as *contractors* to the Broadcasting Authority to provide a national television and radio service.[59]

Secondly, following the enactment of Act XII of 1991, public broadcasting services at the very least still carried same obligation on an *indirect* basis, by virtue of their acting as *licensees* to Government. [60]

Thirdly, on the basis of the 1997 judgment of the Court of Appeal, Act XII of 1991 needs to be interpreted in the sense that the law has now imposed *direct* legal obligations on all broadcasters, and as the Court emphasised if these principles have become incumbent on licensees of private stations, the more so, *multo magis,* do they bind and oblige *(jorbtu u jobbligaw)* public broadcasting services. Emphasis added by the Court.

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[58] World Radio and Television Council, 'Public Broadcasting, Why? How?' Quebec: Centre d'etudes sur les medias, 2000

[59] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et.,* Civil Court, First Hall per Mr. Justice Maurice Caruana Curran, 4 August 1977

[60] Article 10 (4C) of BAct, 1991 (Cap. 350 of the Laws of Malta), as amended by article 2 of Act VIII of 2011.

It is irrelevant whether to keep affirming this principle, one needs to refer to the provisions of the National Broadcasting Policy, rather than to those of the National Broadcasting Plan that was deleted from our Broadcasting Act in 1991, in the light of the arguments made above.

Fourthly, and most importantly, over and above all other considerations, while Act VIII of 2011 provided for licensing of public broadcasting services by Government, in virtue of a new sub-article (4C) to article 10 of the Broadcasting Act, as a result of the same amendment, the law now clearly stipulates as follows -

> The provisions of article 119 of the Constitution of Malta, this Act and all subsidiary legislation made thereunder shall continue to apply to such licensee.

It is suggested that in view of the clear wording of the law (following the 2011 amendments), the *direct* obligation pertaining to public broadcasting services to provide an impartial service as well as to observe any other relevant legal obligation cannot and should not be an issue of further debate or interpretation.

5.13 Independence of direction or control of any other person or authority

In the exercise of its constitutional function to ensure due impartiality, the "Broadcasting Authority shall not be subject to direction or control of any other person or authority"[61] This issue came up for scrutiny before our Courts of Justice in a case[62] where the right of reply that had been granted to the Opposition spokesperson on Finance in response to a Ministerial broadcast by the Minister of Finance was temporarily suspended by the Chairman of the Broadcasting Authority, acting without

[61] CM, Article 118 (8).
[62] *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro noe.,* Civil Court, First Hall, per Mr. Justice George Schembri, 1 June 1976

convening the Authority's Board after that the Minister of Finance had been informed of the content of the Opposition's reply and phoned to complain about the said content arguing that parts thereof could be seditious and lead to public alarm. The Minister of Finance was informed of the content of the Opposition reply by an employee of the public broadcasting station despite a clear policy that the content of such recordings was to be considered as strictly confidential until aired on television.

On this issue, the Court had ruled that the fact that a Minister of Government had drawn the attention of the Broadcasting Authority that it was about to breach the law and that he intended to take action about the matter, did not constitute a violation of article 118 (8) (then article 121 (8)) of the Constitution since it was not tantamount to "direction or control of any other person or authority".

While it is suggested that the Court has in this case interpreted very restrictively what constitutes "direction or control of any other person or authority", the Court was possibility giving consideration to the fact that after the initiation of the relevant Court proceedings, the Broadcasting Authority had allowed the Opposition reply to be aired, and the Court held the same Authority responsible for the legal costs related to the request for the reply to be broadcast.

The author is of the opinion that irrespective of the particular circumstances of this case, the judgment clearly establishes that the Courts of Justice in Malta would be willing to examine situations where the Broadcasting Authority would have been potentially impacted in exercising its constitutional role of safeguarding impartiality by allowing itself to be subjected to the direction or control of any other person or authority, thereby prejudicing its own independence that is a prerequisite to its ability to ensure impartiality.

In *Karmenu Mifsud Bonnici et v Anthony Tabone noe et,*[63] the Court held –

> If it results that the Authority acted on directives that it received from Government, this can lead to the decision of the same Authority being annulled since it would not have been taken "by the Authority" or it would have been taken "*for the wrong reasons*" or after it would have taken into consideration circumstances that it should not have considered.

In *Dr Wenzu Mintoff et noe v Chairman ta' l-Awtorita' tax-Xandir et,*[64] the Court went further in the sense that the Court held that in fulfilling its constitutional obligation to ensure impartiality, not only is the Broadcasting Authority safeguarded from any interference by the Executive, but the Authority is also safeguarded from any interference by Parliament which cannot, even by way of legislation, give any direction to the Authority as to how to fulfil its Constitutional obligation.

The Constitutional Court distinguished between the constitutional function *(funzjoni kostituzzjonali)* of the Authority – in terms of art. 119 (1) of the Constitution, and the organisational function *(funzjoni organizattiva)* given to the Authority in terms of the Broadcasting Act, 1991. The Constitutional Court pointed out that these two functions are on a totally separate juridical level adding that while in the exercise of its constitutional functions, the Authority acts in a totally autonomous manner and in that respect enjoys utmost independence, in the exercise of its secondary functions conferred upon it in terms of the ordinary broadcasting law, it is then subject to act within the parameters of the law which not only vested the Authority with additional functions over and above those vested in it by the Constitution, but also imposed upon it duties and obligations that the Authority has to observe.

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[63] Civil Court, First Hall, per Mr. Justice Tonio Mallia, 24 September 2002, p 32

[64] Civil Court, First Hall, per Mr Justice Giannino Caruana Demajo, 16 April 1996; and Constitutional Court, per Mr Chief Justice Joseph Said Pullicino, Mr Justice Carmel A Agius and Mr Justice Joseph D Camilleri, 31 July 1996, discussed *supra* pp 192 - 194

As will be examined in Chapter Six that deals with procedural issues, the Court would look into any allegation of interference and if proven, can annul the relevant decision of the Broadcasting Authority, within the Court's remit of carrying out a judicial review of the Authority's behaviour and decision taking. The Court would, if necessary, also declare a law to be in violation of the Constitution if it results that the law is directing, or interfering with, the Authority in the exercise of its Constitutional role rather than leave the Authority act according to its own discretion.

5.14 Unintelligible reporting

The duty to ensure impartiality can, especially when it comes to the political arena, be linked with the duty to ensure that the message of the different political parties and other opinion makers is rendered in an intelligible manner. Already in the *Toni Pellegrini* case[65] the Court had ruled that if the omissions from the recording in issue were such as to prevent viewers from being able to follow and understand the message given by Toni Pellegrini, the Court would not have hesitated to order that the broadcast in question be re-transmitted in order to secure true impartiality.

Two cases that have dealt with the issue of unintelligible reporting, Dr *Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et* (1977)[66] and *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci, noe. et* (1978)[67], will be examined at length in Chapter 7 dealing with the duty of imparting information and ensuring objectivity, although that duty can also be seen within the context of ensuring impartiality.

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[65] *Supra* pp 189 - 195

[66] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et.,* Civil Court, First Hall per Mr. Justice Maurice Caruana Curran, 4 August 1977

[67] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci, noe. et,* Civil Court, First Hall, per Mr Justice Vincent Scerri, 16 January 1978

5.15 Civil Society Rights

The concept of safeguarding impartiality is not limited to ensuring that adequate space is given to different political parties to air their views.

Article 13 (4) of the Broadcasting Act refers to civil society by providing:

> It shall be the duty of the Authority ….. to produce properly balanced discussions or debates that afford access to persons from different interest-groups and with different points of view, and also to produce commentaries or other programmes about questions relating to current public policy, wherein persons taking part can put forward differing views and comments.

The issue came up before the Courts of Justice when Malta was preparing for accession to the European Union. An organisation set up under the name CNI – 'Campaign for National Independence' sought redress on the basis that it was set up to offer the people of Malta 'information about the policies, institutions, *acquis Communautaire,* and treaties of the European Union, as well as to promote a policy in favour of safeguarding the independence, the freedom and sovereignty of Malta, as well as national democracy'. The organisation, in a lawsuit filed against the Broadcasting Authority, the public service broadcaster as well as the Attorney General in representation of Government, claimed that it had every right to air its views about the European Union, in contradistinction to those being aired by the Malta – EU Information Centre (MIC) which the organisation described as a centre issuing 'propaganda in favour of the European Union'.

In response, one of the pleas raised by the Broadcasting Authority, was that this entity lacked juridical interest in terms of law. In its judgment[68] the Civil Court pointed out that this organisation had as one of its fundamental aims that of communicating

[68] *Karmenu Mifsud Bonnici et pro et noe v Anthony Tabone noe et,* Civil Court, First Hall, per Mr. Justice Joseph R. Micallef, 12 July 2002, p 21

information about what it believed in to the public, and therefore had the required juridical interest in seeking the remedy that it was requesting through the lawsuit (provision of air time to air its views on the matter). The Court added that 'access to broadcasting was one of the means that the entity considered as required for it to fulfil its aims.' The Court added that the broadcasting law itself did not exclude from its remit a "person" such as the organisation that filed the law suit in question.

This is in line with the 'fairness doctrine' that 'it is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas which is crucial here'.[69] The doctrine was not explicitly invoked by counsel or by the Court, but the reference to different entities, even if not political parties, having a right of access to the broadcast media is to the author's mind a positive development in the interpretation and application of our broadcasting law.

The duty on broadcasters in general but more so on a public service broadcaster to ensure impartiality is meant to safeguard that right by creating a marketplace of different ideas and opinions to help listeners and viewers form their own objective opinions on any issue of interest to them. It is suggested that this is moreover consonant with the fundamental concept that "freedom of expression and pluralism shall be the basic principles that regulate the provision of broadcasting services in Malta."[70]

5.16 Spots in anticipation of EU referendum

The spots that were being aired by MIC in anticipation of the referendum wherein the people of Malta were called upon to vote as to whether or not Malta

[69] *Red Lion Broadcasting Corporation v Federal Communications Commission,* United States Supreme Court, 395 U.S. 377, 378

[70] Art. 11 (1) (a), BAct (Cap. 350 of the Laws of Malta)

should become a Member of the European Union had also led to a lawsuit being filed by the Malta Labour Party that from the Opposition benches was vehemently campaigning against EU membership.

With regard to the Malta Labour Party, the Broadcasting Authority had decided that the Party had a right to transmit a number of spots in reply to those produced by MIC, but had limited that right to one-third of the time that was being availed of by MIC. Moreover, the Public Broadcasting Services had not complied with the decision given by the Broadcasting Authority and had instituted judicial review proceedings against the Broadcasting Authority to have that decision annulled.

This is what led to the Malta Labour Party filing a lawsuit against the Broadcasting Authority as well as, jointly, against the Public Broadcasting Services. The Malta Labour Party was requesting that in order to have effective balance, it was entitled to be allocated broadcasting spots that in total would equal the time made available to MIC, and that, if necessary, further spots by MIC should be withheld.

The First Hall of the Civil Court had found for the Malta Labour Party with regard to the Public Broadcasting Services but not with regard to the Broadcasting Authority. The Court[71] reached that conclusion on the basis that Authority had fulfilled its Constitutional and legal obligations since it had used its discretion correctly in giving what it considered as an adequate remedy in favour of the Labour Party to ensure impartiality with reference to an issue of political controversy and certainly one of current public policy.

On the other hand, the Public Broadcasting Services had failed in its obligations by not adhering to the directives given to it by the Authority and the mere fact that

[71] *Dr Alfred Sant noe et noe v Chairman, Awtorita' tax-Xandir (Broadcasting Authority) and Public Broadcasting Services Limited,* Civil Court, First Hall, per Mr. Justice Joseph R. Micallef, 5 September 2002

that it was seeking to annual the decision of the Authority through judicial review proceedings in Court was not a valid pretext for not following, in the meantime, the Authority's directives.

The judgment was then confirmed by the Court of Appeal.[72]

The lawsuit filed by the Malta Labour Party against the Malta Broadcasting Authority (MBA) and Public Broadcasting Services (PBS) was following the same *iter* as that filed for judicial review by PBS against MBA. The Courts were dealing with the two cases simultaneously since they referred to the same subject matter. Moreover, the Malta Labour Party was admitted to join *in statu et terminis* the defendant, MBA, in the case filed against the Authority by PBS, in view of its clear interest in the outcome of that case.

A number of interesting legal principles have been established in these cases, which together with two more cases, one instituted by another civil society organisation *Moviment IVA* (the YES Movement) and the other by *Partit Nazzjonalista* (the Nationalist Party – both campaigning for Malta's membership of the European Union), which will be examined *infra,* can be regarded as the cases which all relate to the campaign for Malta's adhesion to the European Union.

5.17 Seven Principles on Impartiality following Introduction of Pluralism

In the case instituted by Public Broadcasting Services against the Broadcasting Authority, the Court of Appeal pronounced itself on what it considered as seven significant principles which in the author's opinion summarise very well the state of

[72] *Dr Alfred Sant noe et noe v Chairman, Awtorita' tax-Xandir (Broadcasting Authority) and Public Broadcasting Services Limited,* Court of Appeal, per Mr. Chief Justice Vincent de Gaetano, Mr Justice Joseph D. Camilleri, and Mr Justice Joseph A. Filletti, 15 January 2003

play with regard to the concept of impartiality following the introduction of pluralism of broadcasting in Malta.

The Court of Appeal[73] enunciated the seven principles as follows -

1. Within the context of liberalised and pluralistic broadcasting, as is now the situation in Malta, it is still necessary to ensure due impartiality in a matter of political or industrial controversy or in a matter of current public policy;

2. The duty to ensure such impartiality is incumbent on whoever provides a sound or television broadcasting service, but is especially incumbent on public broadcasting services, including therefore PBS, also bearing in mind the fact that it is partly financed out of public funds;

3. Wherever such due impartiality is not observed, there is the duty on the Broadcasting Authority to intervene and to give all such directives as would be necessary in order to reinstate that impartiality;

4. In order to fulfil this duty, the said Authority, has extensive powers and a very wide discretion;

5. These powers and this discretion, on the part of the Broadcasting Authority, must be exercised within the limits of general principles which are at the foundation of the rule of law in a democratic society as is nowadays understood in Europe; in other words, these powers and this discretion have to be exercised (1) according to law; (2) in a reasonable manner, and (3) in a way through which fundamental human rights are safeguarded;

6. The Court is the ultimate arbiter (to decide) whether the Broadcasting Authority would have abided by these general principles, or, wherever it is alleged that the Authority would have failed to act when it was supposed to act, whether or not it would have failed to act;

7. When the Broadcasting Authority gives an order or a directive that would *prima facie* be regular (correct) in its form and content, that order or directive, must, as a rule, be immediately obeyed, without prejudice to the right of that person providing sound or television broadcasting services and to whom that order or directive is addressed, to contest the legality of the same order

[73] *Chairman tal-kumpanija Public Broadcasting Services Limited et noe v Awtorita' taxXandir (Broadcasting Authority) et,* Court of Appeal, per Mr Chief Justice Vincent de Gaeatno, Mr. Justice Joseph D. Camilleri, and Mr. Justice Joseph A. Filletti, 15 January 2003, 12 - 13

or directive, and, if that would be the case, to recover damages after that it would have abided by the same rule or directive.

On the basis of the foregoing principles and after establishing that the decision of the Broadcasting Authority was a valid one in terms of law, the Court of Appeal confirmed the judgment given by the First Hall of the Civil Court[74] to the effect that the public broadcasting services were bound to observe the directive given to them by the Broadcasting Authority to allocate spots in favour of the Labour Party to balance those that were being aired by MIC with regard to Malta's forthcoming accession to the European Union.

This decision was referred to, on the same date, in another judgment given by the same Court of Appeal in the case instituted by Dr Alfred Sant as Leader of the Opposition and of the Malta Labour Party, since the two cases in question were considered concurrently. The Court of Appeal disposed of the case instituted by Dr Sant by reaffirming that the Public Broadcasting Services were bound to follow the order given to them by the Broadcasting Authority and allocate airtime to the Labour Party to present its spots with its own perspective on Malta's accession to the European Union.[75]

The allocation of political spots to the Labour Party to present its case about what it considered to be the alternative to Malta's membership of the European Union then led to a lawsuit by the Nationalist Party on the basis that a refusal by the Broadcasting Authority to allocate similar spots in its favour was itself creating a situation of lack of impartiality.

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[74] *Chairman tal-kumpanija Public Broadcasting Services Limited et noe v Awtorita' tax-Xandir (Broadcasting Authority) et,* Civil Court, First Hall, per Mr. Justice Joseph R Micallef, 5 September 2002

[75] *Dr Alfred Sant noe et noe v Chairman, Awtorita' tax-Xandir (Broadcasting Authority) and Public Broadcasting Services Limited* (n72)

The Broadcasting Authority on its part was arguing that its decision to allow the Labour Party to produce spots about the alternative to EU membership was meant to balance the information spots produced by MIC, which decision was considered as reasonable and within the discretionary limits pertaining to it according to law as affirmed by the Court of Appeal.

On its part, the Nationalist Party referred to art. 119 (1) of the Constitution which not only provides that it shall be the function of the Broadcasting Authority to ensure, as far as possible, due impartiality "in respect of matters of political or industrial controversy or relating to current public policy" but also "that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties."

When the First Hall of the Civil Court upheld the claim of the Nationalist Party[76], the Broadcasting Authority, in its appeal, argued that it was now faced with two conflicting judgments, that delivered on the 5th September 2002 in the case *Chairman of the company Public Broadcasting Services Limited et noe v Broadcasting Authority et* (subsequently confirmed by the Court of Appeal)[77] and the judgment in favour of the Nationalist Party, from which it lodged its appeal.[78]

The Court of Appeal however held that the former case was decided solely within the context of judicial review proceedings that were instituted by the Public Broadcasting Services against the Broadcasting Authority, and the fact that the Court had decided even at the appeal stage that the Authority had acted within its

[76] *Partit Nazzjonalista v Awtorita' tax-Xandir (Nationalist Party v Broadcasting Authority),* Civil Court, First Hall, per Mr Justice Geoffrey Valenzia, 15 November 2002

[77] *Chairman tal-kumpanija Public Broadcasting Services Limited et noe v Awtorita' tax-Xandir (Broadcasting Authority) et,* Court of Appeal, per Mr Chief Justice Vincent de Gaeatano, Mr. Justice Joseph D. Camilleri, and Mr. Justice Joseph A. Filletti, 15 January 2003, 12 - 13

[78] *Partit Nazzjonalista v Awtorita' tax-Xandir (Nationalist Party v Broadcasting Authority),* Civil Court, First Hall, per Mr Justice Geoffrey Valenzia, 15 November 2002

discretionary limits, in no way conflicted with the later judgment in favour of the Nationalist Party through which that Party was then allocated spots to counter those produced by the Labour Party, in particular in view of the legal requirement that broadcasting facilities and time should be fairly apportioned between persons belonging to different political parties.

In its judgment, the Court of Appeal[79] emphasised that the Constitutional obligation regarding fair apportionment of broadcasting facilities and time between persons belonging to different political parties was a function imposed on the Authority over and above its function to ensure impartiality.

The Court moreover quoted article 13 (4) of the Broadcasting Act which, without prejudice and in addition to the functions bestowed upon the Broadcasting Authority in terms of article 119 of the Constitution, provides as follows -

> It shall also be the duty of the Authority to organise from time to time schemes of political broadcasts (including political spots) which fairly apportion facilities and time between the different political parties represented in Parliament[80]; to produce properly balanced discussions or debates that afford access to persons from different interest-groups and with different points of view, and also to produce commentaries or other programmes about questions relating to current public policy, wherein persons taking part can put forward differing views and comments.' (Emphasis as added by the Court)

The Court of Appeal held that it was no coincidence that in article 13 (4) of the Broadcasting Act, the legislator referred specifically to 'political spots' since it is

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[79] *Partit Nazzjonalista v Awtorita' tax-Xandir et (Nationalist Party v Broadcasting Authority et),* Court of Appeal, per Mr Chief Justice Vincent de Gaeatano, Mr. Justice Joseph D. Camilleri, and Mr. Justice Joseph A. Filletti, 31 July 2003, 12

[80] With regard to whether such schemes should or not be limited to political parties represented in Parliament, rather than extended to all political parties, in line with article 119 (1) CM, reference is made to the judgments of the First Hall of the Civil Court and of the Constitutional Court in the case *'Dr Wenzu Mintoff et noe. V Chairman ta' l-Awtorita' tax-Xandir et'* discussed *supra* (pp 202 - 204)

nowadays recognised that such spots were very effective, possibly more effective than political debates or interviews or speeches, in order to convey political messages.

The Court added that when the Broadcasting Authority had granted the Labour Party the remedy to transmit political spots in order to preserve impartiality as regards current public policy, it was 'giving the Malta Labour Party the means in order that, through the spots, it would indirectly influence the electorate in its political choice in the forthcoming referendum' regarding whether or not Malta was to join the European Union.

The Court, even more explicitly, pronounced itself as follows -

The Malta Labour Party was being given the means to influence the electorate in its choice in the forthcoming referendum, while the other political parties were not being given the same facility, that is through spots.

……

Through its decision to preserve balance in terms of one aspect of article 119 (1) of the Constitution, the Authority created a flagrant imbalance in terms of another aspect (of the same article) since while MIC was providing information about full membership of the EU in order that the electorate could eventually form its opinion about whether or not Malta should join as a full member, the Malta Labour Party, through its spots about the alternative to such full membership, was in effect (although in an indirect manner) telling the same electorate to vote such full membership in the referendum.[81]

5.18 Case by YES Movement

It is interesting to note that while the First Hall of the Civil Court upheld the claim of the Nationalist Party[82] on 15 November 2002, and that judgment was

[81] *Partit Nazzjonalista v Awtorita' tax-Xandir et (Nationalist Party v Broadcasting Authority et),* (n79), 13 - 15
[82] *Partit Nazzjonalista v Awtorita' tax-Xandir (Nationalist Party v Broadcasting Authority)* n76

confirmed by the Court of Appeal[83] the claim of *Moviment IVA Malta fl-Ewropa* (the YES Movement for Malta in the European Union) to also produce spots to counterbalance those presented by the Malta Labour Party was not upheld by the First Hall of the Civil Court in its judgment given just over a fortnight later.[84]

In this case, the Court was of the opinion that the Broadcasting Authority was exercising its duty to ensure balance as obliged to do by the Constitution and the broadcasting law, and for that reason the Court should not assume upon itself the rights and obligations entrusted by law to the Broadcasting Authority to conduct itself the exercise through which it sees to it how best to ensure impartiality. The Court reached this conclusion even after taking into account the fact that the Broadcasting Authority was organising various discussion programmes in which the YES Movement was being asked to participate.

The YES Movement did not appeal from this judgment. On the other hand, the case that had been instituted by CNI was considered deserted and the Court did not have to give judgment on the merits of that case although it had decided on the various procedural issues therein raised[85]. In the author's opinion, the judgment in the CNI case would have probably been on the same lines as that given in respect of the YES Movement.

The difference in outcome with regard to the YES Movement, in comparison to the case instituted by the Nationalist Party, results from the fact that, as observed by the Court in its judgment, when it comes to the political parties, article 119 of the Constitution complements the concept of 'due impartiality' with that of 'broadcasting

[83] *Partit Nazzjonalista v Awtorita' tax-Xandir et (Nationalist Party v Broadcasting Authority et)* n79
[84] *Moviment IVA Malta fl-Ewropa v Awtorita' tax-Xandir,* Civil Court, First Hall, per Mr Justice Giannnino Caruana Demajo, 3 December 2002
[85] Chapter Six pp 263 - 265

facilities and time (being) fairly apportioned between persons belonging to different political parties.' In this respect the Court observed -

> It is only the political parties that have a right to be given a due share in the apportionment of broadcasting facilities and time, in terms of the second part of art. 119 (1) of the Constitution.

The same wording, with the addition of the phrase 'in Parliament' is then found in Article 13 (4) of the Broadcasting Act.

In this respect it could be argued that while the concept of impartiality in favour of civil society is safeguarded in our legislation and the right of 'access to persons from different interest-groups and with different points of view' is incorporated in article 13 (4) of the Broadcasting Act, when it comes to fair apportionment of broadcasting facilities and time, the reference is limited to political parties.

Be that as it may, with regard to the discussion prevailing in Malta in anticipation of the referendum about Malta's accession to the European Union, in the author's opinion, the Broadcasting Authority and where required the Courts did manage to ensure that the public would have access to all possible different points of view, in order to be then able to reach a decision when voting at the referendum.

Moreover, it cannot be assumed that civil society cannot exercise the right of access to the broadcasting media, if necessary, even through political spots, simply because such spots could only form part of a scheme of political broadcasts organised by the Broadcasting Authority in terms of article 13 (4) of the Broadcasting Act, as otherwise such spots would be illegal in view of paragraph 1 of the Third Schedule of the same Act.

5.19 General Workers' Union case

In the *General Workers Union* case[86], the Constitutional Court pointed out –

> The *a priori* blanket prohibition that one finds in paragraph 1 (f)[87] of the Third Schedule (of the Broadcasting Act) for one to transmit an advert of a political nature unless with the consent of the Authority ("except as authorized under a scheme of political broadcasts approved by the Authority ….."**)** clashes with the element of proportionality that has to exist between the legitimate aim pursued and the means adopted for the purpose.

The 'legitimate aim pursued' was precisely that of ensuring impartiality, as would be allowed in terms of article 41 (2) of the Constitution or article 10 (2) of the European Convention. The Constitutional Court was, however, examining if the application of the prohibition to the particular circumstances of the case was in violation of the trade union's fundamental human rights, in particular of its freedom of expression as protected by article 41 of the Constitution and article 10 of the European Convention on Human Rights.

The General Workers' Union had filed its lawsuit against the Broadcasting Authority after that the latter had withheld an advert by the Union on the basis that its content was of a political nature. GWU pointed out that this prohibition was not reasonably justifiable or necessary in a democratic society. There was no doubt about the political nature of the advert[88], and in its defence the Broadcasting Authority

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[86] *Tony Zarb et v l-Awtorita' tax-Xandir,* Constitutional Court, per Mr Chief Justice Vincent De Gaetano, Mr Justice Joseph D. Camilleri, and Mr Justice Joseph A. Filletti, 3 November 2006

[87] The reference to sub-paragraph (f) of paragraph 1 of the Third Schedule reflects the wording of that Schedule at the date of judgment. The said Schedule has since then been substituted by L.N. 321 of 2010 and further amended in 2019. Still, the wording with regard to the prohibition against political advertising, unless 'authorised under a scheme of political broadcasts' remains identical to that quoted in the judgment. Paragraph 1 of the Third Schedule – as at present – is identical to Paragraph 1 (f) of the Third Schedule as quoted by the Court.

[88] *Tony Zarb et v l-Awtorita' tax-Xandir,* Civil Court, First Hall (Constitutional Competence), per Mr. Justice Gino Camilleri, 3 June 2005. The First Hall had pointed out that there was no doubt that the text of the advert in question was of a political nature, but still found for GWU on the basis of breach of human rights.

argued that what the Union was requesting was in violation of the Constitutional provision on ensuring impartiality on issues of political or industrial controversy.

The Constitutional Court held that in order to preserve impartiality or to ensure balance in broadcasts of a political nature, there was no need to subject every political advert to the Broadcasting Authority for its approval in advance. The Court added that it would have been a different situation if it had resulted that whoever wanted to transmit this advert, in this case GWU, was conducting a campaign of such entity that whoever had the right to make his voice heard with a different political opinion would find it difficult to cope with that campaign because of financial or other reasons.

The Court then quoted extensively from the judgment of the European Court of Human Rights in the *VGT Verein Gegen Tierfabriken* case[89], making its own in particular the following extracts -

> The Court will consequently examine carefully whether the measure in issue was proportionate to the aim pursued. In that regard, it must balance the applicant association's freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities for the prohibition of political advertising on the other …
>
> ….
>
> In the Court's opinion, however, the domestic authorities have not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition of political advertising also served to

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The advert was pointing out to the injustice where 'there are those who are comfortable and those who have to carry all the burdens.' For a fuller examination of this case, *cfr.* Kevin Aquilina, 'The freedom to impart political information vs. the absolute broadcasting ban on political advertising – a human rights perspective' (2011) Int J. Private Law, Vol. 4, No. 1, p 91 et seq

[89] *VgT Verein Gegen Tierfabriekn v Switzerland,* European Court of Human Rights (ECtHR), Second Section, 28 June 2001. Following the judgment of the Constitutional Court of Malta, the VgT case was referred for a second time to ECtHR, following the continued prohibition of the advert in question, and the same principles were affirmed even more strongly in *VgT Verein Gegen Tierfabriekn v Switzerland (no.2),* ECtHR, Grand Chamber, 30 June 2009. In the second case, the ECtHR held that the State had 'a positive obligation to take the necessary measures' to allow the advert in question to be broadcast following the 2001 judgment.

justify the interference in the particular circumstances of the applicant association's case.'

Drawing parallels with the VGT case where the ECHR upheld rights of a non-governmental organisation to communicate its 'political message' about pig rearing methods in Switzerland, in order to have that voice heard in juxtaposition to that of the powerful meat industry, the Constitutional Court in Malta pointed out that no 'pressing social need' was proved to justify the prohibition *ex ante* of the advert by GWU. On that basis, the Court held that although it was clear that the prohibition was done in terms of a disposition of the ordinary law (and the constitutional legality of that law was not put in any doubt), none the less the application of that law, that is the prohibition in the particular case that the Court was deciding upon was not reasonably justifiable in a democratic society, that is: was not necessary in view of the importance that freedom of expression, especially in a matter of political controversy, should be given.

This is the first judgment with regard to broadcasting issues where the Court in Malta referred at length to case law of the European Court of Human Rights, and it is suggested that this was done in view of the fact that the case was based on the right to 'freedom of expression' rather than on the concept of 'due impartiality' although as discussed *infra*[90] the concept of 'freedom of expression' as in the right of the public to have access to all information can be regarded as the *raison d'etre* of the concept of impartiality. In the author's opinion, this judgment needs to be borne in mind in a discussion with regard to the rights of civil society to access broadcast media. That right cannot be considered as limited to participating in 'properly balanced discussions or debates' as envisaged by article 13 (4) of the Broadcasting Act. Following this judgment, that right can be extended to produce and transmit, within reasonable

[90] p 312

limits, political adverts, especially if it is proven that civil society would need, from time to time, and depending on the particular circumstances of each case, to use that method of communication to convey its message as part of its freedom of expression.

Making some reflections on this judgment and relevant case law of the European Court on Human Rights[91], Prof. Kevin Aquilina points out –

> There should be no *ex ante* censorship of political advertising and minor political parties and frail lobby groups should also be guaranteed access to the broadcasting media by being allowed to air political adverts. In this way the right to impart political information through political advertising on the broadcasting media would be safeguarded in the interests of a pluralist and tolerant democratic society based on the respect for the rule of law.[92]

5.20 Conclusion

As correctly affirmed in the PBS case, when the case was decided by the First Hall of the Civil Court,[93] the obligation to ensure impartiality is now deemed as one that extends also directly to broadcasters, and in particular to the public broadcasting services provider. The Court observed -

> this duty is not (only) a legal obligation towards the (Broadcasting) Authority but one that subsists towards society in general, towards which broadcasting services are intended.

It was in the same judgment that we probably have, to date, one of the best explanations of the *raison d'etre* behind the concept of impartiality, when Mr Justice Joseph R Micallef pronounced –

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[91] Apart from referring to *VgT case* (n69), reference was made to *Murphy v Ireland,* ECtHR, Third Section, 10 July 2003, and *TV Vest & Rogaland Pensjonistparti v Norway,* ECtHR, First Section, 11 December 2008.
[92] Kevin Aquilina, *The freedom to impart political information vs. the absolute broadcasting ban on political advertising – a human rights perspective,* International Journal Private Law, Vol. 4, No. 1, 2011, p 98
[93] *Chairman tal-kumpanija Public Broadcasting Services Limited et noe v Awtorita' tax-Xandir (Broadcasting Authority) et,* Civil Court, First Hall, per Mr. Justice Joseph R Micallef, 5 September 2002, 26, 29

> In the broadcasting field, especially with regard to the concept of freedom of expression which is now the soul within every system of pluralistic broadcasting, we need to be guided by the provisions of Article 10 of the European Convention on Human Rights, read together with Article 41 of the Constitution…
>
> *(After referring to Article 10 (2) of the ECHR)* In this regard, the Court understands that the protection of impartiality and balance in broadcasting has two beneficiaries of fundamental rights: firstly, it is society in general that has the right to expect to receive objective broadcasting, and secondly, it's those who as part of their very freedom of expression have the right to be given the opportunity to express themselves and make their views heard just like anyone else.[94]

The author could not possibly agree more, and would emphasise that as pointed out by the Court, freedom of information is not only about the right to hold and impart one's opinions without interference, as it is also about the right to receive ideas and information without interference. The duty to ensure impartiality is ultimately to protect these two sides of the same coin, to safeguard our freedom of expression.

[94] n56, 29 - 30

6.1 Introduction

In Chapter Five we looked into various judgments of the Courts of Justice that have examined issues related to the duty imposed on the Broadcasting Authority to ensure impartiality. The duty to ensure impartiality is not only imposed on the Broadcasting Authority as the constitutional watchdog set up with this primary function in mind, and as a result *indirectly* on the Authority's contractors and licensees, as well as, and in particular, on the public broadcasting services.

Through the judgments examined in Chapter Five as well as through developments in our broadcasting law, we can now refer to the duty to ensure impartiality as one that *directly* impinges on all broadcasters and even more so on the public broadcasting services provider, since with regard to the *other* broadcasters it is accepted that the Authority is "able to consider the general output of programmes provided by the various broadcasting licensees and contractors, together as a whole"[1]

The duty to ensure impartiality is ultimately intended to safeguard listeners and viewers of broadcasting stations in order for them to have access to a wide array of different ideas and opinions that places them in a better position to reach their own conclusions, as expected in a democratic country. The significance of that duty would be meaningless if that duty could not be enforced not only by a constitutional body such as the Broadcasting Authority, but ultimately and wherever necessary also by independent Courts of Justice.

Jurisdictional issues now need to be examined. The first issue that needs to be addressed is how the Courts of Justice have dealt with the basic question of whether or

[1] Art. 13 (2) Proviso, BAct, Cap. 350 of the Laws of Malta

not they have jurisdiction to supervise the supervisor, the broadcasting constitutional watchdog. The Courts have also had to examine whether there is a legal basis for them to be able to conduct a process of judicial review as well as whether that power of review can be exercised directly on broadcasting providers. Other matters of a procedural nature will be examined. These include whether such cases relate to issues of an ordinary law character or whether there is also a Constitutional dimension that needs to be considered, and in view of that which Courts would be able to exercise jurisdiction; as well as whether an aggrieved party can present a case seeking remedies that are in part of a constitutional law nature and in part of an ordinary law nature.

In line with the approach adopted in Chapter Five, apart from following a thematic approach, in general cases will be examined in a chronological order in order to be able to assess better how the interpretation of the Courts even with regard to jurisdictional issues has evolved over the past fifty-six years.

6.2 Jurisdiction of Courts over Broadcasting Authority

The question of jurisdiction was raised in the very first case our Courts of Justice were called upon to deal with the duty to ensure impartiality. This was the case raised by Toni Pellegrini, as Head of the Christian Workers' Party[2], over the fact that the first thirteen or fourteen words of his political message on television were not audible.[3]

The thorny issue facing the Court was the plea that the decisions of the Broadcasting Authority were not subject to scrutiny by the Courts in view of its nature and statutory powers. The Broadcasting Authority was in effect making the plea that the

[2] For details of merits of case, *cf.* Chapter 5 pp 190 - 195

[3] *Toni Pellegri v Edward S. Arrigo noe.,* Civil Court, First Hall, per Mr. Justice Maurice Caruana Curran, 10 March 1964, Vol. 48, pt II, p 869 et seq, Kollezzjoni ta' Sentenzi tal-Qrati

Courts had no jurisdiction over its decisions. The Court pointed out that the *'sui generis'* nature of the transmission of a political speech through television made the case an even more difficult one to consider. The Court observed that moreover it had to determine for the first time whether these 'new forms of social activity' were justiciable in the sense that they could be taken account of by the Courts and rendered subject to judicial scrutiny.

The Court held that ultimately in order to give its judgment with regard to this plea, it had to determine whether plaintiff had the required juridical interest, which in turn depended on whether plaintiff had contractual obligations with the Broadcasting Authority in his favour, or failing that, an obligation arising in his favour directly in terms of law, or as a result of delict or quasi-delict. The Court affirmed that it would not be enough for plaintiff to ask it to intervene if he only had a political interest in the outcome of the case but was bereft of any juridical interest.

The Authority on its part was pleading that it had decided that the broadcast in question would not be re-transmitted, that that was its final decision which was not subject to review by the Courts since it was taken in terms of its exclusive discretion as conferred upon it in terms of law.

The Court examined the juridical nature of the Broadcasting Authority observing that the Authority was an *ad hoc* regulatory 'social body' set up in terms of a specific statute to manage and control broadcasting. The Court pointed out that it followed that one would need to examine the precise wording used in the statute to determine what was the precise nature of the Authority set up according to law and the presumed purpose of the law setting up the same Authority.

The Court observed that while the Authority enjoyed exclusivity for the provision of broadcasting services since 'such function shall be vested solely in such Authority'[4], that function was to be carried out 'in accordance with the provisions of (this) Ordinance' and there was no provision in the law that excluded the Authority from the jurisdiction of the Courts. That meant that the Courts had every right to determine whether or not the Authority in any particular case acted *ultra vires,* quoting with approval case law of the UK Courts with regard to this doctrine.[5]

The Court pointed out that there was no doubt that the Authority had been set up as a '*"watchdog" tal-benesseri pubbliku fir-ram speċjalizzat tagħha*' (a watchdog of the public wellbeing with regard to its specialised remit) and that in terms of article 7 (2) of the Ordinance the Authority had, alone, the duty to satisfy itself that the various principles enunciated in the same article, are observed *'fl-interess tal-verita', tal-ġustizzja u tal-imparzjalita' politika'* (in the interest of the truth, of justice and of political impartiality). The Court then had to determine whether the Authority was subject to the law and to its jurisdiction whenever it entered into a contract with regard to the allocation of airtime.

6.2.1 Establishing jurisdiction on the basis of contractual obligation

On the basis of the facts of this particular case, the Court determined that when the Broadcasting Authority drew up a scheme of political broadcasts, it had as a result entered into a contractual obligation with the persons entitled to make such broadcasts. It could not be argued that the Authority could not limit its discretionary powers in virtue of a contract since the primary purpose of its discretionary powers was precisely that of

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[4] Art. 3 (1) Broadcasting Ordinance (BO) – Ordinance no. XX of 1961

[5] In particular, the Court quoted the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 K.B. 224, where Lord Greene established that local authorities which are also corporations are subject to judicial review with regard to any action which is 'ultra vires', and where an action is 'intra vires', as where it can make a decision 'in its opinion', the Court can still apply the test of reasonableness.

ensuring political impartiality and the 'contract' in question having as its object the allocation of air time to different political parties did not limit those discretionary powers.

The Court concluded that an actual contract had come into being since there were all the elements according to Civil Law that provide for bringing about an enforceable obligation.[6]

Moreover, the Court observed in a light hearted tone that if the Authority could enter into a contract of allocation, against payment, of air time for advertising through which the businessman who sells car batteries or tomato sauce can have recourse to the Courts if any issue arises with regard to how that airtime was provided, why should not politicians who are exercising a profession supposedly to secure the best results at least in the temporal sense for the community equally have access to the Courts. It needs to be pointed out that there would be no obligation of impartiality as regards vendors of car batteries or tomato sauce since that kind of advertising would only be driven by strict commercial considerations!

Since the Broadcasting Authority had created a scheme and not a proposal of political broadcasts, that scheme had obligatory legal effects. On this basis the Court decided that a contract had come into effect on February 27, 1964 – the date of the broadcast – between the plaintiff and the Authority, and on that basis the Court dismissed the plea that it could not review the decision of the Authority. The Court added that even if the scheme had to be merely considered as a simple offer or solicitation, the moment that plaintiff had submitted his script and the Authority accepted it, a contract had come into being. Through this contract the Authority was making airtime available to the plaintiff, not in consideration of any payment, but in consideration of the fulfilment of its

[6] The Court referred to art. 1001 of the Civil Code (since then re-numbered as art. 906 – Cap. 16 of the Laws of Malta' that defines a contract "as an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved." The Court was moreover satisfied that all the conditions that are essential to the validity of contracts, as are now referred to in art. 966 of the Civil Code, subsisted.

own public duty to offer politicians a means to impart their views through the broadcast media. The other party accepted by submitting his script, in other words there was a 'meeting of the minds' and consensus was reached.

Applying further concepts from the law of contract, the Court held that the defendant had acted with the diligence of a 'bonus paterfamilias' as well as with utmost good faith as expected in the fulfilment of one's contractual obligations. Contracts had to be executed in good faith and in an equitable manner according to the Civil Code. In this respect, the Court quoted art. 1036 of the Civil Code (since then re-numbered as article 993) which provides –

> Contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature.

6.2.2 Right of review on basis of obligations *ex lege* or *ex contractu?*

While the author appreciates to what lengths has the Court gone in this case to guarantee fairness and one needs to bear in mind that this was the first case of its kind where the Courts in Malta were being called upon to guarantee impartiality in public broadcasting, the author feels that it was not necessary to conclude that there was a power of judicial review of the Authority's decision on the basis of a contractual obligation that was created between the Authority and the plaintiff through the creation of the scheme of political broadcasts.

The Court could have established its right of review on the basis of obligations arising in favour of the plaintiff *ex lege* rather than *ex contractu* - or at least to state clearly that it was exercising its right of review on the basis of both considerations.

While the Court concluded that the allocation of air time in favour of plaintiff constituted a contract and conducted its power of judicial review on that basis, just as a

Court of Justice would review whether any contract had been carried out in good faith between the parties concerned, wherever one side or other claims default from the other side, it needs to be observed that the Court at no stage ruled out its power of review had it not established that there was a contractual obligation following allocation of air time in favour of plaintiff.

The Court, before establishing that there was a contract and decided the case on that basis, pointed out that the Authority had to carry out its functions subject to the provisions of the Broadcasting Ordinance, in order for the Authority to establish that the Authority acted *intra vires.* None the less the judicial review carried out in this case was done exclusively on the basis of the law of contract.

In the author's opinion, the obligation of the Authority to ensure impartiality would have subsisted even if there was no contractual obligation entered into with the plaintiff, since it is a legal obligation that an interested party would have every right to enforce by – where appropriate – calling upon the Courts to secure its observance through the right and duty of judicial review. This issue was not raised at the appeal stage of proceedings.

In following the *ex contractu* approach, the Court appears to have been influenced by an earlier judgment of the Court of Appeal with regard to another Governmental Authority. The Court made reference to what had been established in the case *'Giovanna Aquilina v Joseph Ellul Mercer noe'*[7] affirming that the judgment of the Court of Appeal in that case provided a precedent as well as authority in favour of enforcing contractual obligations entered into by an Authority despite its otherwise discretionary powers. The Court of Appeal, in that case, had held that where the Governmental Housing Authority, which enjoys very vast discretionary powers, had bound itself in writing to withdraw a

[7] Court of Appeal, 28 March 1958

requisition order over a shop, it had 'incapacitated itself from not taking account of that letter in view of its discretionary powers.'

As will be examined through subsequent cases that were decided upon by the Courts of Justice following the Pellegrini case, the Courts did move in the *ex lege* direction. It should be observed that subsequent cases were brought about not only in terms of broadcasting legislation but also in terms of the Constitution of Malta.

6.2.3 The Toni Pellegrini case at Court of Appeal stage

Before proceeding to deal with subsequent cases, it needs to be observed that the Pellegrini case was referred to the Court of Appeal. An appeal was lodged by the Broadcasting Authority on the basis that its decision was not subject to judicial review and that no contractual obligations had been brought about between the parties with regard to plaintiff's broadcast. Plaintiff on his part entered a cross-appeal to request that the Court of Appeal orders the retransmission of his broadcast.

The Court of Appeal decided that for the defendant to proceed with his appeal he needed to prove that he had a juridical interest – just as a plaintiff would normally have to prove before proceeding in a Court of First Instance. The Court of Appeal decided that once the Court of First Instance had decided against plaintiff with regard to the actual substance of his claims – in the sense that the Court had rejected his request to have his broadcast retransmitted – and as a result the defendant had not suffered any prejudice which he needed 'to repair', then the defendant did not have the juridical interest required on which to appeal. The Court observed, '*Ir-regola tibqa' illi parti tista' tappella biss jekk tkun "sokkombenti".*' ('The rule remains that a party may only appeal when that party would be the one who has succumbed').

The Court of Appeal observed that a party would have succumbed when as a result of the decision that would have been given, the party would have been placed in a situation that would be less favourable than that which he would have wished for. A party cannot be considered to have suffered such prejudice when what the party would have requested (in this case not re-transmitting plaintiff's broadcast) was accepted in its entirety, irrespective of the fact that some or all of his preliminary pleas or of his arguments for a judgment in his favour had not been acceded to. In other words, defendant had achieved his aim and could not be considered as having been prejudiced. Quoting from Italian jurist Mattirolo, in such cases, the defendant has, as a matter of fact, obtained *'una piena vittoria'* (a complete victory).

The Court of Appeal moreover quoted from the Law Report in the London Times (30 July 1964) with regard to the case *'In Grosvenor Hotel (No.2)'* where it was reported that Crown Counsel had himself submitted before the House of Lords -

> The appellants had won on a number of points of law which in the Crown's view should be ventilated in the highest court of the land. But as the Crown had won, the Crown could not itself appeal.

Once the Court of Appeal decided that on this basis defendant had no right to lodge an appeal from the judgment of the Court of First Instance, the Court of Appeal decided that it could not deal with the cross-appeal of the plaintiff since there can be no cross-appeal from an appeal which was declared inadmissible and as such without effect.

It is interesting to note that on the basis of this reasoning, the situation would have been totally different had the appeal been lodged by plaintiff as the one to have succumbed to not having his request for a retransmission of his broadcast acceded to, and then the cross-appeal would have been entered by the Broadcasting Authority to change the decision given on its preliminary pleas that its decision was not subject to judicial review.

6.2.4 Nature of juridical interest required

It is clear that the Court of Appeal was dealing with the concept of 'juridical interest' within its more civil law restrictive meaning. A party would have a juridical interest when claiming that he has rights which he can enforce at law, and that he would be the victim of another person's actions or inactions if those rights pertaining directly to the person concerned are not enforced.

All cases, to date, relating to broadcasting issues have been brought forward by the party directly claiming that its message was not represented at all or not represented as appropriately as it should have been. Such persons clearly have the requisite juridical interest to file a case for redress. It would be interesting to see whether the Courts of Justice would be willing to consider a broader concept of juridical interest as would hypothetically be the case if a viewer files a case over partial broadcasting on the basis that the viewer has the right to receive the information in question, irrespective of whether the entity giving out the information decides or not to sue for redress. It is suggested that in such a case the viewer could present his case on the basis of violation to his freedom of expression including the freedom to receive information.[8] The author would argue in favour of a broader interpretation of the concept of 'juridical interest' at least to cater for viewers who feel that their right to receive information deserves to be safeguarded and a failure by a public service broadcaster in this regard does not only violate the right of the party whose message was not adequately covered, but also the right of all those who are entitled and want to receive that message.

6.2.5 Dom Mintoff noe. v Dr Antoine Montanaro Gauci noe.

The second case concerning the duty of impartiality to come up for review by the Courts was filed by Dom Mintoff as Leader of the Malta Labour Party in anticipation of

[8] *See* Tonio Borg, *Leading Cases in Maltese Constitutional Law* (Kite Group 2019) 68, 72

the 1971 General Election. As explained in Chapter 5[9], the case regarded allocation of time between different political parties in what the Broadcasting Authority had described as a 'pre-nomination' scheme.

In the meantime, Malta had become an Independent State on 21 September 1964 and as a result Malta's Constitution came into force on the same day. The duty incumbent on the Broadcasting Authority was entrenched in the Constitution. This explains why this case as well as all subsequent cases were decided by the Courts not on the basis of any contractual obligations that one could possibly argue existed between the complaining party and the Broadcasting Authority, but directly on the basis of the Constitution and broadcasting legislation.

6.2.6 Deciding on the basis of the Constitution

The Broadcasting Authority was arguing that in terms of art. 118 (8) of the Constitution[10] in the exercise of its functions to ensure impartiality, 'the Broadcasting Authority shall not be subject to the direction or control of any other person or authority'.

The Court however referred to art. 124 (10) of the Constitution which provides -

> No provision of this Constitution that any person or authority, shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.

In the author's opinion, the wording of the Constitution is that clear and explicit on this matter, that the Broadcasting Authority should not have raised the issue that it is

[9] Chapter 5 pp 195 - 199

[10] In the judgment and proceedings related to this case, the reference is made to art 121 (8) of the Constitution which was subsequently re-numbered as art. 118 (8). All references in this thesis are being made to the provisions of the Constitution as numbered at this stage.

not subject to the jurisdiction of the Courts of Justice although the author can understand that the Authority would want to safeguard a wide margin of appreciation in favour of its discretionary powers provided that it could establish that it did perform its functions in accordance with the Constitution and other relevant laws. As will be examined, *infra*[11], the Authority modified its plea in this sense when the case reached the appeal stage.

Moreover, as had already been pointed out by the Court in *'Toni Pellegrini noe. v. Onor. Edward S. Arrigo noe.'*[12] the Broadcasting Ordinance did not expressly provide for the ousting of judicial review of the functions of this public authority.[13]

The Court observed that in view of these considerations, 'whoever feels, rightly or wrongly, that these functions were not exercised according to law, cannot be precluded to have access to the Tribunals (Courts), once such faculty has not been expressly excluded by law, and even more so it is explicitly provided for through an "ad hoc" provision of the Constitution … in favour of whoever feels aggrieved by any lack of exercising these functions.'

It is suggested that even if the law had provided for the exclusion of review by the Courts of the Authority's discretion in exercising its functions, the Court would still be duty bound to exercise its power of review in terms of art. 124 (10) of the Constitution that should be held to prevail over any contrary disposition of ordinary law. In any case, as the Court pointed out, there is no such contrary disposition of the law.

In affirming its right to review the decisions of the Authority with regard to its main function of ensuring impartiality, the Court made a number of important pronouncements which are worth highlighting since this was the first case where the

[11] *Infra* p 239
[12] Civil Court, First Hall, per Mr Justice Maurice Caruana Curran, 10 March 1964
[13] *Supra* p 231

highest Court in Malta was dealing with the matter and affirming principles of how it would carry out its review in terms of the Authority's obligations in terms of law *(ex lege)* rather than on the basis of any contractual obligations it would have directly or indirectly entered into with an interested party *(ex contractu).* As suggested *supra*[14] this change of approach by the Court is the direct result of the fact that this is the first case that the Court was considering after the Independence Constitution came into effect and that Constitution provided that preserving due impartiality was to be the function of the Broadcasting Authority.[15]

Quoting approvingly from Griffiths and Street, *Principles of Administrative Law,* IV edition, pages 225 – 226, the Court affirmed that -

> 'in unqualified terms, the discretion must be exercised for the purpose contemplated by the Statute, and what these purposes are it is for the Court to ascertain', adding that 'The Courts will intervene if improper considerations are taken into account or any relevant considerations are ignored.'

Quoting moreover from case law of the UK Courts which have affirmed these principles[16], the Court pointed out that it is not enough for the Authority to establish that it 'has acted for a proper purpose' since that does not preclude the Courts from exercising their right of review where 'those performing them (administrative acts) have either acted on extraneous considerations or ignored material considerations.'

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[14] *Supra,* 235
[15] Art 119 of CM
[16] In particular the Court of Appeal, quoted *V. Sharp in Wakefield* (1891) A.C. 173 at 179; (Casebook 224); *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) L. K. V. 233 at 233-4 (Casebook 224); *Roberts v Haperwood* (1925) 18C578 at 600 (per Lord Atkinson) (Casebook 223); and *Filling v Abergele U. D. P.* (1950) I K. B. 636)

6.2.7 Objective Deviation from the provisions of the Law

It is suggested that the ruling that the Courts will intervene in situations where there is an objective deviation from the provisions of the Constitution and of the law with regard to the duty of impartiality – irrespective of whether the Authority acted or not in good faith – is of fundamental importance, since very often in such cases the Authority will try to argue that the fact that there was no bad faith on its part should be upheld as an argument in its favour – to avoid judicial review of the way it would have exercised its discretion.

In this case, the First Hall of the Civil Court affirmed that the Authority had exercised its discretion "within the limit to which an honest man competent to the discharge of his office ought to confine himself." None the less the discretion has to be exercised properly and according to law. The Court further observed that the wording of the Constitution as well as that of the broadcasting law did not provide for such expressions as "in their opinion" or "are satisfied" – which expressions, if used, would have provided room for the exercise of subjective discretion.

On the basis of the foregoing, the First Hall of the Civil Court decided the case on 17 May 1971 by acceding to plaintiff's request to issue a definitive decree of prohibitory injunction against defendant to the effect that defendant was inhibited from going ahead with the planned scheme of 'pre-nomination' broadcasts.

6.2.8 The Mintoff case at Court of Appeal stage

The Broadcasting Authority lodged an appeal from the decision of the First Hall of the Civil Court, and Mr Dom Mintoff then lodged a cross-appeal.

In its judgment, the Court of Appeal[17] began by considering whether the Broadcasting Authority still had or not a juridical interest with proceeding with the appeal since plaintiff was pointing out that in any case the scheme of 'pre-nomination' broadcasts was no longer in place. The Court of Appeal held that the Authority still had the requisite juridical interest since it could not be placed at a disadvantage on the mere basis that too much time had gone by since the date when it actually lodged its appeal. At the same time, the Court held that plaintiff did not have a right of cross-appeal since his main request for a prohibition of the scheme against which he was complaining had been upheld. Moreover, the fact that the First Hall of the Civil Court had rejected the contention by the Broadcasting Authority that it was not subject to the scrutiny of the Courts of Justice was also favourable to plaintiff.

After resolving these preliminary issues, the Court of Appeal proceeded to consider the appeal as lodged by the Broadcasting Authority. In its appeal the Broadcasting Authority argued that its original defence plea was not in the sense that the Courts had no jurisdiction over the same Authority, but that the Court could not consider itself as called upon to revise the Authority's decision and substitute its opinion with its own.

The Court of Appeal pointed out that in reality, the defence plea as formulated by the Broadcasting Authority before the First Hall of the Civil Court was far more 'radical and absolute'.

Its defence plea had been formulated as follows –

> The organisation of the broadcasts in question was seen to by the Broadcasting Authority in virtue of its powers and as part of the functions that have been

[17] *Dom Mintoff noe. v. Imħallef Dottor Antoine Montanaro Gauci noe.,* Court of Appeal, per Mr. Chief Justice Sir Anthony Mamo, Mr Justice Prof. J J Cremona, and Mr Justice J Flores, 22 May 1971.

> conferred exclusively upon it by law, and therefore is not subject to review and cannot be contested before the Court.

The Court of Appeal added that formulated in that manner, the defence plea was manifestly denying the Court any right of review and control and justly the first Honourable Court examined (the plea) on that basis.

The Court of Appeal proceeded to examine itself the relevant provisions of the Constitution and of the Broadcasting Ordinance and pronounced itself as follows -

> This Court agrees, without any hesitation, with the first Honourable Court that the preliminary plea of the defendant Authority, as contested in the first instance, that is in so far as that plea was negating any jurisdiction by the Court to scrutinise the actions of that Authority as regards the organisation of the broadcast set up by it, was unfounded and had to be, as it was, rejected.

The Court added that in any case this was now being admitted by the Authority since in its appeal, it explained that its plea was simply with regard to the limits of the Court's review.

The Broadcasting Authority in its appeal chose to quote the following extract from Griffith and Street as applicable to the present case -

> The Courts deny that they can interfere with the way in which discretion is exercised or that they are acting as a Court of Appeal. They are ensuring only that the discretion is exercised properly or "according to law" or that the administration is not declining jurisdiction.[18]

Quoting from the same source, the Court of Appeal said that the authors, with reference to the review of discretional powers, point out -

[18] Griffith and Street, Principles of Administrative Law, 228

> We must emphasise very strongly …. and the point will be re-iterated, that the scope of judicial review will often be determined mainly by the wording of a power and the context in which it is exercised.[19]

After quoting with approval the above extract from Griffith and Street, the Court of Appeal proclaimed -

> In these circumstances, it is naturally essential that the textual dispositions of our Constitution and our law are safeguarded. In (those dispositions) there is no recognition (use) of such expressions as "in their opinion" or "are satisfied" etc. etc. – expressions that normally give rise to subjective discretion.

The Court of Appeal further pointed out that the wording then found in article 7 (2) of the Broadcasting Authority -

> "It shall be the duty of the Authority to satisfy itself..... (that due impartiality is preserved as respects matters of political ... controversy)"

imposes an obligation on the said Authority rather than allows the Authority any discretion with regard to broadcasting content, and that in any case the wording of the law is subject to and without prejudice to the provisions of the Constitution of Malta.

In the author's opinion, it is significant that the wording of article 13 (2) of the present Broadcasting Act (Cap 350 of the Laws of Malta) is in this respect identical to that which had been used in article 7 (2) of the Broadcasting Ordinance. That means that what the Court of Appeal has established with regard to the clear obligation imposed on the Authority to ensure due impartiality in matters of political controversy still holds as strongly as when this case was decided, apart from the fact that the provisions of the Constitution in this respect have also remained unchanged.

[19] Ibid 331

6.2.9 Latitude of discretion in favour of the Authority

This does not mean that the Authority does not enjoy any degree of discretion at all in exercising its functions. In the same judgment, the Court of Appeal added that "some latitude of discretion needs to be recognised in favour of the Authority and the Court should give weight to its decisions". The Court observed that words such as "due impartiality" and "fairly" cannot be defined rigidly, or in a precise and uniform manner all the time, but represent a field for prudential judgment that depends on the circumstances of the type of broadcast, and on an all the circumstances shaping its context. The Court added -

> However, at the same time, the provisions of the law authorise the Court to intervene if, in its opinion, the arrangements made or the action taken by the Authority fail in a relevant way from the observance of the requisites imposed (on the Authority) by the Constitution with regard to the observance of its functions.

As regards the jurisdictional issue, although the Broadcasting Authority did (unsuccessfully) raise again the plea that it was not subject to the jurisdiction of the Courts in a number of subsequent cases, eventually the Broadcasting Authority would either limit its plea to the extent that the Courts were bound to allow the Authority its due margin of discretion or appreciation before pronouncing whether the Authority would have or not failed from its constitutional obligations[20], or even not raise the plea at all.

6.2.10 Dr Eddie Fenech Adami et noe v Dr Gerald Montanaro Gauci noe. et

In '*Dr Eddie Fenech Adami, et. noe. v Dr Gerald Montanaro Gauci noe. et.*' decided by the Civil Court, First Hall, per Mr. Justice Maurice Caruana Curran, on August 4, 1977, the Court praised the Broadcasting Authority for its loyalty and sense of objectivity, as

[20] *See* for instance *Dr George Borg Olivier et noe. v Dr Carmelo Coleiro,* Court of Appeal, per Chief Justice Prof J. J. Cremona, Mr. Justice Prof. Joseph H. Xuereb, Mr. Justice Maurice Caruana Curran, Mr. Justice Victor R. Sammut, and Mr. Justice Giovanni O. Refalo, 26 February 1976.

well as its legal counsel, for not raising the 'lack of jurisdiction' plea precisely in view of established case law that the Courts of Justice have not only the right but also the duty to ensure that every Authority vested with legal powers carried out its duties in line with the Constitution of Malta and other relevant laws.

That meant that while the Broadcasting Authority did enjoy a certain degree of discretion in carrying out its difficult and delicate functions, that discretion had also to be considered as an 'affirmative obligation' in favour of promoting discussion of 'conflicting viewpoints'.

6.3 Limiting Court's Jurisdiction to making a Judicial Declaration?

In the appeal proceedings from this judgment, the public service broadcaster (but not the Broadcasting Authority) raised the argument that while there was no doubt that the Courts of Justice had every right to examine "whether that person or authority has performed those functions in accordance with this Constitution or any other law"[21] which meant that when there is a failure by the authority in question, the Court is to make a judicial declaration to that effect, that should suffice in a democratic society.

The Courts, according to the argument raised by the public service broadcaster, should not proceed to offer any form of redress, since the Court's jurisdiction was to be considered as limited to making a judicial declaration regarding whether or not the Authority performed its functions according to the Constitution and to law. According to this argument, where the Constitution provided for the right of the Courts to give additional redress, such right was specifically indicated as was the case with safeguarding human rights or the electoral process.

[21] CM, art. 124 (10)

The remedy that was requested by plaintiff in this case was for the Court to give such orders and directives as the Court would deem necessary for the restoration of balance and impartiality, and in particular to restore accuracy (of news coverage) with regard to the programmes which were abusively unbalanced and in respect of which the Court proceedings had been filed.

The Court of Appeal held that the argument that was being raised related to a point of principle that had a certain (degree of) importance and felt that further submissions needed to be made in that regard.[22] For this purpose, the Court of Appeal while largely confirming the judgment of the Civil Court, First Hall, adjourned the case to proceed with this issue further. Since the appeal in question was eventually ceded by the public service broadcaster, the Court of Appeal never pronounced itself further on this matter.

It is suggested that it would be a retrograde step for our Courts of Justice to ever rule that their function in such cases is limited to making a judicial declaration on whether the Broadcasting Authority fulfilled or not its obligation to ensure impartiality and then in the eventuality of the Authority not having fulfilled its obligation, leave it up to the Authority to offer an adequate remedy. In the author's opinion the Courts of Justice are duty bound to evolve positively the interpretation of the law precisely to ensure that persons who have been let down by one authority or other are given adequate redress rather than be simply asked to go back to that same authority for redress, presumably then having the right to go back to the Courts for one more declaration if the redress given is still considered inadequate to restore impartiality.

[22] *Dr Eddie Fenech Adami et noe. V Dr Gerald Montanaro Gauci noe. et,* Court of Appeal per Mr. Chief Justice Prof. J J Cremona, Mr. Justice G O Refalo, and Mr. Justice F. Mizzi, 21 April 1978

The Courts of Justice have in general chosen to act as guardians of the duty by the public service broadcaster to provide impartial broadcasting services, not least by examining in minutest detail, the merits of the different cases that were referred to the Courts for scrutiny and judgment. Our Courts have furthermore given adequate redress to aggrieved parties, contributing in the process to what can be considered as the evolution of Malta's law on the subject. That is why, in the author's opinion, it would be regrettable had the Courts ever to consider that their role in such cases is limited to making a declaration, as regards whether the Broadcasting Authority has or not fulfilled its obligations according to the Constitution and the law.

Remedies given by the Courts of Justice include the allocation of a right of reply in favour of the party feeling not adequately covered in the broadcast media. The Court would also give an order about the time to be allocated and at what time would the right of reply be given – normally to balance out the programme that would have given rise to a situation of imbalance. Other remedies included providing an allocation of advertising spots to allow the aggrieved party to communicate his message, as well as indicating where a news report was unfaithful or not drawn up objectively in order that the news report in question be re-transmitted in a correct manner, following the guidelines laid down by the Court.

Interestingly enough in one subsequent case,[23] the Broadcasting Authority raised itself the plea that the jurisdiction of the Court is limited to establish whether or not there was a breach of the Constitution or of the law, since 'the will of the Authority in its administrative work cannot be substituted by that of the Court'. Yet then in the light of evidence as regards the substance of the case in issue (transmission of recordings of

[23] *Dr Eddie Fenech Adami et noe. v Prof. John J Cremona noe. et,* Court of Appeal, per Chief Justice Carmelo Schembri, Oliver Gulia, and Vincent Scerri, 20th May 1982, 4 - 5

political speeches), the Authority withdrew its plea and as a result the Court of Appeal did not pronounce itself on this plea.

The Broadcasting Authority had raised the same plea in a case dealing with various breaches of the duty of impartiality – relating to serious omissions in news coverage – in the case *Dr Eddie Fenech Adami et noe. v Cosimo Montebello noe. et.*[24] In this case the Civil Court did not give a ruling specifically with regard to the plea that had been raised by the Broadcasting Authority in view of the fact that the case as a whole could not proceed against the Authority since the Authority was no longer constituted according to law. Having said that, the case still proceeded against the public broadcasting service provider, at that stage Telemalta Corporation, and the Civil Court did give such adequate redress as was required in the circumstances after establishing that the public service broadcaster had failed to abide by the Constitutional and legal obligation to be impartial, which obligation was incumbent and enforceable directly on the public service broadcaster as contractor to the Broadcasting Authority as well as in terms of law.

Having established that the Courts of Justice have jurisdiction over the Broadcasting Authority as well as over the public broadcasting services provider, one must still bear in mind that the Courts will allow the Authority its discretionary space and would not intervene to substitute the Authority's discretion with its own unless it results that there was a relevant failure in the Authority's decision.

To this effect, the First Hall of the Civil Court in *'Dr Alfred Sant et noe v Chairman, Awtorita' tax-Xandir et'*[25] ruled -

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[24] Civil Court, First Hall, per Mr. Justice Joseph A. Filletti, 19th February 1985

[25] *Dr Alfred Sant et noe. v Chairman, Awtorita' tax-Xandir (Broadcasting Authority) u (and) Public Broadcasting Services Limited,* Civil Court, First Hall, per Mr. Justice Joseph R. Micallef, 5 September 2002, 31

> … as this Court had pointed out, once the Authority has exercised its discretion, it is not the competence of the Courts to substitute the discretion of the Authority unless it results that there has been a relevant failure in the arrangements ordered by the Authority.

In this respect, the Court was echoing what had already been established in the Mintoff (1971) case.[26]

On the same day, the First Hall of the Civil Court gave judgment in the case instituted by PBS against the Broadcasting Authority and where Dr Alfred Sant as Opposition Leader joined the case as co-defendant since the subject matter of the case related to the same issue of spots regarding Malta's accession to the European Union. In the PBS case,[27] the Court held that it was appropriate to establish to what extent did it have the right to scrutinise the behaviour of the Broadcasting Authority and held -

> It remains correct to retain as a point of departure that the defendant Authority enjoys a non-negligible grade of discretion (to carry out) its function of guardian over all those who are involved in the broadcasting sector. No matter how wide is that discretion, the Court has the right (if a complaint is brought to its attention in this regard) to examine if that discretion has been carried out for the purposes provided by law, or if it conforms with carrying its functions and obligations according to the Constitution and the law…..
>
> That once one is referring to discretion, one is necessarily looking at a situation where a choice has to be made from more than one line of action. If there is no choice from more than one line of action, then one is not talking of discretion but of a duty.

[26] *Mintoff pro et noe. v Montanaro Gauci, pro et noe.,* Civil Court, First Hall, per Mr Justice Edoardo Magri, 17 May 1971

[27] *Chairman tal-kumpannija Public Broadcasting Services Limited noe v Awtorita' tax-Xandir et,* Civil Court, First Hall, per Mr. Justice Joseph R. Micallef, 5 September 2002

The Court then described how it needs to exercise its own review of the administrative discretion exercised by the Authority by approvingly quoting from De Smith and Evans –

> The courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided.[28]

The Court was affirming that once it resulted that the Authority had carried out its obligations according to the Constitution and according to the Broadcasting Act, then the Court should not and would not substitute its own discretion for that exercised by the Authority.

On the issue of discretion exercised by broadcasters and broadcasting regulators, the Court also quoted approvingly Barendt and Hitchens –

> Even accepting that it is important that political parties should have access to broadcasting outlets, there remain difficult questions to be resolved about who should have access and how much access should be allowed. Although there are specific statutory obligations, access is mainly resolved through negotiation between the political parties and broadcasters, leaving considerable discretion in the hands of the broadcasters and regulatory bodies.[29]

Three months later, in the *Moviment Iva* case[30], the Court held:

> Once the Court is of the view that the Authority is exercising its duty (to ensure impartiality), the Court should not take upon itself powers and obligations that in terms of law are entrusted to the Authority in order that the same Authority carries out the exercise to establish how best to ensure impartiality.

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[28] De Smith & Evans, Judicial Review of Administrative Action, 4a Edition (1980) p 278-9
[29] Barendt & Hitchens, Media Law, 2000, p 150-1
[30] *Movimnet IVA Malta fl-Ewropa (YES Movement for Malta in the European Union) v Awtorita' tax-Xandir (Broadcasting Authoirty),* Civil Court, First Hall, per Mr Justice Giannino Caruana Demajo, 3 December 2002, 8

6.4 Are appeals to be referred to the Court of Appeal or to the Constitutional Court?

An important procedural issue that also relates to the right of scrutiny by the Courts of Justice to oversee whether or not the Broadcasting Authority would have exercised its constitutional and legal obligation to ensure impartiality is the question of whether appeals from judgments of the Civil Court should be lodged with the Court of Appeal or with the Constitutional Court.

This issue was first raised in *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro* (1976), a case which dealt with a request for a right of reply over Ministerial broadcasts. In that case, the Nationalist Party had lodged two appeals from the same judgment – one to the Constitutional Court, and the other to the ordinary Court of Appeal. The arguments raised in both appeals were identical, and the only reason for filing two appeals was to ensure that the appeal would not be dismissed on purely procedural grounds.

The Constitutional Court observed -

> That, concurrently with the presentation of their appeal to this Court, on 13th October 1975, plaintiffs have presented a petition of appeal from the same judgment, in an ordinary manner, before the Honourable Court of Appeal, which appeal is pending for a decision before that Court this very day;
>
> That this 'double appeal', as explained during submissions before this Court, apparently was filed in view of some procedural difficulties that plaintiffs felt that they could be faced with, had they not proceeded in this manner;
>
> That plaintiffs alleged in their present petition that this appeal is being made in terms of art. 96 (2) (d) of the Constitution;
>
> Still, as pointed out by defendant noe in his reply …. The judgment that has been appealed from does not include any interpretation of the Constitution, and therefore there is no room for an appeal to this Court on the basis of the dispositions quoted by them,

……

> In view of these reasons, the Court …… declares that it has no jurisdiction to take cognisance of this appeal, and consequently abstains from taking further cognisance of it.[31]

The Court of Appeal acting in its ordinary jurisdiction, and made up of the same Judges, not only took further cognisance of the appeal but also delivered judgment thereon on the same day.[32] The legal issues that arise from that judgment with regard to the duty to ensure impartiality have been examined in Chapter Five, but the author, in this Chapter, is limiting himself to an examination as to what extent do our Courts of Justice have jurisdiction over the Broadcasting Authority and public service broadcasters to ensure impartiality, and including within the present purview procedural issues that have arisen in relation to the Courts' jurisdiction.

The matter had come up again in *Dr Eddie Fenech Adami noe. v Dr Joe Pirotta noe. et* (1997), a case where the Nationalist Party was requesting to be allocated airtime to respond to a number of broadcasts featuring the Prime Minister in discussions with people from the business world to talk to them about changing the Value Added Tax (VAT) system with new taxes.

In this case it was the Broadcasting Authority that opted to file two appeals from the judgment of the First Hall of the Civil Court, and in its appeal filed before the Constitutional Court[33], the Authority argued that it was the Constitutional Court that had to determine the legal issues involved since the case presented by plaintiffs required

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[31] *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro, noe.,* Constitutional Court, per Acting Chief Justice Maurice Caruana Curran, Mr Justice V. R. Sammut, and Mr Justice Giovanni Refalo, 26 February 1976

[32] *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro, noe.,* (Citaz. Nru. 775/75) Court of Appeal, per Acting Chief Justice Maurice Caruana Curran, Mr Justice V. R. Sammut, and Mr Justice Giovanni Refalo, 26 February 1976

[33] *Dr Eddie Fenech Adami noe. v Dr Joe Pirotta noe. et.,* Constitutional Court, per Mr Chief Justice Joseph Said Pullicino, Mr Justice Carmel A Agius and Mr Justice Joseph A Filletti, 17 July 1997

an interpretation of the Constitution, in particular what meaning had to be given to the words 'political controversy' in article 119 (1) of the Constitution.

The Authority referred to what was then paragraph (d) of sub-article (2) of Article 96 (now re-numbered as article 95) of the Constitution which provides that the Constitutional Court shall have jurisdiction to hear and determine -

> appeals from decisions of any court of original jurisdiction in Malta (as is undoubtedly the First Hall where plaintiff noe. proceeded) as to the interpretation of this Constitution' (Reference to proceedings by plaintiff noe as well as emphasis added by Court)

The Authority for all intents and purposes also referred to paragraph (f) of the same article which provides that the Constitutional Court shall have jurisdiction to hear and determine -

> any question decided by a court of original jurisdiction in Malta together with any of the questions referred to in the foregoing paragraphs of this sub-article (including paragraph (d) above quoted) on which an appeal has been made to the Constitutional Court

In other words, the Authority was arguing that where the substance of the claim being adjudicated upon by the Courts of Justice is of a mixed nature, then all issues should be referred to and decided by the Constitutional Court.

None the less the Constitutional Court was very clear in its judgment -

> This court does not agree with this submission. On the contrary it is of the opinion that the competent forum to take cognisance of and determine this appeal is the Court of Appeal….. There was never any contestation during submissions relating to the lawsuit before the First Hall, as regards what was the meaning of the words "political controversy". This is agreed upon. All submissions related to the application of these terms to the contested facts (pertaining to) the lawsuit. The appealed judgment itself has undertaken an analytic exercise to establish whether the resulting facts could or not be considered within the ambit of what was

> accepted as the correct interpretation of the words "political controversy". The Court ended up being convinced that such controversy – even if in a rather limited sense – was proved as existing. The difference of opinion therefore was not with regard to the meaning of the provisions of the Constitution but with regard to the application of these provisions to the facts. This means that the First Hall applied the wording of the law to the facts without the need to analyse and interpret the disposition in itself.

The Constitutional Court added that even if the lawsuit as presented had alleged a breach of the Authority's constitutional obligation to ensure that there is no imbalance and partiality in broadcasting, the lawsuit was not strictly based on the Constitution. The lawsuit was based on an alleged breach of the Broadcasting Act, and the exercise that had been carried out by the First Hall of the Civil Court had also to be seen against that background and in the context of the application of the relevant provisions of that Act.

The Court then quoted with approval what had been established in the lawsuit *'Dr George Borg Olivier et noe v Professor Dr Carmelo Coleiro noe'* that had been decided by the Constitutional Court on 26 February 1976, *supra*[34].

6.4.1 Distinction between interpreting and applying provisions of Constitution

As can be seen from these judgments, the Courts of Justice draw a distinction between *interpreting* provisions of the Constitution and *applying* such provisions. It would only be in the former case, where proceedings would have to be instituted before the Constitutional Court, rather than before the ordinary Civil Courts. On the basis of these judgments, it can be safely assumed that all proceedings relating to ensuring that the Broadcasting Authority and the public broadcasting services provide an impartial

[34] *Supra* p 249

service, need to be filed before the ordinary Courts exercising their ordinary jurisdiction, rather than before the Courts exercising their constitutional jurisdiction.

To the author's mind the distinction that has been made by the Courts between *interpreting* and *applying* the provisions of the Constitution is a correct one since art. 95 (2) (d) provides that the Constitutional Court shall have jurisdiction to hear and determine –

> appeals from decisions of any court of original jurisdiction in Malta as to the *interpretation* of this Constitution ….. (Emphasis added)

The matter was again examined by our Courts in *Dr Alfred Sant et noe. v Broadcasting Authority et* (2003). When Labour Party and Opposition Leader Dr Alfred Sant had instituted a lawsuit against the Chairman of the Broadcasting Authority and against Public Broadcasting Services Ltd in order to be allocated further airtime to respond to information spots regarding Malta's accession to the European Union, the case was referred to the Court of Appeal as a result of an appeal lodged by the public service broadcaster[35]. At that stage, Dr Joe Brincat, legal counsel to Dr Sant, had raised the point that the appeal was null and void since it had to be lodged before the Constitutional Court.

The legal argument that was being raised was to the effect that since what was being decided upon involved an interpretation of a provision of the Constitution of Malta, in this case article 119 of the Constitution that refers to the obligation of the Broadcasting Authority to ensure impartiality, the Constitution itself made it obligatory for the appeal to be lodged before the Constitutional Court.

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[35] *Dr Alfred Sant et noe. v Chairman, Awtorita' tax-Xandir (Broadcasting Authority) u (and) Public Broadcasting Services Limited,* Court of Appeal, per Mr Chief Justice Vincent de Gaetano, Mr Justice Joseph D. Camilleri, and Mr Justice Joseph A. Filletti, 15 January 2003, 8

The Court of Appeal did not uphold this plea on the basis that article 119 of the Constitution for the purposes of the lawsuit in issue was incorporated in various provisions of the Broadcasting Act (which provisions were quoted in the original judgment) and in view of that it was the ordinary procedure of lodging an appeal to the Court of Appeal and not to the Constitutional Court that had to prevail.

6.4.2 Constitutional or Ordinary Law Character

The difficulty that cases relating to impartiality could be deemed to have both a constitutional as well an ordinary law character has arisen not only at the appellate stage of proceedings but also at their initiation.

In the case *'Karmenu Mifsud Bonnici et pro et noe. v. Anthony Tabone et noe.'* (2002) regarding a request to air television spots on behalf of CNI, an organisation that had been set up to oppose Malta's membership of the European Union, plaintiffs had apart from requesting a declaration that the public broadcasting services and the Broadcasting Authority were failing to abide by art. 119 of the Constitution, as well as to be given adequate redress to re-establish impartiality, had also asked for a declaration that two of their fundamental human rights were being infringed. Plaintiffs referred in this respect to articles 41 and 45 of the Constitution, which respectively provide for protection of freedom of expression, and protection from discrimination on the grounds of political opinion.

To date, this is the only case in which arguments based on the human rights' provisions of the Constitution were put forward together with the usual arguments based on art. 119 of the Constitution and on the various provisions of the Broadcasting Act.

When this case was instituted, the procedure for filing a case in respect of breach of human rights (by application) was different from the procedure for filing in respect of

other issues (by writ of summons). Although this procedural distinction is no longer in force, there are other differences between the two procedures which could be relevant, not least the fact that where the extraordinary (human rights) procedure is used, the Court has no limitations as to what form of redress it can award.

In view of such considerations, the Civil Court, First Hall, had to decide whether plaintiffs could in one and the same lawsuit be seeking an 'extraordinary' remedy as would be the case for breach of human rights, over and above an 'ordinary' remedy for breach of other legal provisions.

The Attorney General who was also a defendant to the suit in view of the request for a declaration that there was a breach of fundamental human rights submitted in his fourth defence plea that the lawsuit was contradictory and could not be dealt with in so far as the lawsuit included a request for a remedy on the basis of the alleged breach of fundamental human rights, as well as a request for ordinary remedies on the basis of the Broadcasting Act and of article 119 of the Constitution.

This would presumably imply that the Court would suspend deliberating over the extraordinary remedy sought until it would have decided about whether or not there was an adequate ordinary remedy that would address the grievance of the complaining part, on the basis that one should first and foremost exhaust all ordinary procedures and recourses before proceeding, if necessary, to the extraordinary ones.

While referring to principles established by the Constitutional Court as regards the applicability and availability of constitutional procedures "without prejudice to any

other action that could legally be done with regard to the same issue"[36], the Civil Court[37] added it had to give weight to the fact that as of 1995, article 469A of the Code of Organisation and Civil Procedure, dealing with judicial review of administrative action, had come into force through which an ordinary remedy was provided with regard to administrative acts that violate the Constitution, although aggrieved persons could still seek an 'extraordinary' remedy in such situations.

Art. 469A (1) (a) of the Code of Organisation and Civil Procedure (Cap. 12 of the Laws of Malta) provides -

> Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:
>
> (a) where the administrative act is in violation of the Constitution;
>
> …….

It is suggested that the Court correctly did not make any distinction between different provisions of the Constitution since the law makes no such distinction. In fact, the Court added the words "(in each part thereof)" after the word "Constitution" when quoting Art. 469A of Cap. 12 of the Laws of Malta.

On the basis of the foregoing, the First Hall of the Civil Court rejected the defence plea raised by the Attorney General but limitedly in so far as regards its procedural aspects *(limitatament dwar l-aspetti proċedurali tagħha)* but left the said plea unprejudiced with regard to its substantive aspects *(imma tħalliha bla mittiefsa dwar l-aspetti sostantivi*

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[36] *Tonio Vella v Kummissarju tal-Pulizija (Commissioner of Police) et,* Constitutional Court, (5 April 1991) (Kollezz. Vol. LXXV.i.106; *Steven Bartolo v. Avukat Ġenerali (Attorney General),* Constitutional Court, (Kollezz. Vol. LXXXIII.i.275)

[37] *Karmenu Mifsud Bonnici et noe v. Anthony Tabone noe. et,* Civil Court, First Hall, per Mr. Justice Joseph R. Micallef, 12 July 2002, 23

tagħha). This matter was then deliberated upon and dealt with in a subsequent and separate judgment[38] by the First Hall of the Civil Court, presided by a different Judge.

Dealing now with the substantive merits of the same defence plea, the Court pointed out -

> This Court understands that an application for a constitutional solution should be *"a measure of last resort"* since it is presumed that the citizen can and should find that his rights are protected in the laws of the country.
>
> …….
>
> …….The Juridical Order …….. should be given the opportunity to itself resolve the problems that arise through the exercise of those rights and powers that the same Juridical Order confers, and it is only when it results that this Juridical Order is faulty in these solutions, that the citizen can resort to the extraordinary remedy in virtue of the country's Constitution.
>
> …….
>
> That is why the same Constitution provides that before the person in question presents a complaint in virtue of the Constitution, he should first of all *"exhaust all ordinary remedies"* since before alleging a failure on the part of a Governmental Authority, he should first seek to obtain his remedy in virtue of the ordinary law that the same Government would have provided. It is only if it results that the Government has not provided an adequate remedy, that the citizen can accuse the Authority of a fault through a constitutional lawsuit.'

On the basis of the foregoing, the Court held that the Government was not well suited in the case, that is there was no purpose for the Government to be roped in as a defendant, through the Attorney General, together with the Broadcasting Authority and the Public Broadcasting Services.

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[38] *Karmenu Mifsud Bonnici et noe v. Anthony Tabone noe. et,* Civil Court, First Hall, per Mr. Justice Tonio Mallia, 24 September 2002

The Court added that even if it were established that the Broadcasting Authority had acted according to the dictate and directives of the Government, that could lead to a judgment whereby it is declared that the decision of the Authority should be annulled since it would not have truly been taken "by the Authority" or because it would have been taken *"for the wrong reasons"*. Still while in such a situation the Government would have to carry its political responsibility, from a legal point of view, it would be the Authority that would have to be declared as having failed from its duties, and not the Government.

Moreover, although the review of the behaviour of the Broadcasting Authority would not be carried out within the context of Fundamental Human Rights, it did not follow that these Rights were totally irrelevant. Quoting from what was held by the Court of Appeal with regard to the Planning Authority[39], the Court observed that even the Broadcasting Authority could not act in a discriminatory manner, adding –

> This Court can and has the right to ensure that the (Broadcasting) Authority in the exercise of its function, has not acted in a discriminatory manner, as otherwise it would have acted *"for the wrong reasons"* or *"for the wrong considerations"*, in either case, behaviour that would be reviewed by this Court in the application of the ordinary remedies that have been requested.

The Court then observed that although such considerations could lead to the nullity of the lawsuit, in the light of Court practice that provides for salvaging whatever can be salvaged, the Court did not intend to let its arguments lead to such an extreme conclusion, but instead was only not allowing the lawsuit to the extent that the same lawsuit was seeking an extraordinary remedy in terms of the Human Rights provisions of the Constitution, but was 'holding firm' the lawsuit to the extent that it was seeking an ordinary remedy in virtue of the other laws of the country.

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[39] *Richard Zammit v Chairman ta' l-Awtorita' tal-Ippjanar,* Court of Appeal, 31 May 2002

Clearly where the Court refers to the 'other laws of the country', it is only excluding the Human Rights provisions in the Constitution, and possibly the provisions of the European Convention Act, but certainly could not have been excluding art. 119 of the Constitution that infers the obligation on the Broadcasting Authority to ensure impartiality.

This Court judgment, understood as explained above, is in line with an earlier case[40] that was not related to broadcasting law considerations, where with reference to article 469A (1) (a) of the Code of Organisation and Civil Procedure, the Constitutional Court -

> interpreted the words 'contrary to the Constitution' as meaning contrary to any provision, *other than articles 33 to 45 (human rights sections)* of Chapter IV (of the Constitution) and even excluded the provisions of the European Convention Act (Ch. 319) under *'the otherwise contrary to any law'* ground of review; and in a moment of frustration (the Court) remarked that it hoped that this question would be resolved once and for all by its judgment.[41]

The issue is not without controversy. Tonio Borg remarks:

> It is doubtful whether such interpretation solves the issue, at least in a logical way. Serious questions may be raised challenging this interpretation: why is Chapter IV "more equal" than other entrenched provisions of the Constitution, to the extent that it is not covered by article 469A (1) (a) while other provisions of the Constitution are? The maxim *ubi lex voluit dixit* is thrown overboard.[42]

Be that as it may, with regard to lawsuits relating to broadcasting issues, including lawsuits relating to the obligation of the Broadcasting Authority to ensure impartiality in virtue of art. 119 of the Constitution, on the basis of case law so far, it would, in the author's opinion, be advisable to proceed with one's case by seeking a remedy through

[40] *Emmanuel Ciantar v Commissioner of Police,* Constitutional Court, 2 November 2001
[41] Tonio Borg, *Judicial Review of Administrative Action in Malta* (Kite, Malta 2020) 90
[42] Ibid 91

the ordinary Courts, since as discussed *supra* even the reference to art. 119 of the Constitution would be considered as an invitation to the Courts to *apply* and *enforce* the said article rather than to *interpret* it. Moreover, if a breach of human rights is also alleged, it is likely that the Courts would follow the principle that one must first and foremost exhaust all other remedies and that the remedies available to enforce art. 119 of the Constitution and the provisions of the Broadcasting Act would be deemed sufficient.

6.5 Meaning of 'Administrative Act'

In the PBS case against the Broadcasting Authority[43], the Court referred to where art. 469A (2) of Cap. 12 of the Laws of Malta, by way of interpretation defines "administrative act" as including "the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant".

The Court considered, on the basis of this definition, a decision taken by the Broadcasting Authority as -

> an administrative act and stated that even if one were to accept, for one moment, that the decision was quasi-judicial in nature it would still be considered as an administrative act.[44]

The same sub-article defines 'public authority' as meaning -

> the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law.

With regard to the Broadcasting Authority, the Court concluded -

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[43] *Chairman, Public Broadcasting Services Limited et noe v Awtorita' tax-Xandir (Broadcasting Authority) et,* Civil Court, First Hall, per Mr. Justice Joseph R Micallef, 5 September 2002

[44] Borg (n41) 47

> One would thus ask whether the (Broadcasting) Authority falls within the ambit of this definition. In the opinion of the Court, this question can easily be answered in the affirmative, since in the very (legal) dispositions in virtue of which it is set up, one finds the necessary ingredients for it to be considered among the bodies corporate established by law. This opinion is further strengthened by the relevant dispositions[45] of the specific law that regulates broadcasting.

6.6 Courts should not confine themselves to straightjacket of art. 469A (Cap. 12)

In the author's opinion, the Courts while doing well to refer to principles of judicial review of administrative discretion and how those principles are applicable to the Broadcasting Authority, should at the same time avoid being caught up or confining themselves within the straightjacket of the rules set out in art. 469A of Cap. 12, with regard for instance to the right consistently exercised by our Courts to provide themselves an effective remedy to redress situations of lack of impartiality wherever the Broadcasting Authority would have failed in the exercise of its duties in a relevant way, as well as with regard to the right that has been exercised by our Courts to issue orders not only against the Broadcasting Authority but also and directly against the public service broadcaster.

When cases relating to broadcasting are referred to the Courts for judgment, the Courts are entitled and duty bound to rely on as well as to give effect to all the relevant provisions of the Constitution and of the Broadcasting Act, irrespective of whether or not the case in question can be fitted within the precise parameters of art. 469A of Cap. 12.

The jurisdiction enjoyed by our Courts in terms of art. 124 (10) of the Constitution as well as to ensure that all the provisions of the Broadcasting Act are adhered to cannot

[45] In particular, the Court referred to art. 4 of the Broadcasting Act, Cap 350 of the Laws of Malta, which provides: 'The Authority shall be a body corporate having a distinct legal personality….'

be constrained in virtue of another law. Art. 469A (1) of Cap. 12 itself stipulates at the outset *'Saving as is otherwise provided by law….'* In this respect the Courts need to regard the provisions of this article as being there to enhance their jurisdiction and to establish basic principles at the foundation of judicial review of administrative action in general, but not to limit any general powers that pertain to our Courts to give effect to all laws, and in particular to the Constitution.

Referring to *'Smash Communications Ltd v Broadcasting Authority'*[46] Tonio Borg observes that -

> the Court asserted judicial review of decisions of the Broadcasting Authority, acting as a quasi-judicial authority, but made no reference to article 469A, and based its reviewing power on article 40 (6) of the Broadcasting Act (Ch. 350); it cited judgments delivered prior to 1995 based on English common law. It is therefore presumed that this judgment confirmed that where review cannot be pigeonholed under article 469A it is legitimate to base it legally under English common law even *after* the enactment of article 469A and even when applying a Maltese statutory provision. [47]

Ultimately it is the function of the Courts of Justice to provide judicial review and offer effective redress within the ambit of all the relevant laws as well as on the basis of fundamental principles, not least that of separation of powers.

In the PBS case (2002)[48], while the Court observed that its scrutiny of the administrative acts pertaining to the Broadcasting Authority needed to be carried out within the parameters of article 469A, since in any case the lawsuit was presented on that

[46] Civil Court, First Hall, per Mr Justice Ray Pace, 7 February 2012
[47] Borg (n41) 46 - 47
[48] *Chairman, Public Broadcasting Services Limited et noe v Awtorita' tax-Xandir (Broadcasting Authority) et,* Civil Court, First Hall, per Mr. Justice Joseph R Micallef, 5 September 2002

basis. Article 469A in question itself provides for enquiring into the validity of an administrative act wherever it is *'otherwise contrary to law.'*[49] The Court observed -

> The Court is bound to abide according to the parameters that the law provides for this form of scrutiny, unless the law itself provides otherwise.

In the author's opinion, the fact that Article 469A, within the parameters that it provides for scrutiny of public authorities, includes a review into whether the administrative act complained of is otherwise contrary to law, by definition includes an examination, in the case of the Broadcasting Authority or of broadcasters, as to whether irrespective of other considerations provided for in the said Article 469A, their administrative acts were contrary to the Constitution or to any provision of the Broadcasting Act. The phrase 'otherwise contrary to law' clearly includes the parent Act in respect of which a public authority carries out its functions. In this sense even on the basis of article 469A, the Courts cannot ever argue that their right of judicial review has been curtailed rather than enhanced, as discussed *supra.*

It is on the basis of meticulously examining all the relevant provisions of the Broadcasting Act, that the Court, in the PBS case, was able to proclaim that in terms of law the obligation of impartiality is one that not only relates to the Broadcasting Authority but also directly impinges on the provider of public broadcasting services.

The Court was moreover conducting its judicial review within the broader context that art. 124 (10) of the Constitution provides not merely a <u>right</u> to exercise jurisdiction over the Broadcasting Authority, but also and even more so a <u>duty</u> -

[49] Article 469A (1) (b) (iv), COCP, Cap. 12 of the Laws of Malta.

> to ensure that every authority that has the power to carry out particular functions, carries out those functions and does so in line with the Constitution and the laws of the country.[50]

When the PBS case was then referred to the Court of Appeal[51], that Court enunciated what it has described as the seven principles which summarise the situation in Malta with regard to ensuring impartiality after the introduction of pluralism[52].

Having established these principles, the Court of Appeal explained that it would examine whether the decision of the Broadcasting Authority was invalid in terms of any of the criteria established in article 469A of the Code of Organisation and Civil Procedure (Cap. 12). In other words, the Court would examine if the order given by the Broadcasting Authority (1) was in breach of the Constitution, or (2) was *ultra vires* since (i) it was not authorised to give that order, or (ii) failed to observe the principles of natural justice or other mandatory procedural requirements in the fulfilment of that order or in the deliberations leading to that order, or (iii) that order constituted an abuse of its power since it was exercised for unlawful purposes, or finally (iv) that order infringed the law in some other way.

Once it is established there was no invalidity of the Authority's decision on the basis of these criteria, then, the Court of Appeal emphasised, it was not within the Courts' competence to substitute their discretion for that of the Broadcasting Authority.

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[50] The Court was here quoting from *Perit Dom Mintoff pro et noe v Imħallef Antoine Montanaro Gauci noe,* Court of Appeal, per Mr Chief Justice Prof Sir Anthony Mamo, Mr Justice ProfJ J Cremona and Mr Justice J Flores. The Court also referred to *Dr Eddie Fenech Adami et noe v Dr Gerald Montanaro Gauci noe,* Court of Appeal, per Mr Chief Justice Prof J J Cremona, Mr Justice Giovanni Refalo and Mr Justice F Mizzi, 21 April 1978

[51] *Chairman tal-kumpanija Public Broadcasting Services Limited et noe v Awtorita' taxXandir (Broadcasting Authority) et,* Court of Appeal, per Mr Chief Justice Vincent de Gaeatno, Mr. Justice Joseph D. Camilleri, and Mr. Justice Joseph A. Filletti, 15 January 2003

[52] Chapter 5 pp 229 - 231

The Court added -

> In other words, it may well be the case that the decision taken by the Authority with regard to the case at issue was not the best possible that could have been taken in the circumstances, and had it been up to a Court to decide about the grievance raised (in this case by the Malta Labour Party) it would have decided differently. Still the legislator wanted that such decision be taken by a public authority that was set up according to law, with specialised capabilities and knowledge, as well as with wide powers in order to be able to create that delicate and just balance that are <u>essential</u> for the functioning of democracy. The Broadcasting Authority certainly has no easy task, and it must always keep in mind that it has an important role to fulfil in this specialised broadcasting sector, nearly as important as that of the Courts in a country's democratic life.

In affirming all of the above, the Court of Appeal was making its own the teaching of H. W. Wade, and the Court quoted in its judgment the following extract from Wade's leading publication on Administrative Law -

> The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. "With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."[53] As Lord Hallisham L. C. has said, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.[54] This is not therefore

[53] *Short v Poole Corporation* (1926) Ch. 66 at 91 (Warrington L. J.)
[54] *Re W (An Infant)* (1971) A. C. 682 at 700

> the standard of "the man on the Clapham omnibus". It is the standard indicated by a true construction of the act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come.[55]

6.7 Need to deal with such cases with urgency

Impartiality in broadcasting can only be safeguarded if television and radio audiences have access to the different points of view within the same time frame. In turn, this means that requests for a remedy in cases where a breach of such duty is alleged need to be treated with urgency.

In the case Dr *Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et*, the First Hall of the Civil Court had pronounced that –

> a delay by the Broadcasting Authority to offer a remedy in such cases would of itself constitute a fault since (such delay) frustrates and brings to naught the right that is protected by the Constitution and by law, since delay would mean the negation of the remedy that had to be immediate, real and effective.[56]

Not deciding within a reasonable time upon a complaint about lack of impartiality would amount to a relevant 'transgression by the Authority of its duty to ensure impartiality and adequate sharing of broadcasting time and facilities in the political field.' Moreover, in the same judgment, the Court observed that -

> the failure to exercise discretion amounts to a refusal to at least consider the redress requested (by the aggrieved party) resulting in a denial of justice and

[55] H. W. R. Wade *Administrative Law* OUP (1977), pp 347 – 348, as quoted approvingly by Court of Appeal (n77) 18. See also: H.W.R. Wade and C. F. Forsyth *Administrative Law* (11th edn, OUP 2014) 302

[56] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et.,* Civil Court, First Hall per Mr. Justice Maurice Caruana Curran, 4 August 1977, 22

> leading to the need of the Courts of Justice to take cognisance of the case in virtue of their being the "repositories of truth" ….. in the exercise of their "supervisory powers".[57]

This need to deal with such issues with urgency, even in Court proceedings, then came up in the case *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et.*[58] In this case, the Nationalist Leader of the Opposition pointed out that his speech in Parliament was transmitted in an irresponsible manner, in a way which rendered his speech unintelligible, with substantial parts left out, and with other parts of the reportage in contradiction to what the Opposition Leader had in fact said in Parliament.

When the First Hall of the Civil Court surprisingly did not accept a request for the case to be treated with urgency, the matter came up for review by the Court of Appeal which revoked the decree[59] of the first Court despite the fact that "as a rule" –

> the Court of Appeal would not disturb the exercise of the discretion exercised by the first Court if not for a serious reason as in a case where the first Court would have exercised its discretion in a manifestly erroneous or unjust manner.

The Court of Appeal added that where denial of urgency would lead to frustrating the effectivity of the redress sought by plaintiff in the eventuality that plaintiff proves that his claims are well founded, the Court should allow proceedings to be conducted with urgency. The Court added -

> the remedy requested by plaintiff cannot be excessively delayed from the date of the original broadcast without, considering the very nature of the subject matter, that remedy would lose its efficacy …… resulting in substantial prejudice since it would lead to frustrating the remedy sought.

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[57] Ibid, pp 13 and 22

[58] Court of Appeal per Chief Justice Prof. John J. Cremona, Mr Justice Fortunato Mizzi and Mr Justice Giuseppe Schemrbi, 14 October 1977

[59] Decree was given by Mr. Justice Vincent Scerri on 17 August 1977

In this respect, the Court drew a difference between normal libel proceedings where damages are sought and proceedings where a remedy is sought to rectify a breach of the obligation of impartiality, since it is ultimately a question of the degree of prejudice that could be suffered by plaintiff. Moreover, the Court of Appeal observed that as far as it could ascertain, all cases relating to the issue of impartiality in broadcasting, had by way of general principle, been treated with urgency.

At the European level, the ECtHR referred to the requirement to deal with cases swiftly in proceedings concerning the right of reply as justifiable 'to enable untruthful information published in the media to be contested, and to ensure a plurality of opinions in the exchange of ideas on matters of general interests' since 'news was a perishable commodity'.[60]

6.8 Conclusion

It would be futile to refer to the role and obligations of the public service broadcaster, without examining at length how our Courts of Justice have sought to enforce that obligation. It has not been an easy passage since issues of whether the Courts could even exercise any jurisdiction on this matter or simply leave it up to the Broadcasting Authority set up in terms of the Constitution to safeguard impartiality had to be resolved not only in terms of what the law itself provides on the matter, but also in terms of principles that needed to be defined and evolved – ranging from administrative law considerations regarding in particular to what extent does the regulatory authority enjoy a margin of appreciation to whether remedies can be given to enforce the relevant legal obligations, and then what form of remedies.

[60] ECtHR *Eker v Turkey* [2017] App. no. 24016/05. *Vide also:* Ch. 5, p 218

It has been felt that this study would not have been complete without an examination of the various jurisdictional, procedural and administrative issues that have arisen from one case to another and how in the process the Courts of Justice have largely managed to establish an effective enforcement framework, ultimately for the benefit of the recipients of broadcast media.

That does not mean that there is no further scope for further development, and there is certainly scope to avoid some pitfalls which we have occasionally plunged into.

Chapter Seven –

DUTY OF IMPARTING INFORMATION AND ENSURING OBJECTIVITY

7.1 Introduction

One of the more important duties that needs to be fulfilled by the public service broadcaster is that of imparting information, and in the process of ensuring objectivity.

Stephen Cushion sums up this perspective by asserting –

> News and current affairs have historically been central to the identity of public service broadcasting, a genre where values of accuracy and impartiality have been championed…. In many countries, public service broadcasting has been established to prevent state corruption and to act as a safe haven from market manipulation.[1]

While a private broadcaster could be exempted from this duty, as would be the case where a private broadcaster is given a commercial licence without any obligation or authorisation to transmit news, the same could never be done with regard to the public service broadcaster. It has been established since the very commencement of broadcasting as a public service that the most important functions are 'to inform, educate and entertain'.[2]

7.2 Council of Europe Pronouncements

The Council of Europe has been pivotal in defining and developing standards to reinforce freedom of expression as freedom of the media and editorial independence. Already on 29 April 1982, the Committee of Ministers of the Council of Europe adopted

[1] Stephen Cushion, *The Democratic Value of News – Why Public Service Media Matter* (Palgrave Macmillan 2012) 28

[2] *See for e.g.* BBC Group Annual Report and Accounts 2018/19, p2 – About the BBC, where it is provided 'Our mission has remained the same for almost 100 years. We act in the public interest, serving all audiences through the provision of impartial, high-quality and distinctive output and services which inform, educate and entertain.'

a *'Declaration on the Freedom of Expression and Information'* underlining the objective to ensure the -

> absence of censorship or any arbitrary controls or constraints on participants in the information process, on media content or on the transmission and dissemination of information.[3]

Then, the 1994 Prague Resolution, adopted by the Council of Europe Ministers responsible for Media Policy with regard to the future of public service broadcasting, after stressing its importance for democratic countries, makes the following undertaking –

> to guarantee at least one comprehensive wide-ranging programme service comprising information, education, culture and entertainment which is accessible to all members of the public, while acknowledging that public service broadcasters must also be permitted to provide, where appropriate, additional programme services such as thematic services.[4]

The emphasis on information as the first subject of the comprehensive service that is to characterise the public service broadcasting system to which the Ministerial Conference was affirming its commitment, is highly significant.

The broadcasting of 'impartial and independent news, information and comment' is then indicated, in the same Resolution, as one of the principal missions that public service broadcasters are expected to pursue.

In 1996, the Committee of Ministers, acting by virtue of Article 15.b of the Statute of the Council re-affirmed through Recommendation no. R(96)10 on 'The Guarantee of the Independence of Public Service Broadcasting' -

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[3] Adopted by the Committee of Ministers at its 70th Session, IIb – available at: www.right2info.org/resources/publications/instrumnets-and-standards/coe_decl-on-foe-and-foi_1982 - last accessed: 8 July 2020

[4] CoE, 4th European Ministerial Conference on Mass Media Policy, (Prague, 7 and 8 December 1994), *The Media in a Democratic Society, Resolution No. 1 – The Future of Public Service Broadcasting,* I

> the vital role of public service broadcasting as an essential factor of pluralistic communication….. through the provision of a basic comprehensive programme service comprising information, education, culture and entertainment.

Then through the Appendix to the same Recommendation, which Appendix provided *'Guidelines on the guarantee of the independence of public service broadcasting'*, Governments of Member States were asked to ensure that -

> the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional authority, especially in areas such as:
>
> …..
>
> – the editing and presentation of news and current affairs programmes.

The Appendix re-iterates this principle in Section VI thereof, entitled *'The programming policy of public service broadcasting organisations'* by providing –

> The legal framework governing public service broadcasting organisations should clearly stipulate that they ensure that news programmes fairly present facts and events and encourage the free formation of opinions.

The same emphasis was made in 2004 by the Parliamentary Assembly of the Council of Europe in a Recommendation on public service broadcasting, wherein it was stated -

> Public service broadcasting, whether run by public organisations or privately-owned companies, differs from broadcasting for purely commercial or political reasons because of its specific remit, which is essentially to operate independently of those holding economic and political power. It provides the whole of society with information, culture, education and entertainment; …. It provides a benchmark of quality….. These principles apply, whatever changes may have to be introduced to meet the requirements of the twenty-first century.[5]

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[5] PA of the CoE, Recommendation 1641 (2004), *Public Service Broadcasting,* Adopted by Assembly on 27 January 2004 Council of Europe, Recommendations and Resolutions adopted by the Parliamentary Assembly of the Council of Europe in the field of Media and Information Society, Recommendation 1641 (2004) on 'Public Service Broadcasting', Text adopted on 27 January 2004 (3rd Sitting) Parliamentary Assembly, Council of Europe, Directorate General of Human Rights and the Rule of Law, Strasbourg, 2015

A '*Declaration on the guarantee of the independence of public service broadcasting in the member states'* adopted on 27 September 2006 by the Committee of Ministers, provided as follows in its preamble –

> Highlighting the specific remit of public service broadcasting and reaffirming its vital role as an essential element of pluralist communication and of social cohesion which, through the provision of comprehensive programme services accessible to everyone, comprising information, education, culture and entertainment, seeks to promote the values of modern democratic societies and, in particular, respect for human rights, cultural diversity and political pluralism.

To the author's mind, the above pronouncements affirm the close connectivity between the role of the public service broadcaster and society's as well as the individual's right to know, right to be kept informed – as a most important feature of the fundamental human right of freedom of expression, as well as representing the cornerstone of what democracy is all about. Failure to safeguard and provide information is tantamount to a negation of this right and of democracy.

> In a modern democracy where the ultimate decisions rest with the people, it is the more important that they should be fully informed and empowered to choose between conflicting opinions and alternative courses of action.[6]

7.3 Guidance from the European Court of Human Rights

The European Court of Human Rights has through its case law referred to pronouncements of the Council of Europe, as those outlined *supra*[7]. The Court gives consideration to and incorporates in its judgments principles and guidelines developed by the Committee of Ministers of the Council of Europe. Its case-law on Article 10 of the European Convention, with regard to freedom of expression, has relied on such pronouncements as it has evolved the concept of freedom of expression with emphasis

[6] Tom Bingham, *The Rule of Law* (Penguin Books 2011) 78
[7] *Supra* pp 270 - 273

when it comes to broadcasting and journalism in general to the public's right to be informed.

The jurisprudence of the ECtHR has given further weight to the wording of Article 10 of the European Convention of Human Rights, where it is provided that the right to freedom of expression -

> shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The right to receive information is of particular significance in the field of broadcasting, since it is ultimately about the public's 'right to know'. The duty impingent on public broadcasters to provide a comprehensive service which includes objective news and current affairs programmes is meant to safeguard that right. As has been established in the case-law of the ECtHR, that right is best served through a pluralistic service. That in turn explains why in the European Union's Charter of Fundamental Human Rights, the wording is spelt out in Article 11 thereof -

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> The freedom and pluralism of the media shall be respected.

7.3.1 The Moldova case

In *Manole and Others v Moldova* (2009)[8], the ECtHR was dealing with an application filed by Larisa Manole who had worked at TRM's Television News Section in Moldova, together with eight other applicants who all worked for TRM (Teleradio Moldova) *or* TRM's predecessor as newscasters or presenters of talk shows or otherwise involved in such productions. All applicants sought protection of their freedom of expression against undue political control over the television station TRM after February 2001 when the

[8] ECtHR, Fourth Section, 17 September 2009

Communist Party had won a large majority in the parliamentary elections. The applicants then suffered large scale restrictions and interference with their journalistic freedom of expression, and some of the applicants were dismissed after failing to comply with such restrictions.

Although in theory TRM had been legally transformed from state broadcaster into an autonomous public service broadcasting organisation (PSBO), most of the news and programming began to focus only on the ruling party.

After asserting as its starting point 'the fundamental truism: there can be no democracy without pluralism', the European Court in its assessment has emphasised various principles of direct relevance to the duty incumbent on public service broadcasters to impart information: -

> Freedom of the press and other news media afford the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.'[9]
>
> …..
>
> A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive ….. This is true also where the position of dominance is held by a State or public broadcaster.[10]
>
> …..

[9] *Manole and Others v Moldova* App no 13936/02 (ECtHR, 17 September 2009) para 96. See also: *Lingens v. Austria* (ECrtHR, 8 July 1986), and *Handyside v. the United Kingdom* (ECtHR, 7 December 1976)
[10] Ibid, para 98

> The Court considers that in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment.'[11]

While recognising that a public broadcasting system is capable of contributing to the quality and balance of programmes, the Court pointed out that

> there is no obligation under Article 10 to put in place such a service, provided that some other means are used to the same end.[12]

That means that on the basis of case law so far, there is no obligation to set up a public service broadcasting system provided that whatever the means adopted by the different European countries for the provision of broadcasting in their respective territories, they are bound to ensure that the public has access to 'impartial and accurate information'. It must furthermore be emphasised that this is a positive obligation that each State must pursue. It is not merely a question of being at fault when a State acts in a way to prevent or limit that right, but the State is under a positive obligation to do all that is necessary within its remit to facilitate and give effect to that right.

When a State then chooses to adopt a system of public service broadcasting, it is furthermore bound to provide a legal framework that guarantees the editorial independence and institutional autonomy of the public service broadcaster, as well as to ensure pluralism.

In the *Moldova* judgment, the Court established –

> Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are

[11] Ibid, para 100
[12] Ibid, para 100

> still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.[13]

The principle that where the State decides to create a public broadcasting system, 'the domestic law and practice must guarantee that the system provides a pluralistic audiovisual service' was also affirmed in the *Wojtas-Kaleta* case.[14]

Oster points out –

> 'Being both media entities and part of the state, public broadcasters are yet not only beneficiaries, but also addresses, of human rights of others. In particular, given their influential role in society, they have to be neutral. Competing views, including those of political parties opposed to government policy, must be appropriately reflected in the broadcaster's transmissions.'[15]

With specific reference to the facts of the Moldova case brought for its consideration, the Court ruled –

> In these circumstances, it was of vital importance to the functioning of democracy in Moldova that TRM transmitted accurate and balanced news and information and that its programming reflected the full range of political opinion and debate in the country and the State authorities were under a strong positive obligation to put in place the conditions to permit this to occur.[16]

7.3.2 The Iraqi Migrants case

The importance of the right to information came up in another case that had to be dealt with by the European Court of Human Rights. The case regards an Iraqi married couple, Khurshid Mustafa and Tarzibach who had settled in Sweden.

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[13] Ibid, para 101
[14] ECtHR, *Wojtas-Kaleta v Poland* [2009] App. no: 20436/02, 47
[15] John Oster, *European and International Media Law,* Cambridge University Press, 2017, 159. *Vide also:* Human Rights Committee, Concluding observations on Republic of Moldova (CCPR/CO/75/MDA) para 14.
[16] *Manole and Others v Moldova* (n9) para 108

From 1 November 1999, they had rented a flat in Rinkeby, a suburb of Stockholm. When their landlord changed in October 2003, the new landlord, a real estate company, had demanded that a satellite dish that was mounted on the façade, and that the Iraqis made use of to receive television programmes in Arabic and Farsi, be dismantled.

The landlord was invoking enforcement of part of the tenancy agreement which stipulated that tenants were not to erect outdoor aerials and such like in the rented property. The tenants sought to comply with landlord's request by removing the satellite dish on the façade and instead installed a new device by placing on the kitchen floor an iron stand from which an arm, on which the satellite dish was mounted, extended through a small window. The Iraqi couple even agreed to an additional safety feature recommended by an engineer appointed by the tenants' association.

Since the landlord was still claiming that tenants were infringing the rent agreement and served them with a notice of eviction, the Iraqi couple together with other tenants contested the landlord's claims before the Rent Review Board in line with Swedish law.

They pointed out to the Board that they were exercising their freedom to receive information, as protected by the Swedish Constitution, and by Article 10 of the European Convention of Human Rights.

After taking account of all the evidence, the Board established that there was no breach of the tenancy agreement, and that the only inconvenience suffered by the landlord was of an aesthetic nature. The Board ruled that the tenants' interest to receive information from their own home country weighed more heavily than the aesthetic aspect.

When the landlord appealed to Sweden's Court of Appeal, the Court overruled the Rent Review Board and held that 'while the applicants' interest in receiving the broadcasts of the television channels had to be taken into consideration ….. the right to freedom of information relied on did not have such a bearing on the case that it could be considered to have any real importance'.

This is what led to the case being referred to the ECtHR which in its judgment[17] made a number of very important pronouncements –

> 32. …. The genuine and effective exercise of freedom of expression under Article 10 may require positive measures of protection, even in the sphere of relations between individuals…..
>
> 33. …… (The Court) cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention …..
>
> ……
>
> 41. The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others, wish or may be willing to impart to him or her….
>
> ….
>
> 44. In the instant case the Court observes that the applicants wished to receive television programmes in Arabic and Farsi from their native country or region. That information included, for instance, political and social news that could be of particular interest to the applicants as immigrants from Iraq. Moreover, while such news might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle, also cultural expressions as well as pure entertainment….
>
> 45. …. They might have been able to obtain some news through foreign newspapers and radio programmes, but these sources of information only cover

[17] *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECrtHR, 16 December 2008)

> parts of what is available via television broadcasts and cannot in any way be equated with the latter.

In its judgment the ECrtHR was also highly critical of the Swedish Court of Appeal's assessment that the Iraqi couple's 'right to freedom of information did not have such a bearing on the case that it could be considered to have any real importance'. The ECtHR observed –

> 48. ……From this statement, the Court cannot but conclude that the appellate court, in weighing the interests involved, failed to apply standards in conformity with Article 10……

Having regard to all the evidence submitted and the assessment carried out by the Court, the ECtHR concluded –

> 50. …. Even if a certain margin of appreciation is afforded to the national authorities, the interference with the applicants' right to freedom of information was not "necessary in a democratic society" and that the respondent State failed in their positive obligation to protect that right.

For all these reasons, the ECrtHR unanimously held that there had been a violation of Article 10 of the Convention.

To the author's mind this judgment proves to what extent is the European Court prepared to go to safeguard freedom of expression as inclusive of the right to receive information. When this judgment is seen alongside that delivered in the *Moldova* case[18], the duty of broadcasters in general, and of public service broadcasters in particular, to objectively impart the information that the public has the right to receive, assumes even more importance and significance. That duty can be considered as one of the more important tools required for the very functioning of democracy.

[18] *Manole and Others v Moldova* (n9) *supra* pp 274 - 277

7.3.3 Case of *Informationsverein Lentia and Others v Austria*

While as examined *supra*[19] there is no obligation under Article 10 to put in place a system of public broadcasting services, the obligation to provide for pluralism is one of the logical effects of freedom of expression and information. Moreover, a system of public broadcasting services cannot be used as a pretext for not allowing competing private channels.

The issue came up in the case of *Informationsverein Lentia and others v Austria*[20]. The case generated substantial interest and apart from the applicants, two human rights' organisations that follow media issues 'Article 19' and 'Interights' were allowed by the President of the European Court of Human Rights to submit their own observations.

The first applicant Lentia was an association of co-proprietors and residents of a housing development in Linz, Austria, comprising 458 apartments and 30 businesses. The association had requested a licence to set up an internal cable and television network. The other applicants had either requested or intended to request licences to operate radio stations on a local basis in different regions in Austria.

The requests were turned down by the Austrian authorities and the main argument that was given by the Government of Austria was that the Austrian Constitutional Law of 10 July 1974 guaranteed the independence of broadcasting by providing in Article 1 thereof:

> 'Broadcasting shall be governed by more detailed rules to be set out in a federal law. Such a law must inter alia contain provisions guaranteeing the objectivity and impartiality of reporting ….
>
> 'Broadcasting within the meaning of paragraph 1 shall be a public service.'

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[19] Ibid

[20] *Informationsverein Lentia and others v Austria* [1993] App. Nos. 13914/88, 15041/89, 15717/89 and 17207/90

The Government of Austria pointed out that the National Broadcasting Corporation (ORF) set up with the status of a public law corporation in terms of federal law offered the best guarantee in favour of objectivity and diversity of views, by operating at least two television channels and three radio stations, one of which was to be a regional station. The case was referred to the European Court of Human Rights by the European Commission of Human Rights, which Commission disagreed with the stand taken by the Government of Austria.

The response of the ECtHR was clear –

'The Court is not persuaded by the Government's argument. Their assertions are contradicted by the experience of several European States, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.'[21]

In the same judgment, the ECtHR after stressing 'the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive' added, 'Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.'

Poignantly, the ECtHR observed –

'Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression.'

In deciding whether the Austrian public broadcasting monopoly was in compliance with Article 10 (2) ECHR, the Court found that there was no longer a

[21] Ibid, para 42

'pressing social need' (as was the case when *Sacchi* was decided by the ECJ in 1974[22] in view of the limited number of frequencies and channels than available) to maintain a public broadcasting monopoly in order to safeguard media pluralism.[23]

The judgment was transmitted on the same day to the Committee of Ministers of the Council of Europe which in turn adopted Resolution DH (98) 142 on 11 June 1998 through which it took positive note of the fact that the Government of Austria had taken measures to prevent further violations of the present kind as that found in the judgment.

When *Informationsverein Lentia* again felt the need to have recourse to the ECtHR on the basis that it was still unable to obtain an operating licence for cable broadcasting, a friendly settlement between the parties was registered on the basis that following a change in the law of Austria on 1 August 1996 which in turn followed a judgment of the Constitutional Court of Austria on 27 June 1995, 'private broadcasters were free to create and transmit their own programmes via cable-net without any conditions being attached'. On that basis the Court was satisfied that a settlement was reached between the parties and that the settlement was based on respect for human rights as defined in the ECHR or its protocols.[24]

The co-existence of private and public broadcasting is regarded by Oster[25] as one of the significant features that distinguish the European audiovisual market and the European broadcasting order. This co-existence is furthermore emphasised in the 1997 Amsterdam Protocol on the system of public broadcasting in the EU Member States.[26]

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[22] ECJ, Case C-155/73 [1974] Sacchi [14]
[23] Jan Oster, *European and International Media Law,* 1st edn, Cambridge University Press (2017) 159
[24] *Informationsverein Lentia v Austria* [2002] Application n. 37093/97
[25] Oster (n23) 158
[26] Amsterdam Protocol, now Protocol No. 29 to the Treaty of Lisbon; Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ C 30/1

7.3.4 The ERT case

The issue of the compatibility or otherwise of granting exclusive broadcasting rights and freedom of expression came up in the ERT case that weas referred to the European Court of Justice.

In this case, the Greek State had granted exclusive rights to ERT, a Greek radio and television company. ERT was established by law[27] and the exclusive rights were conferred upon it in terms of Article 2(2) of that law. Notwithstanding the exclusive rights enjoyed by ERT, Dimotiki Etaira Pliroforissis (DEP), a municipal information company at Thessaloniki, and S. Kouvelas, Mayor of Thessaloniki, in 1989 set up a television station and began to broadcast television programmes.

When, as a result, ERT brought summary proceedings, before the Thessaloniki Regional Court, against DEP and the Mayor of Thessaloniki seeking an injunction prohibiting any kind of broadcasting and an order for the seizure and sequestration of the technical equipment, DEP and the Mayor relied mainly on the provisions of European law and the European Convention on Human Rights.

Since the national court took the view that the case did raise important issues of Community law, the court referred a number of questions to the European Court of Justice (ECJ).

Although the ECJ took the view that 'Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest', 'the manner in which such a monopoly is organized and exercised

[27] Official Journal of the Hellenic Republic, No 145 A of 18 August 1987, p 144.

must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition.'[28]

Moreover, apart from referring to how Article 86 of the Treaty establishing the European Community (TEC)[29] protects the rules on competition even with regard to public undertakings that are given exclusive rights, significantly the ECJ when referring to the issue regarding the applicability of Article 10 of the European Convention on Human Rights, pointed out that 'fundamental rights form an integral part of the general principles of law'. That meant that when Member States were applying any provisions to limit freedom of movement on grounds of public policy, public security and public health, those limitations 'must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.'[30]

The principle of pluralism as an emanation of freedom of expression is, in any case, now clearly spelt out in Article 11 of the European Charter on Human Rights.

7.4 Mission Statement of Public Broadcasting Services in Malta

The public service broadcaster needs to stand out from all other broadcasters mainly through the quality and in particular the objectivity of the news and current services programmes that such broadcaster offers.

In the light of the principles established and developed by the Council of Europe, and in view of the pronouncements of the European Court of Human Rights in the

[28] Case C-260/89 [1991] ERT v DEP and others, 12. It is suggested, that in view of further technological developments, the argument of scarcity of frequencies and channels is no longer applicable, and one cannot talk any further of a 'pressing social need' in terms of the Art. 10 (2) ECHR that would justify such a monopoly. *Vide supra:* the *Informationsverein Lentia* case. Moreover this judgment already refers to fundamental rights as an integral part of the general European law which must be borne in mind by EU Member States when applying any provisions to limit freedom of movement of services.
[29] Re-numbered as Article 106 of the TFEU
[30] ERT v DEP (n22) 45

Moldova case[31], the transmission of accurate and objective information through news and other current affairs programmes is not so much a right as it a duty impinging on all public broadcasting services.

In Malta, this is reflected in the Mission Statement of Public Broadcasting Services Limited -

> PBS serves the general public as well as particular segments of the population by striving to be the most creative, inclusive, professional and trusted broadcaster in Malta.[32]

In terms of the National Broadcasting Policy, the broadcasting of news is the first identified core public service obligation pertaining to PBS.[33] The said Policy document then goes into further detail by providing -

> The core public service obligation is being defined as the transmission of -
>
> 1. Regular daily news bulletins in Maltese, with the main TV news bulletin not being of a lesser duration than 20 minutes and at least a once daily TV news bulletin in English. Furthermore at least one of the TV news bulletins in Maltese has to provide facilities for the hearing impaired. The main news bulletin shall include both local and international news;
> 2. Regular daily news on at least one of the radio stations that PBS operates with at least one bulletin thereof being in English.[34]

When the Broadcasting Authority issues licences in respect of nationwide television services in virtue of article 10 (4) of the Broadcasting Act, the first category of 'television broadcasting licence' is referred to as a 'general interest broadcast content licence'. Public Broadcasting Services are licensed directly by the Minister and their licence is deemed to pertain to the 'general interest broadcast content' genre.[35]

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[31] *Manole and Others v Moldova* (n9)*supra* pp 274 - 277
[32] Ministry for Information Technology and Investment, & Ministry for Tourism and Culture, Government of Malta, *National Broadcasting Policy,* (April 2004) 1
[33] Ibid, 6
[34] Ibid, 14
[35] Article 10 (4A) (a), (4C), BAct, Cap. 350 of the Laws of Malta.

7.4.1 Specific obligations with regard to news

The specific obligations with regard to news arise from article 13 of the Broadcasting Act that provides -

> In so far as general interest broadcasting services are concerned and where the Authority allows news and current affairs programmes to be broadcast by such services, it shall be the duty of the Authority to satisfy itself that, so far as possible, the programmes broadcast by any general interest broadcasting service complies with all or any of the following requirements as the Authority may impose in the broadcasting licence, that is to say –
>
> ……
>
> (a) that all news given in the programmes (in whatever form) is presented with due accuracy;
>
> (c) that sufficient time is given to news and current affairs and that all news given in the programmes (in whatever form) is presented with due impartiality.

When it comes to paragraph (c) – that is the duty of impartiality – the Authority, can in terms of the first proviso to Article 13 (2) of the Broadcasting Act, consider -

> the general output of programmes provided by the various broadcasting licensees and contractors, together a whole.

Still, the Authority cannot do that with regard to public broadcasting services. Equally, it cannot do that with regard to <u>all</u> broadcasters as regards the obligation stipulated in paragraph (b) - the obligation of 'due accuracy' in all news. This appears to respect the journalistic principle that while comments and opinions are free, facts are sacred and should be treated as such.

Then in terms of the General Interest Objectives (Television Services) (Selection Criteria) Regulations, 2011[36], issued by the Prime Minister after consultation with the Broadcasting Authority, the Authority set out the criteria for the selection of television

[36] L.N. 240 of 2011, now published as S.L. 350.32

services that fulfil a general interest objective, whether such services are generalist or niche.

With regard to news, the Regulations stipulate that a -

> generalist general interest objective television service shall broadcast at least one news bulletin during the mandatory broadcasting timetable

which is defined as a -

> minimum of programme content of continuous duration of 16 hours to cover a broadcasting timetable between 7.00 a.m. and 11 p.m.[37]

Niche general interest objective television services are only bound to transmit for a minimum of ten hours a day and the programme content can be spread between 7.00 a.m. and 10 p.m. Such stations are expected 'to be flexible in the application of' the regulations and 'to adapt to address particular requests which would enhance the range of offer to the consumers'.[38] This means that niche stations are not necessarily bound to offer news services.

Still, all 'general interest objective service' stations, be they generalist in nature (transmitting a wide range of programme genres) or of a niche nature (transmitting programmes of a limited number of genres of a specialist subject nature)[39], are, if allowed by the Authority to present news and current affairs programmes, bound to ensure that all news given in the programmes (in whatever form) are presented with due accuracy.

In contrast, commercial television broadcasting services are not subject to the obligations of a general interest objective service.[40]

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[37] Article 3, S.L. 350.32
[38] Article 4, S.L. 350.32
[39] Article 10 (4E), BAct
[40] Ibid

If the Broadcasting Authority avails itself of its right to provide itself or through broadcasting contractors sound and television broadcasting services,[41], then it would also have the power to 'collect and diffuse news and information in Malta and from any part of the world.'[42] The Broadcasting Authority has not been availing itself of this right.

7.4.1.1 Detailed Requirements

In virtue of its right and obligation to ensure highest standards, the Broadcasting Authority has published detailed requirements with regard to news and current affairs programmes. These requirements are incorporated in Subsidiary Legislation 350.14 under the heading 'Requirements as to Standards and Practice Applicable to News Bulletins and Current Affairs Programmes'. The Requirements are issued by the Authority and have the force of law since -

> the Authority may, in the discharge of its responsibility for programmes, impose requirements as to standards and practice for such programmes….[43]

At the very outset of these Requirements, in Section 2 which provides for Definitions and Interpretations, we have a definition of "News" as follows -

> 2.1.1 The sole criterion for the inclusion of any item in a news bulletin is its news value. News can be defined as tidings, new information or fresh information. News values usually cited include: timelines, proximity, prominence, magnitude, impact, conflict and oddity. As such a news item which is essentially a repetition or simply constitutes a rehash of a news item already featured in a previous edition of a news bulletin cannot be justified for inclusion in a news bulletin.

[41] Article 3 (2), BAct
[42] Article 12 (c), BAct
[43] Article 20 (3) BAct

To the author's mind, this definition seems to contrast with the practice adopted by broadcasters to keep a news item alive precisely by giving it a new twist or angle to justify its repetition in news bulletins. While a broadcaster may produce news items about any subject or issue which he or she chooses, the broadcaster must 'ensure fairness and respect for truth'.[44]

7.4.1.2 Integrity and Responsibility of Broadcasters

The Requirements recognise that in order to ensure a credible and objective service, much will ultimately depend on the integrity and responsibility of the broadcaster. Section 3 deals specifically with this issue -

> 3.1 Journalists and broadcasters must guard their own integrity and credibility in order to be able to act freely and independently of forces which may exert undue influence and impair free and balanced judgement.
>
> 3.2 Officials in a political party should not be involved in news-gathering, production and presentation of news.
>
> 3.3 Sponsorship should never influence editorial activity, contents and presentation. Journalists must not accept commissions or give in to these seeking publicity for commercial purposes. Editorial favours must not be promised in return for advertisements.
>
> 3.4 Errors must be quickly acknowledged and public(l)y corrected.'

Such safeguards are of utmost importance since ultimately much depends on the broadcaster's credibility. Moreover, key decisions about news content are taken by the

[44] Article 2.1.2, S.L. 350.14

broadcaster. For instance, it is the Head of News that decides what constitutes news value.[45]

The Broadcasting Authority Requirements acknowledge that the whole purpose of imparting information is to reach out to the people and provide them with the information that they require, that they have a right to.

The Requirements in defining 'public interest' state that this is -

> ….. not to be confined within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned about, what is going on, or what may happen to them or others, then it is a matter of public interest on which everyone is entitled to make fair comment.[46]

One of the examples then given of how the public interest may be served by the broadcast media is 'exposing significant incompetence in public office.'[47]

To the author's mind, scrutiny of public authorities should always be considered as one of the key components of freedom of expression in a democratic society. It is ultimately about the people's right to receive information. This is more so, rather than less so, even in a time of crisis.

The 7th European Ministerial Conference on Mass Media Policy addressed the issue in 2005 by –

> affirming that freedom of expression and media freedom must be respected in crisis situations, since the public's right to be informed about the actions of public authorities and all other parties involved in order to keep them under scrutiny is especially important in these situations.[48]

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[45] 2.1.4, S.L. 350.14
[46] 2.2.1, S.L. 350.14
[47] 2.2.2 iv, S.L. 350.14
[48] CoE, European Ministerial Conferences on Mass Media Policy and Council of Europe Conferences of Ministers responsible for Media and New Communication Services, Texts Adopted. 7th European Ministerial Conference on Mass Media Policy (Kyiv, 10 and 11 March 2005), *Integration and Diversity: the new frontiers of European media and communication policy, Resolution No. 1 – Freedom of Expression and*

7.4.1.3 News have to be factual

The Broadcasting Authority Requirements place strong emphasis on the concept that facts are sacred, and should be clearly distinguished from opinions or comments. Article 4.8 provides –

> A news item has to be factual or at the very least based on fact. Conjectures, distortions, remarks, opinions, judgements or convictions should not be allowed whether they are termed as comments or opinions and whether they are related to the item in question or not, simply because they can – and usually do – mislead the audience and lead to confusion as to whether the so-called comment / opinion is what the station / newscaster thinks or whether it resulted from the fact being reported.

That is why editorial opinion must be clearly labelled and kept entirely distinct from regular broadcasts of news bulletins.[49] Moreover, combinations of semi-fabricated news items, without care for accuracy, solely aimed for partisan propaganda shall be prohibited.[50]

These Requirements bring to mind comments made by Curran and Seaton -

> News making is a knowledge industry: part of the advanced economy of understanding that is remaking the world. Stupid societies make bad decisions. Those that cannot have a common discussion on the realities (both the jolly and the unnerving) of their predicament become tyrannies – either aggressively nasty or myopically stumbling places, replete with trivial comforts but unaware of simmering problems. Getting the thinking around news making right, so that it goes on discovering and alerting us to the unexpected …… is important…… Keeping information honest is not a luxury. It is a matter of self-interest.[51]

The importance of information to a functioning democracy is based on the premise that we should be able to make better decisions the more we have access to the facts. As

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Information in Times of Crisis, (Council of Europe, Media and Internet Directorate General of Human Rights and Rule of Law Strasbourg 2015), 47

[49] 4.9, S.L. 350.14

[50] 4.10, S.L. 350.14

[51] James Curran and Jean Seaton, *Power Without Responsibility. Press, broadcasting and the internet in Britain* (7th edn, Routledge, London and New York, 2010), 325

Delli Carpini, Michael X. and Scott Keeter had pronounced over two decades ago, 'political knowledge is the basic currency of democracy.'[52] Expanding on that theme and examining behavioural differences being brought about as a result of a shift to relying on the internet as a source of information, Kleinberg and Lau observe –

> Individuals with high political knowledge exhibit behaviours that are consequential to a well-functioning democracy, including holding stable attitudes about a broad spectrum of political topics, ideological constraint, high levels of political participation and informed, value-maximizing voting decisions. In short, political knowledge is an instrumental good that allows citizens to translate their political interests into effective political action.'[53]

7.4.1.4 Techniques used in news bulletins

The Malta Broadcasting Authority Requirements delve into substantial detail about various techniques that are used in news bulletins. For instance, since location reporting as when journalists need to convey to their audience what is happening by being 'live' on the spot, requires some remarks to enhance the presentation of a breaking story, care must still be taken to retain the journalistic standards set out in the same requirements.[54] Equally whenever the presentation of news is aided through the use of 'reconstruction material', the audiences need to know that the visual material which they are watching is not actual, just as viewers need to be alerted whenever they are watching archive as opposed to fresh footage.[55]

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[52] Delli Carpini, Michael X., and Scott Keeter. 1996. *What Americans Know About Politics and Why It Matters*,. (1996) New Haven, CT: Yale University Press.

[53] Mona S Kleinberg and Richard R Lau, 'The Importance of Political Knowledge for Effective Citizenship – Differences between the Broadcast and Internet Generations' (2019) *in Vol. 83, No. 2, Public Opinion Quarterly, OUP, 338*

[54] 5.1, S.L. 350.14

[55] 6.1, S.L. 350.14

7.4.1.5 Respect for privacy

Any discussion about the right of journalists to impart information which in turn relates to our right to receive that information – these two rights are two sides of one and the same coin: freedom of expression – would normally involve some discussion about the need to counterbalance that right with respecting the private and family life of others.

The Broadcasting Authority Requirements on News and Current Affairs recognise that 'everyone is entitled to respect for his or her private family life.' Still, when it comes to persons holding office in public life, these persons are -

> entitled to protection of their privacy except in those cases where their private life may have an effect on their public life.

Equally much as the general rule would be to request a subject's permission when using footage from closed-circuit television cameras of which the subject is unlikely to have been aware, the subject's permission is not required where the footage is required to serve the public interest 'as in the case of the exposure of crime or gross negligence in the management of public affairs.'[56]

On the basis of the same principles, the Requirements provide that the use of hidden microphones and cameras would be justified in the event of 'an overriding public interest' that would justify (i) the decision to gather the material, (ii) the actual recording, and (iii) the broadcast.' Having said that, the identity of innocent parties should in such circumstances be obscured.[57]

While these Requirements have been published nearly twelve years ago, their relevance and importance has increased in view of the material that can be obtained

[56] 8, S.L. 350.14
[57] Ibid

secretly through the use of smart phones and so many other devices that have become available because of massive strides in information technology.

With regard to protection of privacy, the author would also recommend guidance from case-law of the ECtHR.

As a general principle, 'the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention.'[58]

In the case concerning Princess Caroline of Monaco,[59] the Court reiterated 'the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection …. extends beyond the private family circle and also includes a social dimension.'[60]

While the Court held that in the case in question the right to protection of private life with regard to Princess Caroline had been breached since she was not exercising any official function 'and the photos and articles related exclusively to details of her private life', the ECtHR considered 'that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.'[61] In this case the photos complained of made no such contribution.

In this case, the ECtHR gave considerable weight to the fact that the interest of the general public and the press in Princess Caroline 'is based solely on her membership of a reigning family, whereas she herself does not exercise any official function.' The Court held that the definition of 'a figure of contemporary society *"par excellence"*' that had been

[58] *Case of S. and Marper v the United Kingdom,* App nos 30562/04 and 30566/04 (ECtHR) 4 December 2008
[59] *Case of Von Hannover v Germany,* App no 59320/00 (EctHR, 24 June 2004)
[60] Ibid, para 69
[61] Ibid, para 76

used by the Courts in Germany which 'definition affords the person very limited protection of their private life or the right to control the use of their image, .. could conceivably be appropriate for politicians exercising official functions.'[62]

> With regard to politicians and taking account of their functions, Oster observes –
>
> 'A special legal status for politicians or state institutions shielding them from scrutiny solely on account of their function or status is not reconcilable with the essential function freedom of expression and media freedom fulfil in a democratic society.'[63]

In the case regarding Princess Caroline, the fact that she was not exercising any public function led the ECtHR in the first case brought for judgment by that Court to weigh in favour of protecting her right to privacy. Still in two subsequent cases involving Princess Caroline,[64] the Court affirmed that the Princess of Monaco and her husband must be regarded as public figures. 'The outcome in *Von Hannover (No. 3)* follows the momentum of the pendulum swinging back towards freedom of the press in *Von Hannover (No. 2).*'[65]

Another case related to the publication of a photo without the consent of the person concerned, was brought up to the ECtHR by the Austrian Broadcasting Corporation (ORF)[66], a public law foundation set up in Vienna. The Court gave weight to the fact that ORF is the Austrian public broadcaster, set up within the general framework provided by the Constitutional Act concerning the Safeguarding of the Independence of Broadcasting of 10 July 1974 ("the Constitutional Broadcasting Act")

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[62] Ibid, para 72
[63] Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 156
[64] *Von Hannover v Germany (No.2)* [2012] App nos 40660/08 and 60641/08; *Von Hannover v Germany (No.3)* [2013] App no 8772/10
[65] Alex Bedat, 'Case Law, Strasbourg: Von Hannover v Germany (No.3), Glossing over Privacy' *(Inforrm, October 13, 2013)* https://inforrm.org/2013/10/13/case-law-strasbourg-von-hannover-v-germany-no-3-glossing-over-privacy-alexia-bedat/ accessed 19 March 2021
[66] *Case of Österreichischer Rundfunk v Austria,* App no 3584/02 (ECtHR, 7 December 2006)

which obliges it to observe the requirements of objectivity and diversity of views and has to preserve its independence from the State, parties, other media or lobbying groups.'

The ECtHR added –

> 'In this connection the Court reiterates its view that the press and more generally the media have a duty to impart – in a manner consistent with their obligations and responsibilities – information and ideas on all matters of public interest.'[67]

In this case, ORF carried a news item about K., head of a neo-Nazi organisation called Extra-Parliamentary Opposition True to the People ("VAPO") who had been sentenced under the National Socialist Prohibition Act, and had on the date of the news item been released on parole from prison. The news item also mentioned his deputy, S., who had been released on parole five weeks earlier.

The issue was whether ORF could carry a picture of S during the news item, without his permission. Since there was agreement that the news item concerned an issue of public interest, the Court observed that 'consequently, it related to a sphere in which restrictions on freedom of expression are to be strictly construed.'[68]

The Courts in Austria had prohibited ORF from showing the picture of S in connection with any text mentioning his conviction once the sentence had been executed or once he had been released on parole. The reasoning behind the prohibition was that the trial of S had happened years back and the publication of the picture would not add any information of public interest to the report. The Courts in Austria held that the right of S to start to re-integrate in society prevailed over the station's intertest to show the picture merely for illustrative purposes.

The ECtHR on its part observed –

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[67] Ibid, para 64
[68] Ibid, para 66

> 'Elements that will be relevant are the degree of notoriety of the person concerned, the lapse of time since the conviction and the release, the nature of the crime, the connection between the contents of the report and the picture shown and the completeness and correctness of the accompanying text.'[69]

In this respect the ECtHR held that while the domestic courts attached great weight to the time-element, especially with regard to the lapse of time since Mr S's conviction, those courts did not pay any particular attention to the fact that only a few weeks had elapsed since his release. That factor coupled with the other elements of relevance led the Court to hold that the interference was 'not necessary in a democratic society' and that given the particular circumstances of this case, freedom of expression had to prevail over any other consideration. Significantly, the decision of the ECtHR in this case is to be distinguished from that given by the same Court in a comparable case[70] where the Court found no violation of freedom of expression as regards the prohibition to publish a convict's picture since relevant facts relating to the convict in question, in particular that he had been acquitted of any involvement with attacks through letter bombs, which is what the news item in question was dealing with, were left out. The omission of relevant facts may have the same impact as a statement of untrue facts.[71]

7.4.1.6 Other Issues

Other issues that are covered in detail by the Broadcasting Authority Requirements but which tend to go beyond the remit of the scope of this chapter include Media Releases, portrayal of violence in the news, right of reply, current affairs programmes, interviews, rights of children, as well as independent productions.

The Requirements are applicable to all broadcasters, 'and to all news bulletins and current affairs programmes whether made by a broadcaster or by an independent

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[69] Ibid, para 68
[70] *Österreicischer Rundfunk v Austria* App no 57597/00 (ECtHR 25 May 2004)
[71] Oster (n63) 178

production house for the said broadcaster.'[72] Moreover, all broadcasting stations are to appoint an editor who 'shall act as compliance officer to ensure the due (observance) of the provisions of these standards and practice requirements.'[73] Each broadcasting station is to furnish the Broadcasting Authority with the details of the said editor.[74]

7.4.1.7 Additional guidelines for the public service broadcaster

The Requirements provide two additional rules that are applicable to the public service broadcaster but strangely establish that these rules are not enforceable by the Broadcasting Authority but may be applied by the public service broadcaster.[75]

The first additional rule, or better still in view of the wording above indicated, guideline provides –

> Producers of news and current affairs programmes should have no outside interests or commitments, which could damage the public service broadcaster's reputation for impartiality, fairness and integrity.[76]

Then the second guideline which the public service broadcaster is "invited" to follow regards presenters and reporters primarily associated with the public service broadcaster.

The integrity of such persons stands to be seriously compromised if such persons engage in 'off air' activities such as writing, giving of interviews or making of speeches that would place in doubt their objectivity while 'on air'. In particular, such persons cannot be stating publicly their voting intentions, or taking sides on an issue of current

[72] 20, S.L. 350.14
[73] 21.2, S.L.350.14
[74] 21.3, S.L.350.14
[75] 17.1, S.L. 350.14
[76] 18.1, S.L. 350.14

public policy or political debate, or advocating any particular position on such issues, or exhorting a change in high profile public policy.[77]

7.5 PBS Guidelines

Although the BA guidelines are not enforceable, Public Broadcasting Services in 2012 followed suit by issuing its own 'Guidelines on the Obligation of Due Impartiality' In these guidelines PBS acknowledges –

> In fulfilling its role as public broadcaster PBS has stricter legal obligations imposed upon it at law and consequently also upon those who are employed by it or whose services are engaged by it.

The PBS Guidelines specifically refer to the Requirements as to Standards and Practice Applicable to News Bulletins and Current Affairs Programmes that were brought into effect under the Broadcasting Act, and analysed *supra.* While the Guidelines refer to the overall obligation of ensuring due impartiality, which matter has been comprehensively dealt with in Chapter 5, the Guidelines refer specifically to the requirement that news and current affairs programmes are presented with accuracy.

> Moreover, echoing the BA Guidelines, those issued by PBS provide –
>
> 4. All the employees of PBS associated with news gathering and news presentation, including news co-ordinators, newscasters, directors, editors, cameramen and journalists cannot associate themselves with a political party or undermine the perception of the impartiality, integrity, independence and objectivity of PBS.
>
> 5. PBS expects that all programmes broadcast by it abide with these guidelines. However, it is to be noted that the application of these guidelines is stricter in relation to programmes that deal with news and current affairs ….
>
> ……

[77] 19.1, S.L. 350.14

7. The reputation for impartiality of PBS is upheld through parallel binaries that are interdependent and interrelated:

i. the content of the programme broadcast;

ii. The activities of its employees, particularly producers, journalists and presenters of programmes broadcast.

It is consequently important that those associated with news and current affairs do not engage in off-air activities that can lead to any doubt about their objectivity on-air and to what is transmitted. The activities mentioned below may tarnish one's reputation for impartiality and consequently also damage the reputation of PBS for impartiality:

i. Expressing public support for any political party or express views or lobby in favour of or against a policy which is a matter of current party political debate or a matter of public or industrial controversy; stating in public how one intends to vote or how one has just voted in an election or referendum, endorse political candidates;

ii. Publicly demand a change in high profile public policy. One's activities off-airt may therefore bring about a conflict of interest, especially where one's external activities may be perceived to affect the PBS's reputation for independence and impartiality.

In general news presenters, producers, journalists and presenters of news and current affairs programmes are not to undertake promotions or endorsements of political parties or individual candidatures or political organisations as well as endorse commercial products. Furthermore, they ought not to regularly write or participate in public debate on issues of:

- Current affairs or politics;
- Economics, business or finance;
- Matters of public policy, political or industrial controversy.

External activities include also letters to the editor, articles published in newspapers, online blogging, posting of remarks or opinions online, participating in public debates, fronting a campaign and similar activities whether made online or not.

Furthermore, the Guidelines recognise that at law, the Head of News is responsible and answerable for any decisions taken concerning the content of news bulletins and / or current affairs programmes transmitted by PBS. This is in line with

Article 2.5.1 of S.L. 350.14. The said Head of News (also referred to in the Guidelines as 'the Registered Editor') is to be informed without delay and before it becomes publicly known whenever one decides to participate in any activity that could compromise the principles referred to in the guidelines and that can lead to that person being stopped from broadcasting or having his role changed.

Considering that the public service broadcaster has developed the practice of farming out most of its current affairs programmes, it would appear that producers of such programmes still need to consult with the Head of News about the content of their programmes, and in any case the station's Head of News remains responsible for all content of such programmes.

In terms of Article 21 of the Media and Defamation Act (Cap. 579 of the Laws of Malta) –

> Every holder of a broadcasting licence in Malta shall, for the purposes of this Act, be considered as editor and be considered as editorially responsible for the broadcasting service and may be required to so register as editor in the Media Register unless such person appoints another person to be editor in his stead.

7.6 Decisions by the Broadcasting Authority

As could be expected, complaints about lack of fairness or objectivity in news coverage are presented to the Broadcasting Authority from time to time.

An analysis of a few significant decisions given by the Authority is indicative of a general tendency to give due weight to the editorial discretion of the public service broadcaster, but the Authority has in its decisions established some relevant criteria. On a positive note, all decisions given by the Authority are placed on the Authority's website

and can be searched by year, by television station in respect of which the complaint would have been lodged, as well as by nature of complaint.

7.6.1 Use of verbs that negatively impact the content of news

With reference to the PBS news bulletin transmitted on 3rd May 2017, the Nationalist Party complained about the use of verbs and other tactics that were intended to negatively impact the content of the news story relating to the same Party and thereby influence the reasoning and fair judgement of the listener / viewer. The Party was referring to the excessive use of such verbs as 'alleged' with reference to accusations that the Party was making with regard to the Government, during an election campaign. The Party felt that the diction used was such as to weaken the arguments made and have listeners and viewers consider the serious accusations made as not credible. Although the Authority did not consider the complaint as founded, it availed itself of the opportunity to remind all news editors to be always more sensitive with regard to the choice of words used in news bulletins, especially during an election campaign.[78]

7.6.2 Evidence given by whistle blower

With regard to another news bulletin on 16th May 2017, the Nationalist Party complained that PBS did not cover evidence given in Court by a whistle blower who worked with Pilatus Bank as regards non-payment of her wages. This was the whistle blower who had made serious accusations about the ultimate beneficial ownership of Egrant – a secret Panama company. The Party pointed out that all news portals had given

[78] Broadcasting Authority Annual Report 2017, Programme Complants, 4.4 Complaint by Nationalist Party vs. PBS (TVM News) p 22

the evidence extensive coverage, and that PBS in not giving coverage to evidence regarding the same whistle blower's wages was engaging in an exercise of gatekeeping.

PBS argued that the station had given extensive coverage to all that the same whistle blower had said as regards Egrant, but it could not accept that anything done by the same whistle blower had news value.

The Broadcasting Authority did not agree with PBS on this issue and observed that from the moment that the person in question chose to be the whistle blower in the Egrant case, she had become a person of public interest and for that reason her evidence in Court – even with regard to her wages – was important and had news value. Moreover, the public service broadcaster had not predicted that from her evidence, elements of public interest could emerge. In view of these considerations, the Authority held that the Nationalist Party complaint was justified, but felt that there was no room to offer a remedy.[79]

It is worth pointing out that within the context of case-law of the ECtHR, disclosures by employees can be regarded as whistle-blowing on illegal conduct. In the Guja case[80] the Court had regard to the following statement from the Explanatory Report to the Council of Europe's Civil Law Convention on Corruption –

> 'In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong.'[81]

On that basis, the Court held that in the appropriate circumstances, such disclosure is protected by Article 10 of the ECHR. Moreover, 'the interest which the public may have in particular information can sometimes be so strong as to override even

[79] Ibid, 4.8 Complaint by Nationalist Party vs. PBS (TVM News) p 24
[80] *Guja v Moldova* App no 14277/04 (EctHR 12 February 2008)
[81] Ibid, 72

a legally imposed duty of confidence.'[82] The applicability of Article 10 to the workplace was re-affirmed in a case involving a Russian judge who was debarred from holding judicial office in view of her critical public statements about judicial proceedings in Russia.[83] The penalty at issue was considered as 'capable of having a "chilling effect" on judges wishing to participate in the public debate on the effectiveness of the judicial institution.[84] The Court has held on many occasions that Article 10 applies to all kinds of information or ideas or forms of expression including when the type of aim pursued is profit-making or relates to a commercial or professional activity of the applicant.[85]

7.6.3 Political commentary

It was the turn of the Labour Party to file a complaint. In the news bulletin transmitted on 19th March 2017, during a live telephone link from a Nationalist Party political event, the PBS journalist used the expression 'shocking story' which constituted a political commentary since the journalist was making his own, remarks made by the Nationalist Party Leader during the same event.

PBS counter argued that the phrase 'shocking story' was preceded by 'He said …' and that therefore the reference was in fact made to the Nationalist Party leader, although the journalist had possibly rushed or did not express himself clearly enough when using the qualifying expression 'He said…'

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[82] Ibid, 74
[83] *Kudeshkina v Russia* App no 29492/05 (EctHR 26 February 2009)
[84] Ibid, 100
[85] *Sosinowska v Poland* App no 10247/09 (EctHR 18 October 2011) 68, 76. See also *Bucur and Toma v Romania* App no 40238/02 (ECtHR 8 January 2013)

On the basis of the evidence produced and the submissions of the parties, the Broadcasting Authority held that the Labour Party claim was unfounded.[86]

7.6.4 Portrayal of minors or vulnerable persons

In another decision, the Broadcasting Authority affirmed the obligation on broadcasters not to portray minors or vulnerable persons without the consent of their legal guardians or of the relevant social welfare agency *(Appoġġ)*, unless such portrayal was strictly required for the reasons envisaged in the law.

The portrayal in question - in a news bulletin transmitted on 16th February 2019 - was of a minor suffering from a rare medical condition within the context of the coverage of an event organised by the Prime Minister's wife as Chairperson of the Marigold Foundation which in turn is the Founder of the National Alliance for Rare Diseases Support.

The Broadcasting Authority ruled that apart from cases of exceptional public interest, such direct portrayal of the vulnerable person in question had to be avoided, and the public service broadcaster had to seek in any case the approval of the social welfare agency in question. The Broadcasting Authority issued a warning against the station not to repeat such omission.

Reference to the minors' 'special situation and the importance of development and integration in society' has been affirmed by the ECtHR which even with regard to retention of data affirmed, '… the Court considers that particular attention should be paid

[86] BA Annual Report 2017 (n78), 4.12 Complaint by Labour Party vs. PBS (TVM News) p 26

to the protection of juveniles from any detriment that may result from the retention by the authorities of their data following acquittals of a criminal offence.'[87]

7.6.5 Coverage of civil society

Two cases were decided by the Broadcasting Authority with regard to news items pertaining to civil society. The first case regarded coverage of a protest event having as its theme 'Truth and Justice', organised by the civil society *Repubblika* on the occasion of the second anniversary of the assassination of journalist Daphne Caruana Galizia.

The complaint in question regarded the news bulletin of 19th October 2019 where the newscaster used the expression 'tens of people attended' when in reality it was a case where 'thousands of people attended'.

PBS admitted that the coverage was not factual and the station journalists were even asked not to mention or give an indication of number of persons attending the protest. PBS considered the case closed on the basis that the station had carried a correction issued by *Republikka* quoting the same civil society organisation as pointing out that around four thousand persons had attended, and not as claimed by PBS only tens of people.

Civil Society pointed out that by carrying their correction, the public service broadcaster had still not taken ownership of the fact that the attendance was far larger than portrayed in its coverage but merely reported what civil society was stating about the matter.

The Broadcasting Authority took note of the fact that PBS had confirmed and recognised that its original news report could have been better, and that the station had tried to make up for its shortcoming. On that basis, the Authority felt that there was no

[87] *Case of S and Marper* (n58) 124

scope for a further correction, and decided not to take further cognisance of the complaint.[88]

The second case regarded coverage of a decree by the Fist Hall of the Civil Court (Constitutional Jurisdiction)[89] in a lawsuit filed by the same organisation *Repubblika* contesting the procedure being used by Government for appointment of members of the judiciary, as a procedure that is in default of the Treaty of the European Union, and of the Charter of Fundamental Rights, in particular of the European law principle of due process 'by an independent and impartial tribunal previously established by law'. The Court gave a decree to the effect that as was requested by plaintiffs, the matter should be referred to the Court of Justice of the European Union for an opinion on this issue. The PBS coverage, in its news bulletin of 5th November 2019, with regard to the Court's decision included reactions from the Leader of the Opposition, and from the Labour Party, as well as a reference to the Attorney General who indicated at that stage that he intended to appeal from the said decision. Still the PBS coverage did not include the views of the very organisation that had actually filed the lawsuit in question.

The Broadcasting Authority held that while the News Editor enjoyed editorial discretion with regard to coverage of Court decisions, wherever there are comments or political statements about the said decisions, the station should consider all the comments and / or views made known about the matter. On the basis that the political comments by the civil society organisation *Repubblika* were left out, their complaint was justified. Still, on the basis that in the prevailing circumstances, the views of civil society had been amply covered, the Authority decided not to offer any remedy.[90]

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[88] www.ba-malta.org/pbs-repubblika-19-ta-otturbu-2019 (last accessed: 28 June 2020)
[89] *Marion Pace Axiaq et noe v l-Onor Prim Ministru et,* Civil Court, First Hall (Constitutional Jurisdiction), per Mr Justice Mark Chetcuti, 4 November 2019
[90] www.ba-malta.org/pbs-repubblika-5-ta-novembru-2019 (last accessed: 28 June 2020)

To the author's mind, the Broadcasting Authority's general reluctance to provide a remedy as in asking the public service broadcaster, if necessary, to re-transmit a news item that would not have met the required standard of fairness and objectivity, is excessive. The Broadcasting Authority presumably aspires that through its decisions, it is still setting further guidelines for broadcasters which would be kept in mind for the future. Still, the Broadcasting Authority ultimately needs to weigh less in favour of editorial discretion where its own standards and guidelines would not have been reached, and to act more as the guardian of the public's right to fair and objective information.

7.7 Judgments by the Courts of Justice

Two cases regarding the duty to provide information and to ensure objectivity were referred to the Courts of Justice.

7.7.1 Quality of news coverage

The first case specifically referring to quality of news coverage dates back to forty-three years ago. In *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et* (1977) case, the Courts of Justice had to deal with a situation where entire segments from the Opposition Leader's speech were deliberately left out. Those omissions together with unintelligible reporting had prevented viewers from being able to follow the messages of the newly elected Leader of the Opposition when he was delivering his first major policy speech on the occasion of Workers' Day in 1977.

The case was referred to by the Court as a 'further step' in the evolution of Malta's law regarding radio and television broadcasting in the political field that had to follow rules of impartiality and of fair apportionment of time and facilities between persons of different political opinions.

The Court observed that earlier cases had dealt with the issue of offering, where appropriate, a right of reply with regard to Ministerial broadcasts, while the new case was dealing with the concept that news coverage of political events had to be adequate and impartial –

> a new issue of fundamental importance to democratic life and to the public's right to have an opportunity to have fair coverage of both sides.[91]

In this case, the Court made reference to the fairness doctrine that had to be considered as the guiding principle in interpreting the relevant provisions of the law. The Court then quoted with approval what had been pointed out by the U.S. Supreme Court -

> The primary goal is that of producing an informed public capable of conducting its own affairs. It is the right of the viewers and listeners which is paramount here. It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas which is crucial here.[92]

The Red Lion case enunciating the fairness doctrine had already been quoted approvingly by the Court of Appeal, eleven years earlier, in one of the early cases dealing with Ministerial broadcasts.[93] It is not often that the Courts of Justice would resort to quote from precedents of Courts in the United States of America, and the author has not found other references to U.S. judgments in cases relating to broadcasting, but since the nature of broadcasting tends to know of no borders, the author finds the reference made in these two judgments to the American fairness

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[91] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et.,* Civil Court, First Hall per Mr. Justice Maurice Caruana Curran, 4 August 1977, 7

[92] *Red Lion Broadcasting Corporation v Federal Communications Commission,* United States Supreme Court, 395 U.S. 377, 378

[93] *Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro noe.,* Court of Appeal, per Chief Justice Prof. J J. Cremona, Mr Justice Prof. Joseph H. Xuereb, Mr Justice Maurice Caruana Curran, Mr Justice Victor R. Sammut, and Mr. Justice Giovanni O. Refalo, 26 February 1976

doctrine appropriate in the sense that it encapsulates the duty of producing an informed public by providing access to a wide range of different ideas.

This duty fits in very well with the concept of impartiality in Malta's broadcasting law, the more so when one considers the reference made in the Constitution to "broadcasting facilities and time being fairly apportioned between persons belonging to different political parties."[94] Having said that, considering that access to broadcast media in the United States tends to be based primarily on commercial considerations, further reference to American precedent would not be appropriate.

Applying that principle enshrined in the 'fairness doctrine' to news coverage, the Court apart from referring to what was then Article 122 (now Article 119) of the Constitution, referred to what were then paragraphs (c) and (g) of article 7 of the Broadcasting Ordinance, 1961 – and are now, with minor changes, paragraphs (b) and (f) of Article 13 of the Broadcasting Act, Cap. 350 of the Laws of Malta. The said paragraphs of the 1961 Broadcasting Ordinance provided -

> (c) that any news given in the programmes (in whatever form) is presented with due accuracy and impartiality;
>
> ……..
>
> (g) that due impartiality is preserved as respects matters of political or industrial controversy or relating to current public policy….
>
> …..
>
> Provided that nothing in paragraph (g) of this subsection shall prevent the inclusion in the programmes of: -
>
> …….

[94] Art. 119, Constitution of Malta

(iii) factual and objective news coverage of events of political interest.

The Court observed that the words 'accuracy' and 'impartiality' in paragraph (c) with regard to news in general provide the guiding note, while the words 'factual' and 'objective' specifically with regard to political news, in sub-paragraph (iii) of the proviso to paragraph (g), render that guiding note even more pure.[95] In the author's opinion, although the present Broadcasting Act no longer makes such a distinction between news in general and political news in particular, the arguments made by the Court remain valid.

The distinction in the wording between paragraphs (c) and (g) (iii) of article 7 (2) of the Broadcasting Ordinance 1961 was used as an argument in an appeal by the public service broadcaster to the effect that political news coverage only had to be 'factual' and objective' and not necessarily also impartial. The Court of Appeal rejected this argument as fallacious on the basis that the wording in sub-paragraph (iii) of the proviso to paragraph (g) was subordinate to the wording in paragraph (c) rendering the wording in paragraph (c) applicable to <u>all</u> the news. In any case, all the provisions of the broadcasting law are then subordinate to the overriding provision of the Constitution with regard to the requisite of political impartiality.[96] The interpretation given by the first Court to the raison d'etre of the law remains of utmost relevance -

> The basic principle of the Constitution and the (Broadcasting) Ordinance is that politics is not prohibited from broadcasting, and that it is even dutiful that the public be well educated and informed of the different political opinions, in

[95] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et.,* Civil Court, First Hall per Mr. Justice Maurice Caruana Curran, 4 August 1977, p 25

[96] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et,* Court of Appeal, per Mr. Chief Justice Prof. J J Cremona, Mr. Justice G. O. Refalo, and Mr. Justice F. Mizzi, 21 April 1978

> order to be able to mature politically, but everything has to be carried out within the limits of due impartiality and (fair) apportionment of time.[97]

The Court added that in this regard, broadcasters had to aim for high journalistic standards.

> The lack of faithfulness to the original (text) could be positive …. or negative, through distortion of realty. Whenever that spectre emerges, we are faced with the monstrosity of political censorship, that could also be involuntary, but remains equally culpable, except of course if it is so marginal that one could ignore it without perturbation.[98]

The Court on the basis of these principles sought to carry out an examination of the reportage that was complained of from three points of view: number of transmissions allocated to the news item in question; time allocated; and substance of report.

The Court established that as many as 104 lines of news script had been eliminated from an original news report of 196 lines. The Court was comparing the summary as originally drawn up by the journalist assigned to cover the Leader of the Opposition and the summary as eventually broadcast after the same text was revised by the public broadcaster's Head of News. The Court held that the original report was not 'edited' but 'slashed', leading to a rather pale reflection of what the newly elected Leader of the Opposition had said at the Party's General Congress. The Court ordered the Broadcasting Authority to transmit an adequate summary of the speech in question and pointed out to the same Authority the main themes within that speech that had to be covered intelligibly within a fortnight of date of judgment. The judgment was duly complied with.

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[97] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci noe. et.,* Civil Court, First Hall per Mr. Justice Maurice Caruana Curran, 4 August 1977, 25

[98] Ibid

7.7.2 Parliamentary coverage

The issue of partial reporting came up again with regard, this time round, to coverage of a speech by the Leader of the Opposition in Parliament, in the case *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci, noe. et* (1978).

When the Civil Court, First Hall, proceeded to consider this case with urgency[99] and decide on the complaint raised by the Opposition Leader, that Court established that the parliamentary report in question was "unbalanced, unfair and partial" although the Court excluded malice on the part of the person drawing up the report.

The Court proceeded to highlight that five parts of the speech delivered by the Opposition Leader in Parliament, as resulting from Parliament's own transcript and records, were missing in the television coverage relating to it, and ordered the Broadcasting Authority to retransmit a summary of that speech, comprising this time round the five 'missing parts' and that the Broadcasting Authority was to ensure that the entire report would be intelligible to viewers.

In its judgment, the Court pointed out -

> The purpose of the law is to (to ensure) that when a citizen follows television or radio broadcasts, he would be able to form an opinion about what is being transmitted, since in that way he would be receiving political education, he would be forming his opinion and he would not be unduly influenced by the way how issues are being presented.[100]

[99] The First Hall of the Civil Court had originally decreed that the case did not require to be heard with urgency as requested by plaintiff. The Court of Appeal overruled that decree. *See:* Chapter 6, p 46

[100] *Dr Eddie Fenech Adami pro et noe. v Dr Gerald Montanaro Gauci, noe. et,* Civil Court, First Hall, per Mr Justice Vincent Scerri, 16 January 1978

7.8 Conclusion

As the ECrtHR had occasion to point out in *Observer and the Guardian v the U.K.*[101]

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> It is nevertheless incumbent on it (the press) to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog.

Within the context of the public's right to know, the public service broadcaster has a crucial role in a democratic society. His role is to stand above any political, commercial or any other possible form of conditioning, to provide the public with a truly comprehensive, objective and fair portrayal of all the information to which the public has a right. The vigilance that needs to be exercised by the public service broadcaster on his own output, and then by the Broadcasting Authority and ultimately by the Courts of Justice is meant to safeguard that right through which democracy itself thrives.

[101] App no 13585/06 (ECrtHR, 26 November 1991) 59

8.1 Licensing by Minister responsible for culture

One of the significant developments in the concept of public service broadcasting is the emphasis on the cultural dimension of such broadcasting. In our own Broadcasting Act, '"Minister" unless otherwise indicated means the Minister responsible for culture.' [1]

The 'company providing public broadcasting services' in Malta is in terms of that law to be licensed by the Minister responsible for culture (Art. 10, sub-articles 4C and 4D) Moreover, any 'general interest broadcasting service' must ensure 'that proper proportions of the recorded and other matter included in the programmes are in the Maltese language and reflect Maltese cultural identity.' (Art. 13 (2) (d))

Still, in virtue the Broadcasting (Amendment) Act, 2020 (Act No. LVI of 2020), regrettably the definition of 'Minister' has been substituted by 'Minister responsible for broadcasting.' That unfortunately means that while Government is regularising its position in the sense that the Minister given responsibility for broadcasting has in the current Cabinet of Ministers not been the Minister responsible for Culture, on the other hand the linkage between broadcasting and the Ministry for Culture at Ministerial level is being removed. While this move is regretted at the political level, it is suggested that the cultural remit of the public service broadcaster remains a crucial component of its very *raison d'etre.*

8.1.1 Responsibility for broadcasting policy

When Malta's first ever National Broadcasting Policy was published in April 2004[2], it was stated from the very outset of that document that broadcasting policy was

[1] Article 2 of BAct (Cap 350 of The Laws of Malta)
[2] Ministry for Information Technology and Investment, & Ministry for Tourism and Culture, Government of Malta, *National Broadcasting Policy,* (NBP) (April 2004)

to be and has in fact remained the responsibility of the Minister responsible for Culture. At that stage the operational responsibility for Public Broadcasting Services Limited was retained by the Minister responsible for Information Technology and Investment. This created a dichotomy, but four years later, following the 2008 General Election, the situation was reversed and the Ministry for Culture assumed the responsibility not only for policy in general but also for the operational side of the public broadcasting services company. The aim was to avoid to have two different Ministries both responsible for public broadcasting services. Moreover, the Policy has achieved bipartisan support and has been kept in place following a change in Government five years later, and thereafter.

To the author's mind, a legal anomaly was created when the present Cabinet of Ministers was appointed on 15 January 2020, in the sense that the Ministry responsible for culture has not been assigned responsibility for public broadcasting, and a Ministry within the Office of the Prime Minister, headed by the Hon. Carmelo Abela, has been assigned responsibility for public broadcasting.[3] This anomaly is not without precedent, defies the concept of having Ministry responsible for culture also responsible for broadcasting, and at the very least necessitates an amendment to the Broadcasting Act. The anomaly has now being addressed through the Broadcasting (Amendment) Act, 2020 (Act No. LVI of 2020) through which the definition of Minister has been changed to 'the Minister responsible for broadcasting'.

Answering a parliamentary question about the said National Broadcasting Policy, on March 9, 2020, sixteen years since the original Policy was adopted, the Minister responsible for broadcasting informed the House of Representatives that this policy is

[3] www.gov.mt/Government/Government%20of%20?Malta/Ministries - last accessed 30 June 2020. *Cf. however, supra* p 304: *re publication of bill no145 to amend the Broadcasting Act, whereby definition of Minister is being changed to remove this anomaly.*

now being examined with a view to have a clearer picture as to how to proceed.[4] On July 1, 2020, the same Minister did not have anything to add to his former reply, in other words the policy is still in force but still being reviewed.[5]

Distinction in programme quality is one of the more important points of emphasis made in the National Broadcasting Policy that set out clear guidelines for the public service broadcaster to follow. An important commitment is this policy document is –

> Government re-affirms that PBS should remain Malta's public broadcaster affording the nation a varied programme schedule including programming content that would otherwise not be aired due to its commercial non-viability.[6]

This commitment echoes that made at the 4th European Ministerial Conference on Mass Media Policy which undertook -

> to guarantee at least one comprehensive wide-ranging programme service comprising information, education, culture and entertainment which is accessible to all members of the public.[7]

The emphasis made in National Broadcasting Policy with regard to the concept that the public service broadcaster needs to be placed in a situation whereby that broadcaster can offer the public what would otherwise not be possible if all broadcasting had to be carried out only on the basis of what is commercially viable, will be examined in this chapter from different angles.

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[4] HOR – Parliamentary Questions Website, XIII Legislature, Parliamentary Question no. 13195 by the Hon. Karl Gouder to Minister Carmelo Abela, Sitting no. 306 – 9 March 2020 (available at: www.pq.gov.mt/pqweb - last accessed 28 June 2020)

[5] HOR – Parliamentary Questions Website, XIII Legislature, Parliamentary Question no. 15897 by the Hon. Karl Gouder to Minister Carmelo Abela, Sitting no. 352 – 1 July 2020 (available at: www.pq.gov.mt/pqweb - last accessed 9 July 2020)

[6] NBP (n2) 3

[7] CoE, European Ministerial Conferences on Mass Media Policy and Council of Europe Conferences of Ministers responsible for Media and New Communication Services, Texts Adopted. 4th European Ministerial Conference on Mass Media Policy (Prague, 7 and 8 December 1994) *The media in a democratic society,* Resolution No. 1 – The Future of public service broadcasting (Prague Resolution) (Council of Europe, Media and Internet Directorate General of Human Rights and Rule of Law Strasbourg 2015)

8.1.2 Ethos of public service broadcasting

It is an emphasis that relates to the very ethos of public service broadcasting, to why it is needed in the first place and why it remains relevant in an age where it faces growing competition from the commercial sector.

On the other hand, it relates to the kind of obligations that can, as a result of this concept, be placed on the public service broadcaster. That is why State funding is justified and required to ensure that those commercially non-viable obligations are carried out. Furthermore, these obligations will be examined within the broader European context, in particular how the concept impacts on the principle of State Aid, and how the European Union promotes programmes and initiatives that support European culture, the arts and creativity.

As pointed out in the Policy –

> A public service broadcasting organisation has to respect the public if it wants to be of service to the public. One of the distinctions between such an organisation and the commercial ones is that a public service organisation looks at the audiences as citizens while the others look at them mainly as consumers.[8]

The fact that there is a direct link between public broadcasting services and the cultural needs of society is recognised by the Amsterdam Protocol of the European Union and is one of the arguments used to justify the competence of the EU Member States to provide funding to 'broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State.'[9]

8.1.3 Special cultural role of public service broadcasters

Hendy points out –

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[8] NBP (n2), 22

[9] *See* Chapter 4, pp –179 - 180

> Henceforth, …. Wherever broadcasting could guarantee a range, depth, quality and independence of programming for all listeners, it was thought it might become something extraordinary: something which, in a true Enlightenment spirt, would help each one of us find our "best self" and live a good life.
>
> …..
>
> To put it simply, while commercial broadcasting assumes that in cultural matters demand will be what shapes supply, public service broadcasting assumes that supply might actually be capable of shaping demand.[10]

Hendy furthermore quotes senior BBC producer Huw Wheldon who referred to the public service broadcaster's cultural task as not 'just about "making the good popular", but also about making "the popular good"', which in turn justifies the claim by public service broadcasters that they 'have a special cultural role in the modern world'.[11]

8.2 'Consciousness industries'

The National Broadcasting Policy referred to media organisations as being also 'consciousness industries' and that was one of the principles on which public broadcasting services were to be based. In this regard the Policy points out –

> As a result, media organisations of the public service kind cannot be run as if they are only a business. Programmes that fulfil the public service obligation of the organisation mainly cater for the media's cultural / symbolic dimension.[12]
>
> The Policy set the vision by providing that this need had to be –
>
> institutionally safeguarded by the setting up of an agreed set of parameters through a Public Service Obligation Contract.[13]

The Policy then divided the public service obligation of the public service broadcaster into a "core PSO" for which PBS would have to source funds from general

[10] David Hendy, *Public Service Broadcasting,* Palgrave Macmillan 2013, 26, 46
[11] Ibid 50
[12] NBP (n2), 4
[13] Ibid

advertising revenue, and an "extended PSO" for which Government would provide funds.

8.3 Minimum Requirements

Reference is then made to the minimum requirements for national broadcasting as recommended by the Council of Europe. A 'high educational and cultural element' is considered as one of those requirements.[14]

In analysing the minimum criteria required, the Policy quotes with approval what the World, Radio and Television Council (WRTC) considers, when it comes to content, that public broadcasting should provide. Content needs to include –

> 3. Programmes that Leave Their Mark – "must promote the arts and culture, broadcast existing works and cultural products, support the creation of original works: theatre, concerts, and also light music or variety programmes, (….) must feature entertainment programmes, intended for a wide public (but) differently, distinguishing itself from commercial media."[15]

Correctly, the document referred to the fact that PBS is obliged to observe the EU *Television Without Frontiers Directive (TWF)* which had already provided for reserving broadcasting time for the promotion of European works. Since then that Directive has been amended, leading to the new *Audio Visual Media Services Directive (AVMSD)* which in turn has been further amended in 2018. The significance of the new Directive from the perspective of the cultural role of the public service broadcaster will be examined *infra.*

It is within the ambit of the extended public service obligation, that Government undertook to provide the funding required for various genres of programmes that would

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[14] CoE, Recommendations and Resolutions adopted by the Parliamentary Assembly of the Council of Europe in the field of Media and Information Society, Recommendation 748 (1975) on 'The role and management of national broadcasting', Annex – Draft Minimum Requirements for National Broadcasting', Text adopted on 23 January 1975 (19th Sitting) Parliamentary Assembly, Council of Europe, Directorate General of Human Rights and the Rule of Law, Strasbourg, 2015

[15] World Radio and Television Council, *Public Broadcasting, Why? How?* Quebec: Centre d'études dur les médias, 2000 (as quoted in NBP n2)

otherwise be not necessarily viable on a purely commercial basis. Among the programmes which Government committed to cover, we find the following –

7. drama programmes in Maltese with preference being given to original drama in Maltese ….
8. programmes that are cultural in nature but especially those that enhance the Maltese language, heritage, history and culture and programmes of classical music …..
9. programmes that are focused on Gozo and in particular that highlight Gozitan society, culture and way of life ….
10. Programmes that focus on Maltese communities abroad ….
11. Programmes that are educational in nature ….[16]

All the above obligations formed part of an agreement that was then entered into between the Ministry responsible for Culture and PBS. A sample of such agreement was provided in Appendix I to the National Broadcasting Policy. To ensure that Government's undertaking to provide the required funds as well as to guarantee that the public service obligations are duly carried out, the Policy document and the contract drawn up in terms of the Policy document went into substantial detail about quotas of programmes, funding method, as well as accountability mechanism. The initial funding provided by the Government for the first year was of Lm 500,000 (€ 1,164,683).

The concept of funding to ensure that the public service broadcaster carries out its public service obligations and not be confined to relying only on commercial considerations is one of the undertakings that Member States of the Council of Europe had made through the Prague Declaration of 1994 where it was provided –

> Participating states undertake to maintain and, where necessary, establish an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions…[17]

[16] NBP (n2), 15 - 16
[17] Prague Resolution (n7) II

TVM, the television station run by PBS was meant to allocate between 50% and 55% of its air time for core and extended public service obligations, while the radio station was to allocate between 55% and 60%. Moreover, two thirds of that time 'should be dedicated to extended public service programming'.

Government would allocate a determined sum every year, and PBS would keep detailed costs of programmes funded in this manner in order to reconcile actual cost with subsidy given. If the costs overrun the subsidy, then PBS would be responsible, but if the subsidy overran the costs, then PBS would retain half of the costs saved, 25% would divert back to Government, and 25% would be used by PBS to fund itself 'the following year's extended public service obligation in addition to the subsidy allocated in the year's estimates.'[18]

The system became fully operational as of 1st October 2004.

In the Programmes Policy that PBS was asked to follow, PBS was to provide 'a specific dimension to its varied and high-quality range of programmes in the fields of information, culture, education and entertainment.' Moreover, it was stipulated that –

> Programmes should promote Maltese heritage, culture, the arts and language, enhance human dignity and underpin the social cohesion, and the quality of life and the environment.[19]

PBS was also expected to start outsourcing most of its programmes (apart from its news bulletins) to independent, producers with PBS retaining editorial control over such productions. One of the advantages that was advocated for 'an aggressive out-sourcing policy' is that outsourcing 'encourages and maximises creativity' since –

[18] NBP (n2) 18
[19] NBP (n2) 28

> Creativity has a short shelf life. Farming out helps the company to pick and choose the most creative at a particular point in time and not depend solely on its own full time employed "creativity" which it has to carry for many years.[20]

8.4 Broadcasting Authority Regulations

The General Interest Objectives (Television Services) (Selection Criteria) Regulations published on 21 June 2011[21] issued by the Prime Minister, after consultation with the Broadcasting Authority, set out the criteria for the selection of television services that fulfil a general interest objective, whether such services are generalist or niche. Those criteria include a reference to programme genres 'which are considered to fulfil a core or extended public service obligation'[22] which genres are then listed in Schedule A to the said Regulations.

Echoing the Broadcasting Policy on the same subject, among the programme genres listed in Schedule A we find –

(viii) Drama programmes in Maltese with preference being given to original drama in Maltese;

(ix) Programmes that are cultural in nature but especially those that enhance the Maltese language, the arts and culture, as well as programmes of classical music;

(x) Programmes that are focused on Gozo and in particular that highlight Gozitan society, culture and way of life;

(xi) Programmes that focus on Maltese communities abroad;

(xii) General information programmes;

(xiii) Programmes that are educational in nature.

With regard to a television station that has been assigned the status of a generalist general interest objective service, that station must ensure that not less than thirty-five per cent of its programmes are from at least five genres that are considered to fulfil a core

[20] NBP (n2) 29
[21] S.L.350.32
[22] S.L. 350.32, Regulations 3 (3) and 4 (3)

or extended public service obligation – as listed in Schedule A. Then while niche general interest objective television services are allowed to be more flexible and to transmit programmes from a limited number of the programme genres listed in Schedule A, still niche stations have to ensure that not less than sixty per cent of their output shall consist of such programmes[23], the idea being that in this manner there will be scope for development of more specialised broadcasting channels and as a result 'enhance the range of offer to the consumers.'[24]

Whilst a number of niche general interest objective television stations are meant to cater for different interests and together offer a wider and more specialised array of different choices, it is ultimately up to the generalist stations to offer audiences a comprehensive range of different programme genres that appeal to different tastes and as wide an audience as possible. That is why these stations are to offer programmes that represent at least five of the different genres listed in Schedule A. The role of the public service broadcaster is crucial in this regard. As has been experienced in the United Kingdom, and reported by the Independent Television Commission in 2000 –

> It is certainly the case that despite the range of services on multichannel television, including services such as Discovery, the History Channel and National Geographic designed to cater for particular interests, some genres are under-supplied. These include arts, education, multi-cultural programmes and investigative current affairs which are generally commercially unattractive to produce. These genres have been hallmarks of PSB…..[25]

It is in view of all the foregoing and such considerations, that the Licence for the Provision of Nationwide Television and Sound Broadcasting Services, issued by the Ministry responsible for Culture in favour of Public Broadcasting Services Limited (PBS) in Malta contains, *inter alia,* the following provisions –

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[23] Ibid
[24] Ibid, 4(1)
[25] Independent Television Commission, *ITC Consultation on Public Service Broaedcasting,* (ITC, London, 2000)

WHERAS PBS has the duty of serving the general public as well as particular segments of the population by striving to be the most creative, inclusive, professional and trusted broadcaster in Malta.

……

3. PBS shall:

a. Provide high quality programming across the full range of public tastes and interests with emphasis on public service obligation programmes in accordance with the provisions of the NBP (National Broadcasting Policy) and the directives of the Ministry for Culture in line with the same policy;

b. ….

c. Broadcast European works and thus contribute actively to the promotion of cultural diversity.

8.5 Correct use of the Maltese language

Culture is ultimately about preserving and enhancing a society's sense of identity. At the communal and national level, that needs to be done by giving particular importance to a nation's language. Already, one can notice the direct reference to the Maltese language in paragraphs (viii) and (ix) of Schedule A of S.L.350.32 quoted *supra.*[26]

The Broadcasting Authority has taken various initiatives to promote and safeguard the Maltese language. In particular, the Broadcasting Authority has on 26 March 2010 issued a *Code on the Correct Use of the Maltese Language on the Broadcasting Media*[27].

The Code goes into considerable detail and begins by establishing that broadcasters shall have the duty to use the Maltese language correctly by -

(a) understanding their responsibility in safeguarding the Maltese language;

[26] *Supra* pp 324 - 325
[27] S.L. 350.10

(b) complying with developments taking place in the Maltese language, whether spoken or written, especially in the case of journalists.

The reference to developments taking place in the Maltese language is, in particular, a reference to new rules that evolve from time with regard to orthography, as such rules are issued and updated by *Kunsill Nazzonjali tal-Ilsien Malti* (National Council of the Maltese Language) on the correct spelling of various words, as well as with regard to new words that are morphed into the Maltese language, as happens with other languages.

The Code furthermore refers to the need of ensuring that proper translations are carried out, 'based on the fundamental principles of translation'[28], assisting persons who participate in programmes and even 'stopping participants who do not use the Maltese language properly.'[29]

Programmes need to be monitored for the correct use of the Maltese language, especially if they are of an educational or informative nature, or aimed at children.[30]

Two requirements in the Code sum up its purpose –

(f) ensuring that the Maltese language used is of a high level as to diction, semantics, grammar, syntax, morphology and content;

(g) ensuring a good command of all the aspects of the Maltese language so that the final result will be a unified one, well linked and comprehensible.

Broadcasting stations that transmit programmes in Maltese are then given a number of responsibilities. Those responsibilities include having their own consultant with a recognised University degree in the Maltese language or recognised by the *Kunsill*

[28] S.L.350.10, 3(c)
[29] Ibid, 3 (d)
[30] Ibid, 3 (e)

Nazzjonali tal-Ilsien Malti as having the required expertise. In any case such consultants have to be approved by the Broadcasting Authority.[31]

The Broadcasting Authority has clearly felt, and rightly so, that in an age where English has, through the internet and social media, taken over as the language of communication, and even then, that has not been without its own problems, the Maltese language needs to be further promoted. For that reason, the Code makes it obligatory on all broadcasters –

> to broadcast at least one programme over a period of three consecutive months intended to advance the Maltese language. The station shall inform the Broadcasting Authority of the date and time of such broadcast and shall forward to the Broadcasting Authority an electronic copy of the transmission not later than seven days before the date of its transmission. This programme shall not be of a lesser duration than half an hour provided that it can be broadcast within a number of segments in various programmes, which segments shall not in their totality be less than half an hour.[32]

A regular clip with regard to the correct spelling of different words in Maltese, as well as another programme to promote the Maltese language, both aired by the public service broadcaster, fulfil this obligation.

It is worth recalling that the Authority assumed responsibility –

> to ensure that broadcasting stations and broadcasters comply with their duties in terms of this Code and the rules and guidelines on the safeguard and proper use of the Maltese language.[33]

8.5.1 Other initiatives to promote correct use of Maltese language

Apart from enacting the Code, the Authority has proactively embarked on a number of initiatives to promote the correct use of the Maltese Language in broadcasting.

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[31] Ibid, 4 (a)
[32] Ibid, 4 (d)
[33] Ibid, 5 (a)

One significant initiative has been that of sponsoring a number of media presenters to sit for the Certificate Course in Proof Reading.

> During 2018 the Authority sponsored media personnel occupying different roles in the industry to follow this course in proof reading of the Maltese language. The course organised by the University of Malta, is of a year's duration. This course leads to a formal qualification whilst raising standards of the local language, both written and spoken, on radio and television. The beneficiaries sign an agreement binding them to attend all the sessions and for the first year this time, they were also asked to provide a report on a theme in broadcasting which would help other media colleagues on the use of Maltese language.[34]

In 2018, three broadcasters successfully completed their course, one from the public service broadcaster, and one each from the political stations – NET TV and ONE TV.

On 19August 2019, the BA issued a circular[35] to broadcasters to inform them that this time round it was launching a new course in the Maltese language together with *Kunsill Nazzjonali tal-Ilsien Malti* for journalists, newsreaders and presenters. Although, the course was tailormade for broadcasters, the author has been informed that there was no uptake for the same course due to lack of interest.

In 2020, the Broadcasting Authority offered to sponsor broadcasters to undergo a course run by the University of Malta in conjunction with *Kunsill Nazzjonali tal-Ilsien Malti* in proofreading in the Maltese language. The author has been informed that there was one broadcaster who took up the offer.

It is suggested that apart from the need for the Broadcasting Authority to be more vigilant in ensuring correct use of the Maltese language by broadcasters, it would be appropriate to subject broadcasters to a positive obligation of reporting to the Authority

[34] BA, Annual Report 2018, 6
[35] www.ba-malta.org/circulars-archive (accessed 29 January 2020)

about what initiatives they would be taking to abide by the *Code on the Correct Use of the Maltese Language on the Broadcasting Media.*

8.6 Malta Television Awards

An important initiative of the BA that links with promoting culture and quality programming in general is its collaboration with a private entity in the organisation of the Malta Television Awards. According to the Authority's Annual Report for the year 2017, the Authority participated in the organisation of –

> The Malta Television Awards, an event aimed at raising standards in local broadcasting and rewarding the best. It is a combination of talent, creativity, training and sheer hard work which produces that which entertains and informs the viewer…… The Malta Television Awards are an acknowledgement of the highest degree. In spite of the industry's limited resources, the Authority notes that much of what is produced is of a professional level in most aspects and the event itself contributed to highest quality in TV broadcasting.[36]

8.7 Quality in television broadcasting

In November 2018, the BA appointed a Consultative Committee to evaluate the issue of quality in television broadcasting in Malta and to make a number of recommendations for the future.

The committee had to examine various aspects of quality as expected from whomsoever produces content for television broadcasting. Apart from consultation meetings with relevant stakeholders, the committee examined samples from various programmes, including drama, aired by different television stations. Quality was looked into from three aspects in particular: content, aesthetic level, and the technical element.

[36] BA, Annual Report 2017, 12

Difficulties with regard to the use of the Maltese language, both as it is spoken, as well as written in crawls or captions, were, not surprisingly, identified by the sub-committee which referred to the BA initiatives to address the situation.

With regard to drama, the Consultative committee referred to lack of sufficient resources to achieve the desired standards, and noted that one particular tele-serial episode that stood out from the rest for its script, dynamic camerawork, good planning and gripping story line had benefitted from funds provided by Culture TV. That indicated how Maltese productions could reach higher standards through more support. The Committee made its assessment after seeing episodes from different tele-serials shown by different broadcasters in Malta. The Committee listed the different episodes but did not point out, in its report, which was the one that stood out from the rest.

A number of recommendations emerge from the Report prepared by the Consultative Committee and published by the Broadcasting Authority.[37] The more important recommendations include:

- Amending the Broadcasting Law, in order to provide for Minimum National Standards in the field of television broadcasting. These Minimum National Standards are to be achieved by whoever has a broadcasting licence, over a given period of time. The Broadcasting Authority should be the guardian to ensure that each licensed station reaches these levels in order to be able to retain (or in the case of a new applicant) acquire a licence to broadcast through television. This should be carried out through an audit of all licensed stations. Moreover, there should be a Fund to assist broadcasters achieve the said Minimum National Standards.
- There should be an increase in public funds through schemes aimed to assist the production of programmes of different genres for such programmes to be of a high quality, with the possibility that these could also be marketed abroad. All stations should be able to apply for these funds.

[37] BA, *Rapport imħejji mill-Kumitat Konsultativ dwar il-Kwalita' fix-Xandir Televiżiv fi ħdan l-Awtorita' tax-Xandir* (Report prepared by the Consultative Committee, as regards Quality in Television Broadcasting, within the Broadcasting Authority) Hamrun, November 2019

- The authorities concerned should work on helping private stations avail themselves from European funds directed at costs involved for the training of employees. These funds should be used to have an intensive training programme in an effort to meet in the first place the Minimum National Standards.

- A Broadcasting Academy should be set up under the auspices of the Broadcasting Authority aimed at all persons who wish to be engaged in television broadcasting. This Academy should offer teaching courses that are accredited by the Commission for Higher Education.

Apart from these Recommendations, the BA report observed that it was only the public service broadcaster that had a specific unit to control quality in programming, although even then there were limitations since that unit did not cover live broadcasts and should not limit its scrutiny to a few details in one episode or another as opposed to looking at the overall quality of the various programmes. The Report furthermore recommended a process of outreaching the University, the Malta College for Arts, Science and Technology (MCAST) and the Education Department to better synchronise training in media, journalism and broadcasting with the industry requirements.

The issue of making better use of European funds will be examined within the context of the European dimension, discussed *infra.*

8.8 The European Dimension

In a Recommendation dealing with the *Challenges facing the European audiovisual sector*[38] the Parliamentary Assembly of the Council of Europe expressed itself as follows –

> The Assembly deplores the persistent and growing threats to the integrity and special value of culture in a commercial environment. Audiovisual works, because of their cultural value, must not be regarded as a simple commodity and treated

[38] CoE (2004) Recommendation 1674 https://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17246&lang=EN -last accessed: 7 July 2020

like any other service in the framework of the Doha Round of the World Trade Organization.

Safeguarding the cultural value of broadcasting has been at the heart of European policy both within the Council of Europe as well as within the European Union over the years, since it is that value that affirms not only national identity within the various Member States but also a strong sense of European identity.

Vaclav Havel, former President of the Czech Republic, sums up the argument very eloquently -

> European public service broadcasters are, in my opinion, essential societal institutions in the service of culture and democracy……. Public service broadcasters act as guardians of national cultural diversity. You will hardly find anyone else in the audiovisual world that would consistently preserve and foster the languages, literature, theatre, music and history of the many European nations. By doing this they are at the same time sustaining the national cultural basis on which true European integration can be built.[39]

The role of the public service broadcaster is crucial. As pointed out by Jakubowicz in the same book –

> 'Whichever of the great many definitions of public service broadcasting one chooses to cite, upholding and strengthening national and cultural identity has always been a central objective of this form of broadcasting. Also, whatever the weakness of public service broadcasters in particular instances may have been, most have always outperformed commercial broadcasters in the area of cultural programming which embraces all types of music, dance and theatre, literature and poetry, visual arts, design, architecture and the built heritage, film and comedy.'[40]

Sustaining cultural diversity and democracy is deemed as one of three categories of Public Service obligations that characterise and impinge on European public

[39] Vaclav Havel, Preface in Christian S. Nissen (ed) *Making a Difference – Public Broadcasting in the European Media Landscape* (John Libbey Publishing / European Broadcasting Union 2006) vii

[40] Karol Jakubowicz, 'If not us, then who? Public service broadcasting and culture in the 21st century' in Christian S Nissen (ed) *Making a Difference – Public Service Broadcasting in the European Media Landscape* (John Libbey Publishing 2006)

broadcasters. The other two categories are enhancing social cohesion and serving the individual citizen.[41]

Nissen argues further –

> Symbolically speaking, citizens of modern society have left the "town square" (where they used to swap "the talk of the town") and have withdrawn to their private homes.
>
> Public Service Broadcasting is one of the few societal institutions in a position to counterweight this trend by bringing the "town square" to private homes, thus re-establishing at least some of the lost societal and cultural commons.[42]

According to Nissen, 'the free movement of capital, goods and services, growing tourism, migration, business travel and language abilities' are among the trends 'freeing' Europeans of traditional national boundaries. Still –

> The backside of the coin is that a number of huge cosmopolitan metropolises are at the centre of this new internationally-oriented culture, and consequently place many of the smaller European countries on the periphery making their traditional cultures ripe for being taken into custody at the museum of national heritage.[43]

To the author's mind the risk is not only on the smaller European countries, but on Europe as a whole. This is precisely why it has been felt necessary by the European Union to adopt a quota system in favour of European audio visual works, as shall be examined *infra* in a discussion about the Audio Visual Media Services Directive.

The rationale in favour of safeguarding European cultural identity is linked with preserving our way of life and the demands of a democratic society. In this sense, the public service obligations in the field of broadcasting are of a qualitative nature, leading to –

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[41] Christian S Nissen, 'No public service without both *Public* and *Service* – Content provision between the Scylla of populism and the Charybdis of elitism' in Christian S Nissen (ed) *Making a Difference – Public Service Broadcasting in the European Media Landscape* (John Libbey Publishing 2006) 66

[42] Ibid 67

[43] Ibid

serving the audience with a range of content and services of "public value" seldom found in the general (commercial) media market.[44]

The content relating to –

cultural diversity and the *demands of a democratic society …..* can be summed up in (among others) the following requirements for public programme scheduling and service provision:

- Programmes / content based upon, or bearers of national cultural heritage, language, music, literature, drama and so forth that compete with mainstream programming from the international market, especially in the small countries of Europe.
- Contribute to pan-European / international cultural diversity by sustaining individual national cultures and co-operate with other public broadcasters on co-productions, the exchange of programmes and so forth.
- Foster citizenship, political culture and democratic processes by according high priority for content in areas such as news, current affairs, education, documentaries and debate, and also provide space for critical investigative journalism.
- Set quality standards for national media production in areas such as "production values", creativity and innovation…..[45]

Examples of how the third requirement above can be fulfilled would include programmes aimed at ethnic groups, linguistic and cultural minorities as well as programmes in the national language and promoting national culture.

Barendt lists six hallmarks of public service broadcasting. Concern for national identity and culture is one of those hallmarks.[46] That principle needs to be considered within the wider concept that –

[44] Ibid 71
[45] Ibid 72 - 73
[46] Eric M Barendt, *Broadcasting Law, A Comparative Study* (Clarendon Press, Oxford, 1995) 52

> the public service broadcasting system is based on the idea that a democratic state has a responsibility for the quality of the information publicly available to citizens on its territory.[47]

It is also interesting to observe that as affirmed by the European Court of Justice, importance of implementing a cultural policy in the audiovisual sector could justify restrictions on the broadcasting of advertisements, even if such restrictions constitute a limitation to freedom of movement. 'Such restrictions may be imposed in order to protect consumers against excessive advertising or, as an objective of cultural policy, in order to maintain a certain level of programme quality.'[48]

In this case, the Netherlands Government had explained the aim of this cultural policy –

> 'to safeguard the freedom of expression of the various – in particular social, cultural, religious and philosophical – components of the Netherlands in order that that freedom may be capable of being exercised in the press, on the radio or on television. … that objective may be jeopardized by the excessive influence of advertisers over the content of programmes.'[49]

The ECJ observed, 'A cultural policy understood in that sense may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services.'[50]

8.9 Audiovisual Media Services Directive

At the European Union level, 'to harmonize national broadcasting laws and to achieve an internal market in broadcasting, the Television Without Frontiers Directive (TWF Directive) was adopted in 1989. The TWF Directive was subsequently substantially

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[47] Oliver Castendyk, Egbert Dommering and Alexander Scheuer, *European Media Law,* Wolters Kluwer, The Netherlands, 2008, 6

[48] Case-288/89 *Stichting Collective Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-04007, para 27

[49] Ibid, para 22

[50] Ibid, para 23 *See also* Case 353/89 *Commission of the European Commission v Kingdom of the Netherlands* [1991] ECR I-04069, para 30

revised in 1997 and in 2007.'[51] This then led to codification by Directive 2010/13/EU and as a result of codification, became known as the Audiovisual Media Services Directive, (AVMSD) that has again been amended in 2018.

The cultural issue was already addressed in the TWF Directive through the adoption of cultural quotas -

> to address concerns over domination by non-European programmes, especially of the United States origin, of the European television market without regulatory intervention to require "local content in television programmes."[52]

Two provisions in the TWF Directive, one for the reservation of a minimum percentage of transmission time for European works, and the other for the reservation of a minimum percentage of transmission time or programming budgets for independent European producers have been retained in the AVMS directive with regard to linear services, whilst a 'light touch version of the first provision has been included in the AVMS Directive for non-linear services.'[53]

As can be seen from the very Recital to the AVMSD[54], the cultural remit of broadcasting was one of the more important considerations taken into account by the European Parliament and the Council of the European Union to adopt the said Directive. The Recital to the Directive provides –

> (5) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services.

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[51] Peggy Valcke and Klatrien Lefever, *Media Law in the European Union,* Wolters Kluwer, The Netehrlands, 2012, para 46
[52] Ibid, para 118
[53] Ibid
[54] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version)

(6) Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures.

(7) …… the European Parliament supported the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value." …..

On the basis of such considerations, the cultural quotas are then provided in Chapter VI (Articles 16 and 17) of the AVMD.

Article 16 (1) provides –

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Then Article 17 provides –

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria. It must be achieved by earmarking an adequate proportion for recent works, that is works transmitted within 5 years of their production.

The concept of allocating a minimum of 10% of airtime or of programming budget in favour of independent producers was meant to incentivise the growth of a European audiovisual media services industry that is not limited to inhouse productions of the

broadcasting stations. The same concept is found in Malta's National Broadcasting Policy in its references to the need to farm out productions, apart from news that must still be provided by the station directly.

Member States were to provide the European Commission with reports every two years with a report on the application of both Articles 16 and 17. The reports in each case were to include adequate statistical information and the Commission would keep

other Member States as well as the European Parliament informed of such reports, and where required give its own opinion.

It is moreover worth recalling that 'Member States are to remain free, as regards television broadcasters under their jurisdiction, to lay down more detailed or stricter rules in the areas covered by the Directive.'[55] While this principle has been affirmed by the ECJ with regard to rules on advertising, it is clear that the wording of Article 4 of the AVMSD is applicable to all fields coordinated by this Directive, including therefore rules about minimum cultural content, provided that are such rules are in compliance with Union law.

8.9.1 Provisions for non-linear services

The AVMSD in contrast to the original TWF Directive sought to include within its remit non-linear services as would be the case with 'on-demand' services where viewers choose the programme of their choice from a catalogue of different programmes.

In this case, the concept of setting minimum requirements becomes more difficult to apply. Nonetheless, the AVMSD provides as follows with regard to non-linear services, in Article 13 thereof –

[55] Case C-412/93 *Société d'Importation Édouard Lecler-Siplec v TF1 Publicité and M6 Publicité SA* [1995], para 11

> Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and / or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.

This is referred to as a 'soft quota' by Valcke and Lefever.[56]

Recital 69 of the Directive provides the rationale for dealing with non-linear services as follows –

> On-demand audiovisual media services have the potential to partly replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity…..

8.9.2 Further amendments to the AVMSD

On 14 November 2018, the AVMSD was amended by a new Directive[57] to take account of increasing audiovisual content on video-sharing platforms and thus providing an updated legal framework to reflect these developments. It was felt that 'those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenue as audiovisual media services.'[58]

In virtue of the new (amending) Directive, the 'soft quota' as regards non-linear services has been substituted by a very clear and specific quota. Article 13 (1) of the amended AVMSD provides –

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[56] Valcke and Lefever (n51) para 122

[57] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 Novembeer 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

[58] Ibid, Recital (4)

> Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure prominence of those works.

The kind of prominence to be given to European works is explained in Recital 35 of the 2018 Directive[59] –

> Prominence involves promoting European works through facilitating access to such works. Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools.

Moreover, EU Member States have been enabled to impose financial obligations on media service providers established on their territory, and such obligations can take the form of direct contributions to the production of and acquisition of rights in European works. The Directive furthermore provides for the imposition of such obligations by a targeted State on a broadcaster established in another Member State.

8.9.3 Media Literacy Skills

A new interesting provision of the 2018 Directive is the insertion of a new Article 33a in the revised AVMSD which establishes –

> 1. Member States shall promote and take measures for the development of media literacy skills.
>
> 2. By 19 December 2022 and every three years thereafter, Member States shall report to the Commission on the implementation of paragraph 1.
>
> 3. The Commission shall, after consulting the Contact Committee, issue guidelines regarding the scope of such reports.

The requirement to develop media literacy skills is being considered not merely as a cultural goal in its own right but as a means of being able to differentiate between

[59] 2018 Directive (n57)

different kinds of content, in particular to be able to distinguish between reliable and unreliable sources of information, in an effort to combat the scourge of fake news.

8.9.4 Transposition into National Law

On 4th June 2010, the AVMS Directive was, as required by the same Directive and in line with EU laws, transposed into the Laws of Malta. Through Act IV of 2010, Part III B was added to the Broadcasting Act, and in this manner the main provisions of the Directive became part and parcel of that law, while other provisions were transposed through Legal Notices 320-326 of 2010.

The provisions with regard to linear services (Articles 16 and 17 of the AVMSD) were incorporated in our law through Legal Notice 323 of 2010 which amended Subsidiary Legislation 350.04 – *Broadcasting (Jurisdiction and European Co-operation Regulations)*. The said AVMSD Articles are specifically incorporated in Article 5 of S.L. 350.04 which moreover includes the relevant rules found in the Directive as regards how to determine "European works".

Moreover, while 'the term "independent producer" is not defined by the AVMS Directive and is thus left to the discretion of Member States'[60], Malta has used its discretion to provide the following definition –

> '"producers who are independent of broadcasters" means any person who –
>
> (a) is not an employee (whether or not on temporary leave of absence) or a broadcaster;
>
> (b) does not have a shareholding greater than 15% in a broadcaster:
>
> Provided that a company shall not be considered as an independent producer if a broadcaster has a shareholding greater than 15% in such company.

[60] Valcke and Lefever (n51), para 124

As regards the provisions of the AVMSD (Article 13), these have been incorporated in Article 16N (2) of the Broadcasting Act.

8.9.4.1 Transposing the 2018 Directive

European Union Directives always need to be transposed into the national law of the EU Member States. In terms of Article 2 of the 2018 Directive,

> 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 19 September 2020. They shall immediately communicate the text of those provisions to the Commission.
>
> When Member States adopt those provisions, they shall contain a reference to the Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
>
> 2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by the Directive.

The above requirements are in line with allowing European Union Member States a two-year time window within which new Directives of the EU have to be transposed into national law. The changes brought about by the 2018 Directive which has now been transposed into our Broadcasting Act are bound to have an impact on broadcasters. In view of that, the author would have preferred early transposition after carrying out an impact assessment of all changes.

> It had taken government less than three months to transpose the (2010) Directive into our national legislation, since the EU Directive was enacted on the 10 March 2010, and Act No. IV of 2010 was brought into force as of 1 June 2010, in virtue of L.N. 320 of 2010.[61]

[61] Francis Zammit Dimech, 'Malta's Media Law within a European Context' in Joseph Borg and Mary Anne Lauri (eds), *Navigating the Maltese Mediascape* (Kite Group 2019) 66

The appointment of a Working Group on the Audio Visual Media Services Directive, even before the same Directive was codified in 2010[62], by the Minister of Education, Culture, Youth and Sport in September 2008, meant that Government had its homework ready and had carried out a proper consultation exercise as well as a legal gap analysis. The Report was presented to the Minister on 26 January 2009.

In his paper 'Broadcasting in Malta: Taking Stock of Five Years of Maltese Membership of the European Union'[63], Kevin Aquilina refers to the appointment of this Working Group and observes -

> It is undoubtedly of great relief that Malta has learnt its lesson with regard to the transposition of the TWF Directive and it did not repeat the same mistakes it committed when transposing the AVMS Directive.

In his paper Aquilina refers to the lessons that had been learnt from past experience in the transposition and implementation of the TWF Directive, pointing out, *inter alia*, that where –

> a provision required the making of regulations or the taking of certain administrative decisions …. then it was not wise to delay in making such regulations or taking such decisions.

The transposition of the 2018 Directive has now being seen to through the Broadcasting (Amendment) Act, 2020 (Act No. LVI of 2020).

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[62] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administraive action in Member Sttates concerning the provision of audiovisual media services (Audiovisual Media Services Directoive) (codified version)

[63] Kevin Aquilina, Five Years On and Looking to the Future, (Paper published in 2009 Civil Society Project Report on Malta in the European Union) EDRC, University of Mata, May 2009, pp 129 - 143

8.10 European Media Programme

While taking stock of five years of Maltese membership of the European Union, with regard to broadcasting in Malta, Aquilina also refers in his paper to Malta's participation in the EU Media programme.

After analysing the current programme at the time of writing, MEDIA 2007 which comprised five schemes to provide funding, Aquilina observes that -

> it is only under one scheme that Malta has qualified and it been always the same company which has benefitted from this Programme. Hence although Malta within its first five years of EU membership is moving in the right direction in so far as the MEDIA Programme is concerned, a concerted plan of action needs to be devised by the audiovisual industry.

He then provides a list of measures through which 'local audiovisual companies would be in a better position to ameliorate their product', concluding –

> Hence in so far as this Programme is concerned, Malta has not fared well. But we are still in the initial stages of EU Membership and could therefore do far better in the future if the audiovisual industry were to take up the above challenges.

According to information available on the website of the Educational, Audiovisual and Cultural Executive Agency of the European Commission (EACEA)[64], the present Creative Europe – Media programme with a total budget of around 110 million euro is there to support European production companies interested in producing a television work demonstrating –

- high creative value
- cross border potential
- cooperation between operators from different countries participating in the MEDIA sub-programme

[64] www.eacea.ec.europa.eu – last accessed on 1 March 2020

- increased co-production and circulation of high-profile European television drama series

In particular, the programme is meant to benefit the production of TV programmes involving the participation of at least three European broadcasters. The works which can be 'one-off' or serialised may include drama, animations as well as creative TV documentaries. By helping European cultural and audiovisual works to reach audiences in other countries, the programme is also meant to contribute to safeguarding cultural and linguistic diversity.

The European Commission brochure[65] on the subject explains –

> Creative Europe MEDIA is the EU's sub-programme supporting the EU film and audiovisual industries to promote cultural diversity and strengthen its competitiveness. In the digital age, with growing international competition, MEDIA aims to increase the cross-border creation and distribution of audiovisual works, to allow the industry to grow and reach wider audiences across Europe.

The programme is split into five main components -

1. Fostering talent and skills at the European level. This component includes training for audiovisual professionals;
2. Supporting development of high-quality innovative content, including development of films and tv programmes;
3. Funding the distribution of films and audiovisual works across borders;
4. Promoting European works and reaching new audiences; and
5. Festivals, audience and film education.

The author believes that Malta would do well to explore further the opportunities that it could benefit from through this programme. That should involve the setting up of adequate structures within the Ministry for Culture and specifically within the public

[65] European Commission, 'Creative Europe MEDIA – Supporting the European film and audiovisual industries' European Union (2019)

broadcasting services to ensure maximisation of opportunities to support creativity, high quality programmes that meet the cultural public service obligations in the field of broadcasting, promotion of our national identity as well as incentivising talent and innovation.

The recommendation for devising a 'concerted plan of action' by the audiovisual industry which includes six measures as indicated by Kevin Aquilina remains highly relevant. The recommended plan of action[66] that needs to be drawn up is one which -

a. Ensures that bids are presented under all the five schemes of funding within the EU Media Programme;

b. Develops co-production initiatives with other EU production houses and television stations;

c. Attempts to co-ordinate entries to the Media Programme through co-ordinating extant resources in order to diversify the types of entries under the five schemes;

d. Pools resources, establishes joint ventures and amalgamates proposals to ensure better quality and a more successful bid;

e. Establishes a machinery which provides feedback generated by the audiovisual industry to its own component companies to enhance submissions made under the MEDIA Programme;

f. Coordinates its operations with the Maltese government entities addressing Small and Medium Enterprises in view of the fact that the audiovisual industry is predominantly composed of SMEs in order to ensure that SMEs are well assisted in making bids for the EU Media Programme, in establishing contacts with EU Member States television stations / independent producers and so on.

[66] Aquilina (n63), 135

8.10.1 Creative Europe Programme 2014 to 2020

The former MEDIA programme is now incorporated within a wider Creative Europe Programme, as established by the European Parliament and Council on 11 December 2013.[67]

The new programme has been drawn up primarily on the experience acquired through the former MEDIA programme, the Culture programme, the MEDIA Mundus programme, the 'European Capitals of Culture action' and the 'European Heritage Label action', and in the process bringing these programmes together into a 'single comprehensive programme' offering as a result more effective support for 'SMEs and micro, small and medium-sized organisations in their efforts to take advantage of the opportunities offered by the digital shift and globalisation'.[68]

The EU Regulation setting up the Creative Europe Programme (No 1295/2013) refers to the Treaty on the Functioning of the European Union (TFEU) which, *inter alia,* confers on the Union the task 'of contributing to the flowering of cultures of Member States, while respecting their national and regional diversity'.[69]

Reference is also made to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 'to strengthen the competitiveness of the cultural and creative sectors and to facilitate adaptation to industrial changes.'[70]

With particular reference to the audiovisual sector, in view of the transnational and international character of the Programme, it is recognised that the objectives of the Regulation can be better achieved at the level of the European Union, while

[67] Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC [2013] OJ L 347/221
[68] Ibid, Recitals 2 and 19.
[69] Ibid, Recital 1
[70] Ibid

acknowledging the principles of subsidiarity and proportionality and as a result not going beyond 'what is necessary in order to achieve those objectives.'[71]

The Programme was to be implemented for the period from 1 January 2014 to 31 December 2020. One of the Programme's general objectives is 'to strengthen the competitiveness of the European cultural and creative sectors, in particular of the audiovisual sector, with a view to promoting smart, sustainable and inclusive growth.'[72]

The Programme is structured into three sub-programmes, including the MEDIA Sub-programme which is intended to reinforce 'the European audiovisual sector's capacity to operate transnationally'.[73]

Article 9 of the EU Regulation then identifies the priorities of the MEDIA Sub-programme as including (a) facilitating the acquisition and improvement of skills and competences of audiovisual professionals and the development of networks; and (b) increasing the capacity of audiovisual operators to develop European audiovisual works with a potential to circulate in the Union and beyond and to facilitate European and international co-production, including with television broadcasters.

Article 10 identifies various support measures in order to implement the priorities as defined in Article 9. The first three of the support measures are worth highlighting and are among the support measures for which Malta would do well to have the right structures in place to ensure maximisation of the potential that they offer. The measures in question shall provide support for –

(a) The development of a comprehensive range of training measures promoting the acquisition and improvement of skills and competencies by audiovisual

[71] Ibid, Recital 36
[72] Ibid, Article 3 (b)
[73] Ibid, Articles 6 and 9

professionals, knowledge-sharing and networking initiatives, including the integration of digital technologies;

(b) The development of European audiovisual works, in particular films and television works such as fiction, documentaries and children's and animated films, as well as interactive works such as video games and multimedia with enhanced cross-border circulation potential;

(c) Activities aiming to support European audiovisual production companies, in particular independent production companies, with a view to facilitating European and international co-production of audiovisual works including television works.

During the duration of the Programme, the European Union has committed itself to be a member of the European Audiovisual Observatory. The Observatory which pertains to the Council of Europe 'was set up in Strasbourg in 1992 to reply to a distinct lack of information and transparency concerning this (the audiovisual) industry. To the present day, it continues to provide a comparative European overview of the audiovisual industry in 41 different countries as well as detailed analysis of national and even regional industries.'[74] The Observatory works through two departments, the Department for Market Information, as well as the Department for Legal Information which analyses key legal issues linked to the audiovisual sector, as well as reports on legal developments affecting this industry.

An important feature of EU porgrammes like MEDIA or Creative Europe is that the funds awarded by such programmes are done without the involvement of Member States, and are not State resources. 'Therefore, their assistance does not count for the purpose of respect the (State) aid ceilings.'[75]

[74] https://www.obs.coe.int/en/web/observatoire/about - last accessed, 15 March 2020
[75] *Infra,* European Commission Communication, State aid for films and other audiovisual works, p 398

8.10.2 Creative Europe Desks

To ensure that EU Member States better avail themselves of the opportunities offered through the Creative Europe Programme, they are expected to 'establish Creative Europe Desks in accordance with their national law and practice'.[76]

Among other mandatory tasks, Creative Desks are expected to provide information about and promote the Programme in their respective country, as well as to assist the cultural and creative sectors in relation to the Programme and provide basic information on other relevant support opportunities available under Union policy.

To the author's mind, the drawing up of a plan of action with a number of specific measures should be a priority for Malta's Creative Europe Desk if we really would like to ensure maximisation of opportunities that our country can gain from this programme in the audiovisual field as well as with regard to culture in general.

8.11 Justifying State Aid for public service broadcasters

Reference has been made to European and national instruments to emphasise the cultural role of public service broadcasters.

That role which is given as a major justification for funding such broadcasters has furthermore been recognised at the international level.

As explained by Oster -

> The importance of public service broadcasting for fostering cultural diversity has been recognised by the 2005 UNESCO Convention on the Protection and

[76] Creative Europe MEDIA (n58), Article 16

> Promotion of the Diversity of Cultural Expressions.[77] According to Articles 6 (1) and (2)(h) of that Convention, each party may adopt "measures aimed at protecting and promoting the diversity of cultural expressions within its territory." Such measures may include, among others "measures aimed at enhancing diversity of the media, including through public service broadcasting".[78]
>
> According to Oster –
>
> This re-emphasises the principle established in *Sacchi*[79], where the Court of Justice recognised that Member States legitimately define "services of general economic interest" so as to cover radio and television transmissions for considerations of non-economic public interest as well as activities of an economic nature.

That in turn means that within the parameters of proportionality, public service broadcasters can benefit from State Aid which can take the form of a 'single-funding scheme' as when a public service broadcaster is given public funds, as would be the case through collection of licence fees or otherwise, but not allowed to collect other revenues, or even 'dual-funding schemes' where the public service broadcaster is not only allocated State funds to fulfil its public service remit, but also allowed to collect other revenue, as through advertising, contracting out of air time for productions, and the offering of other services or selling of merchandise related to broadcasts, against payment. Public service broadcasting in Malta benefits from the 'dual-funding scheme'.

The relevant principles relating to derogating from State aid rules in favour of public service broadcasting have been clarified in a Communication from the European Commission.[80]

The ultimate objective is provided in article 2 of this Communication –

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[77] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention now forms part of EU law in virtue of the fact that it was approved by Council Decision 2006/515/EC of 18 May 2006

[78] Jan Oster, *European and International Media Law,* 1st edn, Cambridge University Press (2017) 505

[79] ECJ, Case 155/73 Sacchi [14]

[80] EC, Communication from the Commission on the application of State aid rules to public service broadcasting [2009] OJ C 257/1

> …. While opening the market to competition, Member States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs and public policy objectives that would otherwise not necessarily be fulfilled to the optimal extent. This was confirmed in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty (hereinafter referred to as the Amsterdam Protocol).

More specifically, the Communication refers to the cultural remit of public service broadcasting in article 33 –

> In accordance with Article 151 (4) of the Treaty[81], the Community is to take the cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and promote the diversity of its cultures. Article 87 (3) (d) of the Treaty[82] allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

In articles 38 and 47 of the Communication, reference is then made to the interpretative provisions of the Amsterdam Protocol that refers to funding of public service broadcasting for the fulfilment of their public service remit. That remit can be expressed through a 'qualitative definition entrusting a given broadcaster to provide a wide range of programming' since 'such a definition is considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.'

The Commission leaves it up to the Member States as regards what definition to give to 'public service' in the broadcasting sector, and its role is limited 'to checking for manifest error'.

According to article 48 of the Communication –

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[81] The reference in the Communication to the old numbering of the Treaty establishing the European Community (TEC) should now be read as a reference to Article 167 (4) of the Treaty on the Functioning of the European Union (TFEU)

[82] TFEU, now: art. 107 (3) (d)

> A manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.

The public service remit needs to be entrusted to the public service broadcaster 'by means of an official act (for example, by legislation, contract or binding terms of reference).' (Article 50)

It is, moreover, up to the Member States to decide on the mechanism, preferably through an appropriate independent authority, to ensure effective supervision that the public service remit is being fulfilled.

In *SIC v Commission*[83] the ECJ pointed out that while public service broadcasting falls under the definition of a 'service of general economic interest' (SGEI) as it is 'directly related to the democratic, social and cultural needs of each society'[84] in line with the principles established by the Amsterdam Protocol, the European Commission must be able to meaningfully verify whether the State financing provided to the public service broadcaster is proportional to its compliance with its public service remit which in turn necessitates that the financial and accounting data sent to it concerning the public service operator and its activity are reliable. That moreover requires that the European Commission needs to be satisfied that there is a mechanism for the monitoring by an independent body of compliance by the broadcaster with its public service remit.[85]

Significantly, in this judgment, it has been established that the Commission has a 'duty to undertake a diligent and impartial investigation' wherever it is contested, in this case by other competing (private) broadcasting stations, that the public service broadcaster received State aid that was not compatible with common market rules, or did

[83] Case T-442/03 *SIC – Sociedade Independente de Communicacão, SA v Commission of the European Communities* [2008]
[84] Ibid, para 153
[85] Ibid, para 213

not use the aid received to carry out its public service remit. In such a situation the Commission cannot 'omit to require the disclosure of information which appears likely to confirm or to refute other information which is relevant for the examination of the measure at issue, but whose reliability cannot be considered to be sufficiently established.'[86]Moreover, through its judgment, the ECJ annulled part of Commission Decision 2005/406/EC[87] in so far as the Commission had found that the exemption from registration charges in favour of the public service broadcaster does not constitute State aid. That led the Commission to re-open its investigations with regard to the complaints raised by the private broadcasters and its second (revised) Decision[88], pointed out –

> 'The Court found that the Commission's task was to establish, in relation to the ad hoc advantage consisting of the exemption from payment of the registration charges and fees relating to its transformation into a public limited company …, whether it was compatible with the logic of the Portughese system for the transformation of public undertakings into public limited companies to occur by legislation, or whether the recourse to legislation was a derogation which was intended to confer an advantage on public undertakings in relation to other undertakings.'

In its Decision, the Commission after analysing the various measures that Portugal had implemented in favour of the public service broadcaster, and applying with regard to all such measures the principle of proportionality – that is that every form of financing has to be proportionate to the net cost of the public service provided, concluded that 'the unlimited exemption accorded to RTP from the payment of any charges and fees in respect of any act of inscription, registration or annotation …. constitutes State aid.' On that basis the Commission directed Portugal to repeal the relevant legal provision, as well as to order recovery of any such State aid received by RTP under that provision until the

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[86] Ibid, para 225

[87] Commission Decision 2005/406/EC of 15 October 2003 on ad hoc measures implemented by Portugal in favour of RTP, OJ C (2003) 3526

[88] Commission Decision 2012/365/EU of 20 December 2011 on the State aid C 85/01 and ad hoc measures implemented by Portugal in favour of RTP, OJ C (2011) 9429

repeal of the law, as well as that the sums received were to bear interest from the date on which they were put at the disposal of RTP until the actual recovery.[89]

In the *TV2 Denmark Joined Cases*[90] the ECJ again emphasised that wherever it is contested that a public service broadcaster received State aid that was not commensurate or proportional with its public service remit, 'it is necessary to find out whether the Commission fulfilled its obligations to state reasons and to conduct a diligent examination as regards the manner in which' the public service broadcaster, in this case TV2 'was financed during the period under investigation, and the proportionality of that financing to the funding needs of providing the public service.'[91]

The ECJ agreed with the Commission that it would be appropriate to examine if what have become known as the *Altmark Trans*[92] criteria were satisfied. These criteria can be summarised as follows –

(1) The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;

(2) The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings;

(3) The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and

(4) Where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public

[89] Ibid, Articles 3 and 4 of Decision
[90] Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 [2008] *TV2/Danmark A/S v Commission*
[91] Ibid, para 186
[92] Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paras 88 – 93, referred to in *TV2/Danmark A/S v Commission Joined cases* (n86)

> procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately ….. would have incurred in discharging those obligations.

With specific reference to the case examined in the TV2 Joined cases, the ECJ held that merely referring to the fact that compensation in favour of TV2 was determined in a media agreement set for four years was meaningless since that was a purely descriptive reference whilst 'the parameters of the compensation were not laid down beforehand in an objective and transparent manner.'[93]

Most public service broadcasters had already been established long before the *Altmark* ruling was issued.[94] In view of that, the level of compensation needed has to be determined 'on the basis of an analysis of the costs that a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.'[95] Still for reasons of media independence, EU Member States 'cannot be sufficiently precise about their public service broadcasters' public service obligations with the narrow scope of *Altmark Trans*….. Thus, in order to both escape classification as state aid under the *Altmark Trans* criteria and to avoid violations of media freedom, Member States would have to act in the very narrow margin between eligible determination of the public service remit and prohibited violation of broadcasters' independence….. As a consequence, compensations for public service broadcasters have to be justified under Article 106 (2) TFEU (dealing with – applicability of competition rules to public undertakings which are granted special exclusive rights by Member States) under the auspices of the Commission.'[96]

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[93] *TV2 Danmark A/S Joined Cases* (n86) 225
[94] Oster (n78) 515
[95] Ibid
[96] Ibid, 518

The *Altmark* criteria were quoted by the European Commission in its decision regarding State aid in favour of public service stations France 2 and France 3[97]. In that case, the Commission decided that the second condition laid down in those criteria, whereby parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, had not been met. As a result, the grants and capital injections that France had given in favour of France 2 and France 3 constituted 'selective advantages within the meaning of Article 87 (1) of the Treaty.'[98] That Article since re-numbered as Article 107 of the TFEU deals with State aid.

The Commission then proceeded to examine if there were grounds for derogation from State aid rules in terms of Article 86 (now 106) of the Treaty dealing with undertakings entrusted with the operation of services of general economic interest. In this respect, the Commission had to establish that –

- the activity of France 2 and France 3 constitutes a public service activity and the public tasks of the two broadcasters are clearly defined (definition),
- France 2 and France 3 have been entrusted with these public service e tasks by an official decision (entrustment and supervision),
- the financial compensation granted to them is proportional to the net cost of their public service activity (proportionality test)[99]

For a measure to benefit from a derogation of State aid rules, all three conditions have to be fulfilled. As regards the proportionality test, 'it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission.'[100] The Commission drew up a table where it delved into the total costs of France 2 and France 3 and then

[97] Commission Decision 2004/838/EC of 10 December 2003 on State aid implemented by France for France 2 and France 3, OJ C (2003) 4497
[98] Ibid, para 57
[99] Ibid, para 67
[100] Ibid, para 80

deducted from those costs, those related to commercial activities as well as net profits from commercial activities, in order to establish the net cost of the public service activity. Moreover, the Commission examined in detail the argument of whether the public service broadcaster was taking advantage of the State aid that it was receiving to offer 'introductory prices and artificial reductions on their advertising slots or sponsorship activities in order to retain the custom of advertisers'[101] to the disadvantage of private broadcasting stations.

Only after determining that 'the public funds paid by the French authorities to France 2 and France 3 were lower than the cost of their public service activity and secondly that there is no conclusive evidence of anticompetitive behaviour by the public broadcasters on the market in the sale of advertising slots'[102] did the Commission determine that the State funding of the public service activity of France 2 and France 3 satisfied the proportionality test, and that as a result the conditions for the application of the derogation provided for in (now) Article 106 of the TFEU were met.

It is worth pointing out that in terms of the SGEI Framework[103] the Commission in 2005 clarified further the 'net cost principle' as applicable to public service broadcasters.

Commenting on the 2009 Broadcasting Communication [104], Repa, Tosics, Dias and Bacchiega explain –

> 'In the field of public broadcasting, the net benefits of commercial activities related to public service activities *must* be deducted fully from total costs for the purpose of calculating net public service costs and hence reducing the public service compensation. This reduces the risk of cross-subsidisation by apportioning to

[101] Ibid, para 90
[102] Ibid, para 101
[103] Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p 4 – 7. *See also* Commission, Communication 2012/C/ 8/02 on the application of the European Union State aid rules to compensation granted for the provsion of services of general economic interest.
[104] 2009 Broadcasting Communication (n79)

public service activities a larger portion of costs shared by commercial activities.'[105]

That means that while after the 2009 Communication, public service broadcasters could use State aid even with regard to new distribution platforms in view of the technological developments that had taken place since the original Communication in 2001[106]. Since one could no longer refer only to the 'classic' activities such as tv and radio broadcasting, and the Communication sought to achieve technology neutrality, it equally had to be ensured that the criteria of the Amsterdam Protocol had to be observed and that an independent supervisory mechanism was required to ensure that, and conduct what has been referred to as the 'Amsterdam Test'.

'Public service broadcasters should not use State aid to finance activities which would result in distortions of competition 'that are not necessary for fulfilling the public service mission.'[107] The 2009 Communication gave four examples of what could lead to market distortion –

1. When public service broadcasters act through commercial subsidiaries, they must have regard to the 'market economy investor principle' (MEIP) which means that the publicly financed mother company must honour the arm's length principle when dealing with the commercial daughter company';
2. Prices of advertising or other non-public services must conform to market rules, which means that State aid cannot be used as leverage to undercut prices, thereby placing competitors at an unfair disadvantage;

[105] Lukas Repa, Nóra Tosics, Pedro Dias, Alberto Bacchiega, 'The 2009 Broadcasting Communication' [2009] http://ec.europa.eu/competition/publications/cpn/2009_3_2.pdf accessed 24 April 2021
[106] IP/09/1072
[107] Repa *et* (n105) p16

3. Public broadcasters must observe the principle of proportionality with regard to acquisition of premium rights – in other words they should not unduly use State aid to buy up a market; and
4. Where public service broadcasters do not use exclusive premium rights – as with sports' events – sublicensing of those rights must be offered in a transparent and timely manner.[108]

The efficacy of complaints to the European Commission to establish whether or not there have been infringements of State aid rules can be seen not only from wherever the Commission decides that there has been an infringement and gives specific directives to correct that infringement as seen *supra*[109] with regard to ad hoc measures implemented by Portugal in favour of RTP[110] but also in cases that lead to an agreement between the Commission and the Member State concerned about the way forward.

After the Commission had received various complaints about the financing regime used in Germany in favour of its public service broadcasters, the Commission decided to close its investigation as a result of Germany committing to a number of changes in its financing package to support its public broadcasters ARD and ZDF.

As recorded in the Commission's Decision,[111] Germany formally submitted a number of commitments through a letter dated 28 December 2006, including –

- Through legislative provisions, the precise public service remit of the public service broadcasters would be established even with regard to new digital services by those broadcasters. That in turn would trigger an evaluation procedure as regards all new or modified digital offers or 'mobile services';

[108] Ibid
[109] p395
[110] RTP case (n88)
[111] Commission Decision 2007/1761/EC of 24 April 2007 on State aid E 3/2005 (ex-CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 and CP 195/2004) – Financing of public service broadcasters in German, paras 326 - 357

- To establish an evaluation procedure and criteria to ensure that all new services are covered by the public service remit and therefore serve the democratic, social and cultural needs of society; that new services contribute to *"editorial competition"* – to be defined further in Germany's future Interstate Treaty;

- That the future Interstate Treaty would by way of illustration refer to programme categories that focus on information, education or culture;

- Public service broadcasters will be legally obliged to develop a programme concept specifying these different programme categories;

- Public service broadcasters will continue to be prohibited from offering sponsoring and advertisement;

- Commercial activities of the public service broadcasters would be regulated. The legal requirements include that commercial activities can only be offered under market conditions and shall be accounted for separately from public service activities. The respect of market conditions includes explicitly the principle of market conformity and the arm's length principle;

- Commercial activities carried out by subsidiaries would have separate accounts;[112]

- Germany's independent Commission for the determination of the financial needs of public service broadcasters, the KEF *(Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten)* would ensure that deficits caused by a declared infringement would not be financed through licence fees (such being considered as constituting State aid);

- As regards the proportionality of the State funding, Germany gives assurance that, on the one hand, only the cost of the public service will be taken into account and that, on the other hand, all revenues of public service broadcasters are deducted. Any surplus would then be placed into a reserve fund destined for foreseeable under-compensation in the following years during the same licence period;

[112] The Commission had drawn the attention of the Government of Germany to the EC Transparency Directive (Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, published in the Offical Journal L 312, 29/11/2005, Article 2 (1) (d) regarding the requirement to maintain separate accounts when a public undertaking is receiving public service compensation in any form whatsoever in relation to such service and that carries on other activities.

- As regards the question of unlimited State guarantee, Germany committed that there will be no contractual guarantees in favour of commercial subsidiaries; and
- As regards the formula of assumed / hypothetical profit used for the public service broadcasters, it would be subject to regular control in order to exclude market distortions.

Germany's commitments were submitted following the first assessment that was carried out by the Commission under the EC State aid rules. That led the Commission, pursuant to Article 17 of the Procedural Regulations, to inform Germany of its preliminary view that the existing financial regime was no longer compatible with the EC Treaty (so-called "Article 17 letter" dated 3rd March 2005) and invited Germany to submit comments.[113] The Commission carried out an appraisal of the commitments which were then submitted by Germany with regard to the issues at the heart of the complaints submitted by private broadcasters, including the need to have a clear definition of the public service remit regarding new media activities, ensuring proper entrustment and control, the requirement of separate accounts, the limitation of compensation to net public service costs, respect of market principles, and the issue of acquisition and use of sports rights.[114] After carrying out its appraisal, the Commission concluded that Germany had accepted to implement the agreed appropriate measures. The Commission recorded that acceptance pursuant to Article 19 of the Procedural Regulation and closed the procedure while reminding the German authorities to submit the proposal for legal provisions implementing the commitments given in due time and, in any case, submit the final legal framework which is to enter into

[113] Commission Decision (n 111) para 74
[114] Ibid paras 358 – 396.

force two years from the date of the Commission's letter (24 April 2007) to the Federal Foreign Minister of Germany.[115]

8.12 Conclusion

While Article 167 (1) of the Treaty on the Functioning of the European Union makes reference to 'bringing the common cultural heritage to the fore', the initial thrust is for the Union to 'contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity.'

It is in that context that the remit of public service broadcasters to reflect and project a nation's core identity by promoting its culture assumes its utmost importance. That explains why Vaclav Havel referred to public service broadcasters acting as 'guardians of national cultural diversity.'[116]

Excelling a nation's culture as is one of the key responsibilities of the public service broadcaster is not without economic gain although that it is not the main consideration. Hitchens points out –

> Policies seeking to promote locally produced content are generally seen as relating to the promotion of a community's cultural values, but it is not usually as straight-forward as this, since most such policies will also serve economic goals, because of their potential to support local industry.[117]

In its communication regarding State aid for films and other audiovisual works,[118] the European Commission emphasises that 'to be compatible with Article 107 (3) (d)

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[115] Ibid, paras 398 – 399, 4
[116] Havel (n39)
[117] Lesly Hitchens, *Broadcasting Pluralism and Diversity – A comparative Study of Policy and Regulation* (Hart Publishing, Oxford 2006) 164.
[118] European Commission Communication, State aid for films and other audiovisual works (2013/C 332/01), para 25

TFEU, aid to the audiovisual sector needs to promote culture' and that while Member States are at liberty in defining the remit of cultural activities, they need to ensure to have in place a 'relevant, effective verification mechanism to avoid manifest error' in assessing eligibility of audiovisual support schemes to different audiovisual works.

Be it at the European level or at the national level, investing in culture leads to benefits at different levels, but in particular enhances a sense of identity and belonging, as befits public broadcasting services.

9.1 The shift to multi service media

The role of the public service broadcaster for the future will clearly bear the impact of "what is commonly called the age of multi-media 'convergence'"[1]

In this chapter, the author will explore present and future challenges facing the public service broadcasting sector. One challenge that needs to be examined and that affects the future of public service broadcasting is the shift to *public service media* as opposed to *public service broadcasting.*

> A current issue in the debate over the future of PSB is the means and legitimacy of extending its scope to cover the variety of platforms used by viewers to access broadcast content, from digital terrestrial television to IPTV and mobile services, as well as the evolving modes of consumption, from scheduled programming to on-demand catalogues.[2]

The move towards the broader concept of *public service media* is also reflected in European Union legislation, where what was formerly known as the Television Without Frontiers Directive has become known as the 'Audiovisual Media Services Directive' – extending the scope of the original Directive to cover various media services "for societies, democracy – in particular by ensuring freedom of information, diversity of opinion, and media pluralism – education, and culture."[3]

The amendments subsequently brought about through the 2018 Directive[4] reflect in particular how 'the audiovisual media services market has evolved significantly and rapidly due to the ongoing convergence of television and internet services.' (Recital (1).)

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[1] Geoffrey Robertson and Andrew Nicol, Media Law, Fully Revised Fifth Edition, 2008, Penguin Books, UK

[2] Ian Walden, 'Who Owns the Media? Plurality, Ownership, Competition and Access' in David Goldberg, Gavin Sutter and Ian Walden I (eds) *Media Law and Practice,* (Oxford University Press 2009) 30

[3] Directive (EC) 2007/65. Art. 1(1) / Recital (3)

[4] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 Novembeer 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or

The ultimate purpose of the 2018 Directive is to bring within the ambit of the Audiovisusal Media Services Directive video-sharing platforms and social media. As indicated in Recital (4) thereof -

> Video-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of the Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services….

One of the options that merits to be explored is precisely whether in the light of such present and future trends, Malta needs to opt for a single regulatory structure that combines within its remit the various forms of communication. In the UK, the Office of Communications (Ofcom) established under the Communications Act 2003 has replaced as many as five regulatory bodies with one that covers the entire broadcasting industry.[5]

9.2 Single Regulator convergent concept

Paul Edgar Micallef argues –

> In a small country such as Malta with limited human and financial resources, ideally one should, where feasible, aim for unified regulatory set-ups curbing overlap of jurisdiction ensuring a holistic approach thereby avoiding cross-references from one regulator to another ….. Some countries – including a few large countries – have in place a single regulator responsible for both broadcasting and electronic communications. There is no reason why a similar regulatory model should not be adopted in Malta.[6]

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administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

[5] These were the Broadcasting Standards Commission, the Independent Television Commission, the Office of Telecommunications (Oftel), the Radio Authority, and the Radiocommunications Agency. See: https://en.wikipedia.org./wiki/Ofcom, last accessed: 21 March 2020

[6] Paul Edgar Micallef, 'Reflections on the Regulatory Set-Up of Broadcasting Media in Malta' in Joseph Borg and Mary Anne Lauri (eds), *Navigating the Maltese Mediascape* (Kite Group, Malta 2019) 86

One of the large countries quoted by Micallef in his paper is the United Kingdom where Ofcom was established in 2003. Micallef argues, 'The regulatory set-up in the UK has now been in place for sixteen years and appears to be working reasonably well.'[7]

While the author is in agreement with the single regulator concept in an age of convergence of the different media, it is suggested that the UK model would need to be examined meticulously to ascertain not only where it has worked well, but also where it has been deemed to create its own difficulties. That in turn raises the issue about what should be the role of the broadcasting regulator in an era of convergence.

Kevin Aquilina referred to this theme, and pointed out –

> Technologies are coming to offer various services on one medium. All these developments have brought and will continue to bring about technological and media convergence. This, in turn, necessitates new regulatory structures to be able to monitor the new technological landscape.[8]

Aquilina outlines the characteristics of a broadcasting regulatory authority on the basis of the Council of Europe's Committee of Ministers' Recommendation 2000 (23) *on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector* – in particular that such an authority (a) should be independent from external interference; (b) should be provided with the necessary tools to fulfil its task; and (c) it should be effective but at the same time reasonable and fair. While analysing Malta's broadcasting Authority in line with these criteria, Aquilina points out that 'in Malta the Broadcasting Authority is not a convergent regulator and, therefore, does not have technical expertise.'

[7] Ibid 81

[8] Kevin Aquilina, 'The Role of the Broadcasting Regulator in the Era of Convergence' in *Law and Practice,* Malta Chamber of Advocates, Issue 7, December 2003, pp. 33 - 41

In the light of what was already happening in 2003, Aquilina was already making the case for a single convergent regulator, at least with regard to the broadcasting sector. To this effect he points out –

> As the borders between the different media erode and all products and services become available through the same platform, governments are realizing the need to create a single authority, with powers to integrate telecommunications, television, radio and print regulators. The trend seems to be moving, albeit slowly, in the direction of establishing a single convergent regulator.[9]

This argument was already a valid one in 2003. To the author's mind it is clear that seventeen years after the publication of the paper by Aquilina, the recommendation for a single convergent regulator at least for the broadcasting sector on its own – in other words leaving the telecommunications and postal sector as well as the print media to other regulators – has become an irrefutable one that needs to be addressed with urgency.

The Today Public Policy Institute (TPPI) addressed this issue in its report about broadcasting in Malta.[10] In its report which was presented to the Prime Minister, the Institute pointed out –

> 80. The current and future media scenario based on new media technologies calls for a review of the regulatory framework for the sector.
>
> 81. The convergent technologies of television, radio, internet and telephony make it possible for the consumer to view the same content on different media. For example, the same news bulletins and current affairs programmes can be viewed on television and on the internet on demand. It is therefore desirable for the regulator to be able to deal with all these technologies simultaneously. The tendency in the EU Member States is to move toward the converged regulation of broadcasting and telecommunications.
>
> 82. The European Union's Audiovisual Media Services Directive (AVMSD) entered into force on 19 December 2007. It aimed to preserve the core principles of existing European rules for television and adapt them to the new audio-

[9] Ibid

[10] The Today Public Policy Institute (TPPI), *Confronting the Challenge: Innovation in the Regulation of Broadcasting in Malta* (Lead Authors: Petra Caruana Dingli and Clare Vassallo. Discussion Paper presented to the Prime Minister, November 2014)

visual environment. The Directive covers both traditional broadcasting and new services such as on-demand films and news.

83. This Directive recognizes that traditional television broadcasting and new on-demand services are to be regulated together.

84. It is for consideration that the Malta Broadcasting Authority and the Malta Communications Authority should be merged to form one new regulatory body called the 'Malta Media Authority', regulating both telecommunications and broadcasting.

85. A new Malta Media Authority would be better equipped to approach the new audio-visual environment in the holistic manner which is promoted by the European Union.

Whether or not it is necessary to go for a complete merger between the Malta Broadcasting Authority and the Malta Communications Authority, to the author's mind it remains essential to have at least one single convergent regulator to deal with all issues linked with the broadcasting sector.

9.2.1 EU Audiovisual Media Services Directive

One of the considerations made by the TPPI is that the EU Audiovisual Media Services Directive 'recognizes that traditional television broadcasting and new on-demand services are to be regulated together.' It is suggested, however, that the Directive has never made it mandatory on Member States to set up one single convergent regulatory authority. This is even more so following the 2018 Directive[11] notwithstanding its reference to further convergence since the 2007 Directive –

> Since then, the audiovisual media services market has evolved significantly and rapidly due to the ongoing convergence of television and internet services. Technical developments have allowed for new types of services and user experiences…..

[11] 2018 Directive (n4)

> …. This convergence of media requires an updated legal framework in order to reflect developments in the market and to achieve a balance between access to online content services, consumer protection and competitiveness.[12]

Be that as it may, it needs to be pointed out that while before the amendments brought about by the 2018 Directive, the issue of whether EU Member States could each appoint one or more regulatory bodies was left open in the sense that Article 30 of the AVMSD simply provided that –

> Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive…. in particular through their competent independent regulatory bodies,

Article 30 as amended following the 2018 Directive is more explicit in allowing Member States to have more than one regulatory body. Article 30 (1) of the amended AVMSD now provides –

> Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.

While it is up to Member States to have one or more regulatory authority and / or body, provided that their independence is safeguarded, each Member State –

> shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.[13]
>
> The rules of the system of law applicable to audiovisual media services' would then be the same in each Member State, since Member States 'shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive'[14] while 'Member States shall remain free to require media service

[12] Ibid, Recital 1

[13] Audiovisual Media Services Directive (AVMSD), art. 2 (1). Consolidated Text of Directive as amended following 2018 Directive (30210L0013 – EN – 18.12.2018) . Available at: http://eur-lex.europa.eu/legal-context/EN/TXT/HTML - last accessed 30 October 2019

[14] 2018 Directive (n4), Art. 2

> providers under their jurisdiction to comply with *more detailed or stricter rules* in the field coordinated by the Directive, provided such rules are in compliance with Union law.[15] (Emphasis added by author)

An audiovisual media service is then in terms of the AVMSD is a service 'where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate.'[16]

The audiovisual media service is either a television channel that provides a programme schedule or an on-demand audiovisual service where it is up to the viewer to choose at which moment to choose one programme or another on the basis of a catalogue of programmes selected by the media service provider.

An audiovisual media service moreover comprises any audiovisual commercial communication.

Moreover, following the amendments introduced through the 2018 Directive, the AVMSD provides that Member States are to ensure that video-sharing platforms, as would be the case with social media, respect various relevant provisions of the same Directive whenever such platforms provide programmes, user-generated videos and audiovisual commercial communication. In particular the Directive is seeking that the protection extended to minors from any material that could impair their physical, mental or moral development, as well as the protection extended to the general public against incitement to violence or hatred, as well as against terrorism, would not become devoid of all effect when such content is provided through video sharing platforms. Although the video-sharing platform provider would not have editorial responsibility, the provider

[15] AVMSD – Consolidated Text (n13), Art. 4
[16] AVMSD – Consolidated Text (n13),Art. 1 (1) (a)

would be able to determine the organisation of content on its platform 'including by automatic means or algorithms in particular by displaying, tagging and sequencing.'[17]

In defining the means of transmission by means of 'electronic communications channels', be it with regard to regular television channels or on-demand audiovisual media services as well with regard to video-sharing platform services, AVMSD refers to point (a) of Article 2 of EU Directive 2002/21/EC[18] that provides –

> 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.

9.2.2 Serious Lacuna

As will be explained, the fact that our broadcasting landscape is subject to two regulators has led to a serious lacuna in our law.

In terms of the Broadcasting Act, it is the Broadcasting Authority that –

> shall have the function to regulate sound and television broadcasting services in Malta, and to issue licences for the provision of such services.[19]

Moreover, the same Act categorically provides –

> No person may provide sound or television broadcasting services in Malta for Malta or any part thereof without the licence in writing of the Authority, nor may

[17] AVMSD – Consolidated Text (n13),, Art. 1 (1) (aa)
[18] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002) OJ L 108/33
[19] BAct Cap. 350 of the Laws of Malta, art. 3 (1).

> any person retransmit sound or television broadcasting services from Malta to any foreign state without the licence in writing of the Authority.[20]

Public Broadcasting Services while licensed directly by Government and to that extent are an exception to the rule quoted above, are however still subject to the regulatory duties of the Broadcasting Authority.[21]

It is the Broadcasting Authority that licenses all satellite radio and television programme content services.[22]

The Broadcasting Authority has in agreement with the Government assumed Government's rights and duties with regard to cable and other broadcasting operators in Malta.[23]

Furthermore, in line with the transposition of the AVMSD provisions into the national law of Malta, the Broadcasting Authority –

> … shall ensure that all audiovisual media services transmitted by media service providers falling under the jurisdiction of Malta shall comply with the provisions of this Act and of any subsidiary legislation made thereunder applicable to audiovisual media service intended for the public in Malta.[24]

None the less, the broadcasting landscape is regulated by different entities leading to a 'considerable overlap in the broadcasting landscape.' As pointed out by Aquilina –

> The Prime Minister, the Minister responsible for culture, the Minister responsible for communications and the Minister responsible for wireless telegraphy as well as the Broadcasting Authority and the Malta Communications Authority all have certain powers within the broadcasting landscape.[25]

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[20] BAct, art. 10 (2)
[21] BAct, art. 10 (4C)
[22] BAct, art. 16C (1)
[23] BAct, art. 3 (3)
[24] BAct, art. 16H
[25] Aquilina (n8)

According to law, the Malta Communications Authority,[26] set up in 2003, has been designed as 'the competent authority to regulate electronic communications.[27] The interpretation given to 'electronic communications network'[28] is identical to that given in point (a) of Article 2 of EU Directive 2002/21/EC[29] above referred to.

The resulting situation is that while licensing of broadcasting and satellite stations is done by the Broadcasting Authority, the allocation of radio frequencies, which in turn are availed of by radio and television content services, is carried out by the Malta Communications Authority being the Authority responsible for the effective management of the radio frequencies assigned to it under the said national radio frequency plan.'[30]

The Communications Authority is not to grant any exclusive or special right of use of radio frequencies for the provision of electronic communications services, except that this is 'without prejudice to specific criteria and procedures adopted to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with European Union law.'[31] General interest broadcast licences, apart from the same kind of licence given to public broadcasting services, are issued directly by the Broadcasting Authority[32] availing itself of the frequencies that are allocated by the Malta Communications Authority.

The Malta Communications Authority on its part cannot assume any right whatsoever with regard to broadcast content.

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[26] *See* Mala Communications Authority Act (MCA), Cap. 418 of the Laws of Malta
[27] Electronic Communications (Regulation) Act (ECRA), Cap. 399 of the Laws of Malta
[28] ECA, art. 2
[29] Framework Directive 2002 (n21)
[30] ECA, art. 38 (1)
[31] ECA, art. 38 (2)
[32] BA, art. 4A (a)

In very broad terms, the Electronic Communications (Regulations) Act provides that the Act 'shall not apply to the content of any communications, howsoever described, transmitted through any electronic communications network.'[33] More specifically, the provisions of ECRA are without prejudice to the operation of any other law 'in respect of content and broadcasting regulation or audiovisual policy.'[34] Clearly, the provisions of the Broadcasting Act on this subject have been adequately safeguarded.

It is in view of these legal provisions that Micallef observes –

> Overall, there have no evident issues of overlap of jurisdiction between the Broadcasting Authority and the MCA and the two regulators co-operate quite well, with stakeholders having fairly clear parameters as to which authority is responsible for what in the overall broadcasting regulation landscape.[35]

None the less, Micallef still adds –

> This said, logic dictates that a holistic approach having in place one authority which is responsible for the overall comprehensive regulation of broadcasting media would be a better and more practical option.[36]

To the author's mind, the worrying situation that has emerged partly from the fact that there is no one convergent authority to cover the broadcasting landscape, is that there are multiple television stations that are provided through the internet, are not licensed by the Broadcasting Authority and end up not being regulated at all. The Malta Communications Authority is meant to promote the provision of electronic communication networks, associated facilities and services and electronic communications service, in the process removing any remaining obstacles to the provision of such services.[37] The underlying and fundamental concept with regard to the provision of internet services at the European Union and national level is the promotion

[33] ECRA, art 5 (2)
[34] ECRA, art 5 (3) (b)
[35] Micallef (n6), 80
[36] Ibid
[37] ECRA, art 4 (1) (b)

of an open and unfettered market. Provided that technical requirements are observed. 'any person shall install or operate any electronic communications network or provide any electronic communications service in Malta.'[38]

That in turn has led to a multitude of different platform providers which in turn have entered into contracts with broadcast content suppliers.

Apart from public broadcasting services that are licensed directly by Government, the Broadcasting Authority has in terms of article 10 (4A) of the Broadcasting Act issued television broadcasting licences in respect of general interest broadcast content; commercial broadcast content; and one parliamentary broadcast content licence issued directly to the Speaker of the House of Representatives.

Generalist General Interest Objective broadcast content licences have been issued by the Broadcasting Authority in respect of the two political party owned stations: One TV and Net TV, and Smash TV while niche General Interest Objective broadcast licences were issued in respect of Xejk TV, F Living and Parliament TV. All these stations together with the public broadcasting services are regulated by the Broadcasting Authority.

The Broadcasting Authority moreover acts as regulator with regard to holders of commercial broadcast content licences. These include the cable operators GO plc and Melita plc, as well as Ambriel Media Solutions Ltd which operates ITV Teleshopping Channel and Owners Best Network.[39]

In terms of article 13 (2) of the Broadcasting Act, the Broadcasting Authority is duty bound to act as regulator with regard to all general interest broadcasting services where the Authority allows news and current affairs programmes to be broadcast by such services. Moreover, in virtue of article 16C (1) of the Broadcasting Act, 'all satellite radio

[38] ECRA, art 6
[39] BA, Annual Report 2018, 14

and television programme content services shall be licensed by the Broadcasting Authority.' Moreover, a satellite content licence shall include –

> a condition requiring the holder of the licence to comply with such legislation, requirements as to standards, practice and conditions as the Authority may specify with respect to the programmes supplied in pursuance of the licence.[40]

Moreover, the holders of satellite content licences may be required to pay an administrative penalty of up to € 300,000 for infringing any of the relevant broadcasting law provisions. Considering that the highest administrative penalty is set at € 4,660 for infringing directions by the Authority to ensure impartiality in broadcasting, it is clear that the legislator wanted to ensure that the Authority's regulatory powers with regard to holders of satellite content licences would be effective.[41]

By the end of 2018, 'the number of satellite television stations transmitting under Maltese broadcasting added up to six.'[42] The stations include Nollywood TV, which 'station broadcasts African entertainment content for European TV viewers. Many of the programmes are dubbed into French, and for this reason monitoring was outsourced to confirm that the station is adhering to the application and regulations.'[43]

There is clearly no doubt about the Authority's regulatory functions with regard to all broadcasting stations that are licensed directly by it, as well as with regard to the public broadcasting services although these are licensed by Government.

The lacuna regards the plethora of stations that are being provided through the electronic communications network providers which are not licensed by the Broadcasting Authority or for that matter by the Malta Communications Authority.

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[40] Art. 16C (6) (a) of BAct, Cap. 350 of the Laws of Malta.
[41] See Art. 16D (3), 41, 15 and Fifth Schedule of Broadcasting Act, Cap. 350 of the Laws of Malta
[42] BA Annual Report 2018 (n42)
[43] Ibid

As at 3rd April 2020, scrolling through Maltese stations available on IPTV, the author could observe all the following stations that are operating outside of any broadcasting regulatory framework: Smash Music, Smash Jazz, Smash Food, Smash Sports, Smash 7, Smash 7 News, Smash Politika, Smash Teleshop, Smash Entertainment, Smash Mr Fish TV, Smash Retro, Smash Cam, PM (Drama) Channel, and Celinu (Watch Now) TV. Other channels that have been brought to the attention of the author include ITV Children's Channel and a channel dedicated to a Christian (Evangelical) Movement.

To the author's mind this lacuna raises legal issues that need to be addressed.

First and foremost, when article 119 of our Constitution refers to 'such sound and television broadcasting services as may be provided in Malta' with reference to the Authority's obligation to ensure impartiality, the Constitution does not distinguish between different means as to how broadcasting services can be provided. Admittedly when the Constitution was enacted in 1964, and this article has not been amended in any way since then, the legislator could not have foreseen the present age of the internet. None the less it does not follow that the Broadcasting Authority has any right, in particular with regard to its specific function of ensuring impartiality, to distinguish between different means of transmission or communication.

The issue is not only of academic relevance. When on 28 April 2019, the Broadcasting Authority banned the programme 'Exodus' hosted by the leader of anti-migration minority party *Alleanza Bidla,* Ivan Grech Mintoff, from being aired on F-Living until after the European Parliament elections, the programme host reacted by announcing that he would be 'broadcasting as Exodus DGT TV online on the internet transmitting 24 hours a day, every day, on an internet platform and via IPTV.' The minority Party Leader was quoted as stating –

> The Broadcasting Authority insists it is acting to ensure fair media coverage. But the two major parties have their own TV / radio stations and can transmit their

> political message 24/7 without being limited by the Broadcasting Authority. Are alternate parties to be silenced? All parties are given a few minutes each on the public service channel during the whole five-week campaign period. Why should this limited time be controlled by authorities? The actions of the Broadcasting Authority run counter to the European values of free speech and democracy and call in question the legitimacy of the elections.[44]

Irrespective of whether these arguments could have been availed of in a lawsuit in our Courts of Justice on the basis of our Constitution and broadcasting laws, it is relevant Mr Grech Mintoff opted instead to exploit this possible lacuna in our legal system. In a meeting with the Broadcasting Authority's Research Officer, the author was informed that the Broadcasting Authority interpreted the law in the sense that it had no regulatory powers whatsoever over such an internet station notwithstanding that the station was specifically set up to flout its own directive.

In the author's opinion, this is an incorrect interpretation of our law on the part of the Broadcasting Authority since its constitutional remit is not limited to the stations that are or not licensed by it. Nor, it is suggested, is the remit of the Broadcasting Authority limited in such a manner in terms of art. 16H of the Broadcasting Act which refers to all audiovisual media services under the jurisdiction of Malta.

9.2.3 Primacy and supremacy of European Law

Another issue that this possible lacuna gives rise to is with regard to European Law that enjoys primacy and supremacy over the national law of the Member States. Apart from the right and obligation of national Courts of Justice to give effect to that principle, Member States transpose into their own laws the different Directives of the European Union into their own law.

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[44] Coryse Borg, 'Alleanza Bidla Party and Exodus start TV Station', *Newsbook,* 29 April 2019. *See also:* Ivan Martin, 'Alleanza Streaming Political Content after Broadcasting Authority Ban', *Times of Malta,* 29 April 2019. Both news websites (www.newsbook.com.mt and www.timesofmalta.com were last accessed on 10 April 2020.

The provisions of the Audiovisual Media Services Directive as codified in 2010[45] have been transposed into our law, and the Broadcasting Authority is to ensure that all audiovisual media services transmitted by media service providers falling under the jurisdiction of Malta comply with our broadcasting law and regulations[46] which in turn incorporate within them the AVMSD provisions.

The legal issue that therefore needs to be addressed is whether the providers of audiovisual media services that are transmitted through the internet or through communication networks are or not providers that fall within the ambit of AVMSD.

It is suggested that the very purpose of AVMSD, in comparison to the former Television Without Frontiers (TWF) Directive from which it evolved, was to bring within its remit the new technologies and in that sense regulate television broadcasting irrespective of the means used to transmit the audiovisual media services. Recital (4) of the 2010 Directive provides –

> In the light of new technologies in the transmission of audiovisual media services, a regulatory framework concerning the pursuit of broadcasting activities, should take account of the impact of structural change, the spread of information and communication technologies (ICT) and technological developments on business models, ….

That Recital is then reflected in the definition given to 'audiovisual media service' which is either a linear television broadcast where there is a set programme schedule, or a non-linear audiovisual media service where the viewer can choose from a catalogue of programmes selected by the media service provider.

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[45] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) OJ L95/1

[46] BAct, art. 16H (n27)

Chavannes and Castedyk after referring to the Explanatory Memorandum drawn up by the European Commission on the basis of the consultations that it had carried out before amending the former Directive, point out that one of the 'headline features' of the AVMSD is 'the extension of its material scope' observing –

> Overall, the legislative process demonstrated a significant degree of consensus that the scope of the Directive should, indeed, be extended to television-like services in particular to scheduled programming which is delivered via the Internet or mobile networks and which, at least from the viewpoint of the consumer, is to all intents and purposes the same as traditional television broadcasting.[47]

The purpose of the new Directive was to be technology-neutral. For that reason, the wording of the new Directive 'relates to the *provision of a service* ***to*** the public, regardless of the technical means of transmission and – by extension – the technical means of reception ***by*** the public.'[48] To the author's mind it is more correct to view the applicability of the Directive from the perspective of the end-user rather than from that of the provider.

> There seems to have been a shift from the perspective of the provider (who transmits) to that of the user (who views). Such a shift is not illogical if one considers that the regulation of television broadcasting is largely justified by its potential to influence large sections of the public simultaneously. This potential influence is obviously felt upon reception by the public, rather than upon transmission by the provider.[49]

One of the doubts that had been raised with regard to whether the former TWF Directive was applicable to IP-based broadcasts was that such transmissions are for technical reasons not entirely simultaneous. In the *Mediakabel* case, the European Court of Justice had, *inter alia,* decided that 'the service in question must consist of the

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[47] Remy Chavannes and Oliver Castendyk, 'Directive 2007/65/EC *Audiovisual Media Services* Directive (AVMSD) – Article 1 (Definitions)' in Oliver Castendyk, Egbert Dommering and Alexdander Scheuer (eds), *European Media Law* (Wolters Kluwer 2008) 807

[48] Ibid 817

[49] Ibid 828-9

transmission of television programmes *intended* for reception by the public, that is an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously.'[50]

The matter was addressed in Recital (30) of the AVMSD as codified in 2010 through the following clarification –

> In the context of television broadcasting, the concept of simultaneous viewing should also cover quasi-simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.

9.2.4 All broadcasting services are subject to AVMSD

The fact that the AVMSD as codified in 2010 extends to all broadcasting, irrespective of the method of transmission, is further emphasised following the 2018 Amendments. Recital (1) refers to further developments following the 2010 codification, and provides –

> Since then, the audiovisual media services market has evolved significantly and rapidly due to the ongoing convergence of television and internet services. Technical developments have allowed for new types of services and user experiences.[51]

Moreover article 1 of the AVMD has been amended to include within the purview of 'audiovisual media service' not only any service where the principal purpose thereof 'is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate, by means of electronic communications networks' but also cases where that it is the principal purpose of any 'dissociable section' of such service. Moreover, the Directive has been amended to include within its remit video-sharing platform services.

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[50] ECJ, Case C-89/04, *Mediakabel,* [2005]ECR I-4909, para 30
[51] 2018 Directive (n4)

9.2.4.1 Major Legislative and Administrative Challenge

While the 2018 Amendments have now been transposed into the laws of Malta, and now form part of our Broadcasting Act, in virtue of Act No. LVI of 2020, it is suggested that regulatory convergence has become the major legislative and administrative challenge facing our country with regard to our broadcasting landscape.

That is being said that since allowing a lacuna where internet provided television services are neither regulated by the Broadcasting Authority nor by the Communications' Authority is already in default of the law as it stands at present[52] which is in line with the 2010 codified version of the AVMSD, apart from being in violation of the Constitution should any issue relating to ensuring impartiality arise as regards these stations.

The situation has become even more glaring and acute now that the 2018 Amendments have been transposed into our law. Transposition of the 2018 Amendments brings about the requirement of establishing and maintaining up-to-date lists of video-sharing platforms established or deemed to be established in our territory as well as our having the necessary capability and resources to take appropriate measures related to content uploaded on video-sharing platforms.[53]

The foregoing highlights why the need for a single convergent regulator, as already indicated by Aquilina seventeen years ago,[54] has become more relevant and urgent.

[52] BAct, art. 16H (n27)
[53] AVMSD – Consolidated Text (n13), Articles 28a and 28b
[54] Aquilina (n8)

9.3 Legal Framework to ensure independence of Public Service Broadcasting

'The real challenge for public service broadcasting is not in reflecting democracy, but its role in nourishing it.'[55] Seen in that light, the independence of public service broadcasting needs to be considered as a fundamental pillar of democracy itself. To the author's mind the legal framework in Malta is not robust enough to ensure the independence of our public service broadcaster, although a vigilant Broadcasting Authority and case law developed by our Courts of Justice have, as examined throughout this thesis, tended to provide for important safeguards.

None the less, it is considered high time to provide for a more fool-proof legal framework to ensure the independence of our public broadcasting service provider (PBS) and that such independence in turn would generate the trust expected from society at large.

The first issue to be addressed regards how our public service broadcaster, in contrast to all other broadcasters, is licensed.

Although Article 10 (2) of BAct provides –

> No person may provide sound or television broadcasting services in Malta or any part thereof without the licence in writing of the Authority….

Sub-article 4C of the same article provides that the stations owned or controlled by the Government company designated to provide public broadcasting services 'shall be licensed by the Minister'.

Moreover, as pointed out in Chapter Two dealing with the historical context of Malta's broadcasting legislation -

[55] David Hendy, *Public Service Broadcasting* (Palgrave Macmillan 2013) 44

> What is particularly relevant is the fact that all the shareholding of the company pertained and still pertains to the Government of Malta which in turn appoints the Chairman and the entire Board of Directors.[56]

While such a set up can be explained within its historical context, including the nationalisation of all broadcasting services in Malta in 1975, it is suggested that this kind of set up is now both anachronistic as well as anomalous.

Although the National Broadcasting Policy (2004) had affirmed the principle that 'an independent public broadcasting service is essential to democracy'[57], Borg and Lauri observe –

> This notwithstanding, PBS was not and still is not considered by many to be a fair and impartial organisation. The answer may be to establish structures that distance the governance of PBS from government and to set up stronger structures which can guarantee editorial independence.
>
> .... One proposal could be that PBS should no longer be owned by the government and that civil society will have more say. Moreover, PBS should be licensed by the regulator instead of by government. A wide public consultation with the participation of the different stakeholders could lead to a solution, if a solution is really desired.[58]

Government is the sole shareholder, appoints the Board of Directors without any restriction regarding tenure of office, which in turn means having a dominant say with regard to all major appointments, appoints the Editorial Board which is meant to be an independent body to scrutinise the news and current affairs programmes, is the station's licensor and provides the public service broadcaster with one third of its required funds. Although the Broadcasting Authority retains its regulatory role in terms of broadcasting legislation and the Constitution, to the author's mind the complete ownership and control

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[56] Ch. 2, p 67

[57] Ministry for Information Technology and Investment, & Ministry for Tourism and Culture, Government of Malta, *National Broadcasting Policy,* (April 2004) (NBP) 38

[58] Joseph Borg and Mary Anne Lauri, 'Navigating a Mediascape in Transition' in Joseph Borg and Mary Anne Lauri (eds), *Navigating the Maltese Mediascape* (Kite Group, Malta 2019) xiii

of public broadcasting services by Government is no longer acceptable in a democratic society.

This issue had been addressed by Kevin Aquilina in 2011, who after spending more than ten years of his working career at the Broadcasting Authority, during which term he occupied the post of Chief Executive thereof, wrote a paper with recommendations about how Malta's Broadcasting Law could be updated. In his paper, he pointed out –

> The public service broadcaster should not be under the responsibility of a Minister of Government but directly under the Office of the President of Malta. Its Board of Directors and Editorial Board should be appointed in the same way.[59]

Aquilina in 2013 adopted a different approach in the sense that since he was recommending that the President of Malta should appoint the Broadcasting Authority, that is the regulator, it would be better if it would not be the same person appointing both the regulator and the service provider, and therefore suggested that 'the Board of Directors and Editorial Board should be appointed by a two-thirds majority of the House of Representatives.'[60]

> The issue was addressed in the TPPI Report[61] as follows –
>
> 27. TVM currently provides the most politically balanced news on local television, in comparison with the other stations, and attracts a significant number of viewers ….
>
> 28. The public does not, however, have full trust in the public broadcaster. This is partly because of its history of government interference, and partly because recruitment to the newsroom and managerial positions is carried out by the Board

[59] Kevin Aquilina, 'Updating Maltese Broadcasting Law to Present Day Realities in the Light of the Doctrine of the Rule of Law and of the Separation of Powers' in 'Law and Practice', Issue 24, May 2011, pp 11 – 20
[60] Kevin Aquilina, 'Why a Second Republic for Malta?' in 'Office of the President, The President's Forum – Does Malta's Constitution Still Cater for the People's Needs?', Office of the President, Valletta, Malta, October 2013, 152 -198
[61] TPPI (n10)

> of Directors which is appointed directly by the Minister responsible for Broadcasting.

It is suggested that to have public broadcasting services fully owned and controlled by the government in office, which also means that appointments can be carried out not on the basis of merit but on the basis of whatever would suit the government of the day, albeit remaining subject to the Constitution and laws of Malta as well as to the regulatory function exercised by the Broadcasting Authority, is not in line with the letter and spirit of the Prague Resolution through which Member States of the Council of Europe undertook to ensure the editorial independence of public service broadcasters 'against political and economic interference' and specifically provided –

> Participating states undertake to guarantee the independence of public service broadcasters against political and economic interference. In particular, day to day management and editorial responsibility for programme schedules and the content of programmes must be a matter entirely for the broadcasters themselves.
>
> The independence of public service broadcasters must be guaranteed by appropriate structures such as pluralistic internal boards or other independent bodies.
>
> The control and accountability of public service broadcasters, especially as regards the discharge of their missions and use of their resources, must be guaranteed by appropriate means.[62]

It is recommended that the issue of governance of our public broadcasting services needs to be looked into within the broader context of a required wholistic reform of Malta's broadcasting landscape. In particular we need to ensure that the distinction between public and state broadcasting that should have been brought about through the

[62] CoE, European Ministerial Conferences on Mass Media Policy and Council of Europe Conferences of Ministers responsible for Media and New Communication Services, Texts Adopted. 4th European Ministerial Conference on Mass Media Policy (Prague, 7 and 8 December 1994) *The media in a democratic society,* Resolution No. 1 – The Future of public service broadcasting (Council of Europe, Media and Internet Directorate General of Human Rights and Rule of Law Strasbourg 2015)

National Broadcasting Policy of 2004 will be effective and safeguarded through structures that guarantee the independence of our public service broadcaster.

Hanretty refers to 'the independence of public broadcasters from politics' as 'one of the two classic issues in public broadcasting', the other being the degree to which public broadcasters crowd out free market activity. Hanretty explains further –

> It is a classic issue because of perpetual tension between politicians' desire to secure better coverage from the broadcaster (which often enjoys a considerable influence on the reporting of current affairs), and the role those politicians play in granting the broadcaster the funds and the institutional support needed to continue operating. It is an issue that benefits from analysis through the lens of governance precisely because it has both formal and real elements.
>
> We can describe the independence of the broadcaster in real, or *de facto* terms, as concerning "the degree to which PSB employees take day-to-day decisions about their output or the output of subordinates, without receiving or acting on the basis of instructions, threats or other inducement from politicians, or the anticipation thereof; or considering whether the interests of those politicians would be harmed by particular choices about output." (Hanretty 2010)
>
> If politicians are constantly ringing up news-desk editors to have running orders changed, then the broadcaster is not at all independent. Correspondingly, we can describe the formal or *de jure* independence as the degree to which the law or laws governing the broadcaster give politicians the formal means to sanction or reward the(m) by appointing or dismissing board members, altering the broadcaster's funding, or scheduling extra committee hearings on the broadcaster's work.[63]

Hanretty in his contribution refers to an article he wrote for the British Journal of Political Science in which he developed 'an index of formal independence'.

> This index has several items dealing with the method by which board members and the chief executive are appointed, their tenure in office, the ease with which they can be removed, and whether they can be reappointed. There are also items concerning the method of funding, and how often the broadcaster is called upon

[63] Chris Hanretty, 'The Governance of Broadcasters in Small Countries' in Gregory Ferrell Lowe and Christian S Nissen (eds), *Small Among Giants – Television Broadcasting in Smaller Countries* (Nordicom, University of Gothenburg, Sweden, 2011) 163-4. In this contribution, the author refers to his article: Chris Hanretty, 'Explaining the de facto independence of the public broadcaster', (*British Journal of Political Science*, 40(01), 2010)

> to account for its activities to the legislature and executive respectively. These items have been chosen because they are all features found in the legislative acts establishing public broadcasters, and because they are all means through which politicians can influence or pressure the broadcaster.[64]

A system where appointments are made by the executive only (by Government acting on its own) is the one which ranks least favourably to safeguard independent governance for the public broadcaster.[65]

9.4 Process of how Broadcasting Authority is constituted

When referring to the broader context of the required reform in Malta's broadcasting landscape, it is suggested that one would need to examine not only the process through which the Board of Directors as well as the Editorial Board of the public service broadcaster needs to be appointed, but also the very process of how the Broadcasting Authority is constituted as well as the issue of broadcasting stations owned by the political parties.

> At present in terms of art. 118 (2) of the Constitution of Malta –
>
> The members of the Broadcasting Authority shall be appointed by the President, acting in accordance with the advice of the Prime Minister given after he has consulted the Leader of the Opposition.

While the Constitution provides that the BA 'shall consist of a chairman and such number of other members not being less than four as may be prescribed by any law for the time being in force in Malta'[66], the Broadcasting Act provides that the number of persons is to be not more than seven, and following an amendment introduced through Act No. VII of 2015, it is established that 'one of the members shall be a person with a disability'.[67]

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[64] Ibid, 165
[65] Ibid, 170
[66] Art. 118 (1), Constitution of Malta
[67] Art. 4 (2), BAct, Cap. 350 of the Laws of Malta

While the provision that one of the members shall be a person with a disability has been ignored with regard to the BA and other bodies where such representation was to take effect, the BA has over the years been made up of a Chairman and four other members. The practice has evolved that while two of the members represent the political opinion of the Party in Government, two members represent the political opinion of the Party in Opposition, and more often than not the onus to reach a decision on issues that are politically sensitive will rest with the Chairman. The extent to which the Prime Minister advises the President to appoint a Chairman who is politically acceptable to both sides of the HOR tends to vary from time to time since it ultimately depends on his discretion, and that in turn places in doubt whether the country's constitutional watchdog to ensure impartiality will always act itself with the requisite independence and impartiality that is expected of it.

In a detailed paper dealing with the independence of the BA,[68] Aquilina refers to the Council of Europe's *Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector,* and examines the taxonomy of the Broadcasting Authority's independence under five broad headings: (a) independence as to the decision making and taking process; (b) institutional independence (in so far as the appointment, composition, dismissal and functioning of the broadcasting regulator is concerned); (c) financial independence; (d) regulatory independence (in so far as regulatory powers, granting of licences and monitoring broadcasters; programme output are concerned); and (e) operational independence – in the sense of good governance (in so far as the regulator exercises its independence in an accountable, public and transparent fashion).

[68] Kevin Aquilina, The Indepndence of the Maltese Broadcasting Regulatory Authority: legend, wishful thinking or reality?, *Int. J. Public Law and Policy, Vol. 3, No. 2, 2013,* 141 - 156

After carrying out an analysis of this five-fold taxonomy of independence, Aquilina observes that –

> 'the broadcasting regulator does not satisfy all the above tests of independence. Furthermore, the broadcasting regulator has certain of its functions exercised by government (as is the case with the licensing of the public service broadcaster's radio and television stations)….. Seen in this perspective, the authority's independence leave(s) much to be desired.'

Aquilina reaches the conclusion that 'the independence of the Authority is a hybrid: it has elements of reality and elements of wishful thinking as well' adding that without any sign of political direction blowing in favour of total independence of the broadcasting regulator, the wishful thinking is expected to prevail for the coming years.

Addressing only the issue of how the BA is appointed, the Opposition has been advocating an amendment to the Constitution through which the appointment of Chairman of the Broadcasting Authority along with other politically sensitive appointments such as that of the Chief Electoral Commissioner will only be made by the President if the appointment is supported by not less than two thirds of all the Members of the HOR.

In a policy paper issued in 2015 entitled 'Restoring Trust in Politics', Partit Nazzjonalista argued for the need of such a mechanism to ensure that irrespective of the whims of whoever could be in Government, appointments to holders of public office that need to have the trust of the population as a whole would be carried out in a manner that would guarantee that trust.

With specific reference to the BA, the said policy paper points out –

> The situation (regarding partial public broadcasting) is not helped much by a broadcasting watchdog, the BA which is itself dominated by appointees from the

political parties and which struggles to keep control over content and impose impartiality.[69]

Through the same document, the Party made a commitment that if in Government, the Party would 'review the composition of the BA to reduce the influence of political parties.'

In a subsequent policy document issued in December 2019, the Nationalist Party has recommended that the BA would be appointed in its entirety through the vote of not less than two-thirds of all the Members of the HOR.[70] That would ensure making the BA no longer dependent on the whims of whichever Government is in office.

A variation of that position is found in a document made public by the Nationalist Party on the 18th May 2020 through which the Party published its own proposals with regard to a Report about Malta drawn up by the Venice Commission.[71] In its document the Nationalist Party proposed that the practice or constitutional convention through which half the members of the BA are appointed to represent the Party in Government, and the other half the Party in Opposition becomes law, as is already the case with regard to the Employment Commission established in virtue of art. 120 of the Constitution. This recommendation would safeguard on an equal basis the interest of the two mainstream Parties represented in Parliament. Moreover, the Chairman would be appointed by a Resolution of the HOR supported by at least two-thirds of all its Members, adding that if that consensus is not obtained within a stipulated time frame, it would be the President of Malta who would have the right to appoint the Chairperson, acting according to his

[69] Partit Nazzjonalista, 'Restoring Trust in Politics – Proposals for Good Governance' (2015) 35
[70] Partit Nazzjonalista, 'Riforma u Tiġdid – Governanza Tajba għal Demokrazija b'Saħħitha' (Reform and Renewal – Good Governance for a Healthy Democracy' (2019) (PN-GGHD) 18
[71] Partit Nazzjonalista, 'Proposals by the Opposition as to how the Venice Commission Report can be Concretely Implemented' (2020)

own deliberate judgment and who would exercise such power without any interference from any person.

In its Report, the Venice Commission in the section dealing with the powers of the Prime Minister, pointed out that -

> as the President has a more ceremonial role acting upon (and in accordance with) the advice of the Prime Minister… it is the Prime Minister who is clearly the centre of political power.

One of the examples given by the Venice Commission in this regard is that of the Broadcasting Authority, the 'members of which are appointed by the President, acting in accordance with the advice of the Prime Minister.'[72]

9.4.1 Broadening representation on Broadcasting Authority to include civil society

The author recommends that the entire composition of the BA needs to be examined further to ensure not only that both mainstream political parties in Malta would be satisfied about its membership, but also to have within its membership persons who do not necessarily pertain to one political stream or another but who would have proven competence and experience in broadcasting as well as persons who would be representative of civil society.

This issue had already been raised by Kevin Aquilina in 2011[73], when he pointed out –

> The current method of appointment of members of the Authority is not made in the public interest but in the interest of the two political parties in Government (and Opposition). This is totally wrong in a democratic society based on the rule of law which respects the doctrine of the separation of powers. The Broadcasting

[72] Venice Commission, Council of Europe, European Commission for Democracy through Law, 'MALTA – Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement', (Opinion No. 940 / 2018) paras 107 and 109
[73] Aquilina (n59)

> Authority is not a political partisan institution: it is a Constitutional organ of the State…..
>
> …..
>
> It should be the President of Malta who should appoint the Broadcasting Authority….. not on the advice of the Prime Minister after the latter has consulted the Leader of the Opposition but after the President has carried out widespread consultation not only with the Prime Minister, the Leader of the Opposition and the political parties but also with civil society, organised interests, non-governmental organisations and stakeholders.

Aquilina re-iterated the same argument in a paper presented at the President's Forum in 2013, where he argued that it should be the President of Malta who should appoint the Broadcasting Authority after a wide process of consultation, as opposed to the present system where 'the President's role is insignificant in the whole process' and where 'in practice …. the members of the Authority cancel each other out and then it is up to the Chairman to decide the matter at issue.'[74]

This issue has been brought up again in the TPPI report (2014)[75] which makes a number of salient observations in this regard –

> 42. Perhaps the most urgent issue to be addressed regarding the Malta Broadcasting Authority is its composition. Despite its function as a Constitutional organ of the State, the Authority is compromised by the manner in which its members are nominated.
>
> ….
>
> 45. ….. The practice limiting members to representatives of political parties in government and opposition might have been acceptable before the advent of pluralism. Considering that parties have their own media structures, it is today anachronistic. It is conceptually jarring that the Authority, essentially a regulator, is made up exclusively of members chosen by political parties which, as media owners, are amongst those regulated. The defence of true democratic values requires a strong and effective Authority….

[74] Aquilina (n60)
[75] TPPI (n10)

As had already been recommended by Aquilina[76], one recommended approach is that of allowing the President of Malta to act in his own discretion when appointing the members of the BA. This recommendation has been echoed by the European Law Students' Association (ELSA, Malta) in a document that they have submitted on the subject 'Constitutional Reform, the Way Forward'.

As part of the justification for making this proposal, ELSA has pointed out in its report –

> Since the members of the Broadcasting Authority consist of two persons chosen by the Prime Minister, two persons chosen by the Leader of the Opposition whilst the Prime Minister has the final say in the selection of the Chairman, the authority is not as impartial as required by the Constitution – it is the chairman who makes actual and fruitful decisions because the members appointed will very rarely disagree with the views of the party who has appointed them. It is as though the other four members are useless, and rather than making an unbiased decision this decreases independence from the legislature and the executive, being contrary to the nature of the Broadcasting Authority, a constitutional organ and not a political partisan institution.[77]

The ELSA Report moreover recommends that it should be the President that makes appointments at the public service broadcaster level, pointing out –

> There is also a perceived bias with regard to the Public (Broadcasting Services) Limited, because its board of directors and Editorial Board are appointed by the Minister for Culture. To do away with bias, it would be ideal to have the President making such appointments.[78]

A variation of this proposal has been made by the Presidency itself within the context of ongoing discussions about constitutional reform. The Presidency has put forward the idea that in the eventuality of lack of agreement, within a set time frame, between Government and Opposition with regard to a number of key positions including

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[76] Aquilina (n59 and n60)
[77] European Law Students' Association (ELSA), Malta, '*Constitutional Reform – The Way Forward – A Proposal Paper by ELSA Malta's Social Policy Organising Committee*', published 22 April 2016, 50 (Available at: www.mt.elsa.org/sppapers/ - last accessed 12 May 2020)
[78] Ibid, 51

that of Chairman of the BA, the President would have the authority to appoint such Chairman 'in an autonomous manner, that is according to President's deliberate judgment'.[79]

This proposal was included in a Document on Proposals regarding Amendments in the Functions of the President, presented in September 2014. Referring to this Document in her Term Paper, Rosette Fenech observes –

> … the President could be formally remitted to exercise discretionary decision in eventualities when agreement is not reached, in reasonable time, between Government and Opposition on the appointment of members of Constitutional Institutions. In effect the President could be considered a valid instrument of conflict resolution.
>
> However, despite the present normative tradition whereby in the case of certain entities such as the Electoral Commission or the Broadcasting Authority, consensus is reached by Government and the Opposition each nominating an equal number of trusted representatives, this is often not the case, when it comes to the nomination of chairpersons of such entities, and has often been the cause of much controversy, to the detriment of the smooth running of services due to society…… The time may be ripe to consider that the appointment to such sensitive positions is made independently of political intervention, by the President, on the merits of the potential candidates' calibre, integrity and competence, possibly further to consultation with relevant authoritative sources in the respective fields.[80]

9.5 Political Stations

A particular feature of the Maltese broadcasting landscape is the fact that the two mainstream political parties have their own media houses and both own radio and television stations. While this has been justified within the context of the history of

[79] Ad Hoc Commission appointed by President of Malta Coleiro Preca – 'Document for Discussion on Proposals for Amendments in Functions of the President of Malta' (2014) being considered by Committee for Constitutinal Reform.

[80] Rosette Fenech, 'The Executive Functions of the President in the Constitution of Malta – A Critical Review' (M.Adv Term Paper, University of Malta 2017) 51 - 52

broadcasting in Malta,[81] it was originally assumed that this would have been a transitory phase.

Borg and Lauri quote an interview that former Prime Minister and Leader of the Nationalist Party, Eddie Fenech Adami had given to *The Times of Malta* on 2 December 1998. Fenech Adami 'who introduced broadcasting pluralism, said that this type of ownership was meant to be a transitory phase which should end when the management of politics matures.'[82]

At the political level, the ownership of television stations by political parties was one of the issues addressed in 2008 by a Select Committee of the HOR aimed at strengthening democracy. The Committee was set up through the agreement of then Prime Minister Lawrence Gonzi and then Leader of the Opposition Joseph Muscat.

The Select Committee was set up following the unanimous approval of a Motion for that purpose on 16th July 2008. One of the premises for the setting up of this Committee was that –

> this House agrees that a discussion should take place about public broadcasting in our country, which discussion should also cover the better and more effective regulation of the Political Parties' stations including what should be the role of political parties in the local media.[83]

The author had the privilege to be one of the Members of Parliament to serve on that Committee, in representation of Government.

In that capacity, the author presented a document containing various proposals regarding broadcasting for the consideration of the Select Committee.

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[81] Chapter 2
[82] Borg and Lauri (n58), xii
[83] Parlament ta' Malta (Parliament of Malta), Eleventh Legislature (2008 – 20130, Motion no. 47, www.parlament/en/11th-leg/motion-no-047/ (last accessed 16 May 2020)

The relevant proposals with regard to the presence of political parties in the broadcasting sector are being reproduced hereunder –

> When in the beginning of and in the mid-Nineties, Government began by introducing pluralism in radio and then in television, it allowed the political parties to become owners of radio and television stations. At that time, this was necessary. The country had just emerged from the trauma of the Eighties when public broadcasting had become highly controversial. Government's decision guaranteed that each party could make its voice heard through media controlled by itself.
>
> ……
>
> Government had made it clear from the outset that this measure had to be a transitory situation. So much so that in December 1990, Prime Minister Fenech Adami had augured that the country reaches that stage of maturity where the parties will no longer feel the need to own a tv station.
>
> Government feels that now the country has reached that stage of maturity that Dr Fenech Adami had augured. Government also feels that Malta should not remain the only country in Europe where the political parties are owners of television stations.
>
> ……
>
> The Government is therefore proposing that the political parties reach an agreement between them that none of them should be the direct or indirect owner of a tv or radio station, independently of the platform used in order to broadcast.
>
> Government is willing to accept that as a first step, the parties will at least reach agreement that none of them should be the direct or indirect owner of any tv station.[84]

The Select Committee for Strengthening of Democracy did not reach any agreement or conclusion on this issue by the end of its remit, and twelve years later the issue of broadcasting stations owned by political parties has still not been resolved. That is partly because the discussion about the ownership of radio and television stations by the political parties is indirectly linked to agreeing on financing structures for the said

[84] Proposti dwar il-qasam tax-xadir għall-konsideerazzjoni tal-Kumitat Magħżul tal-Kamra tad-Deputati (*Proposals regarding the broadcasting sector for the consideration of the Select Committee of the House of Reprsentatives)* (3 October 2008)– copy of document in .pdf format available on request from author.

parties in line with democratic practice in many European countries, and even more directly linked to the broader discussion regarding the future of public broadcasting and its regulation in Malta.

9.5.1 Judgment by Federal Constitutional Court of Germany

The uniqueness of allowing political parties to own their own radio and television stations in Malta is borne out by a judgment of the Second Senate of the Federal Constitutional Court of Germany that following an application for review submitted by 232 Members of the German *Bundestag*, with regard to a provision of the *Hessisches Privatrundfunkgesetz* (Private Broadcasting Act – HPRG) while ruling that an absolute prohibition on political parties holding an equity interest in private broadcasting organisations is not compatible with the Constitution of Germany, the legislature is free to ban political parties from holding a direct or indirect equity interest in private broadcasting companies in so far as such an interest would allow them to exercise a controlling influence on the programme design or the content of the programmes.

Referring to the requirement in the Constitution of Germany that broadcasting freedom is to be guaranteed, that this requirement is intended to establish a framework which ensures that the full range of existing opinions finds expression as broadly and as comprehensively as possible, and that the Constitution also prescribes freedom of broadcasting from state intervention, the Federal Constitutional Court ruled –

> The principle of freedom from state intervention must also be considered in relation to political parties. While these do not belong to the sphere of the state, political parties do have a degree of proximity to the state which requires that the principle of freedom from state intervention be taken into account when regulating the participation of political parties in broadcasting organisations. Compared to other social forces, political parties have a particular proximity to the state. It is in the nature of political parties that their efforts are directed towards

> achieving political power and they exert a decisive influence on appointments to the highest offices of government. Political parties influence the formation of government policy by working upon state institutions, primarily by influencing the decisions and actions of parliament and government. This means that certain individuals may simultaneously be members of a political party as well as part of an organ of state. Accordingly, the principle of freedom of broadcasting from state intervention must also, as a matter of principle, be considered in relation to the participation of political parties in the organisation and monitoring of broadcasting.[85]

The judgment of the German Federal Constitutional Court makes it clear that broadcasting needs to be safeguarded first and foremost from state intervention and then as a corollary of that principle equally safeguarded from the control of political parties.

9.5.2 The link between reconsidering the future of political stations and the wider spectrum

After making the point that in Malta political broadcasting is rampant, Aquilina refers to the clear link between the need to close down political stations and the wider spectrum relating to the entire broadcasting landscape -

> The solution is obvious: political stations should be closed down. But for all political parties to agree on such a measure this requires at least addressing satisfactorily three fundamental issues:
>
> (a) The selection process for appointment of the Broadcasting Authority and of PBS Ltd. Structures (Board of Directors, Editorial Board and top and senior management, including the Chief Executive, the Head of News and the Head of Programmes);
>
> (b) The actual or perceived bias of the public broadcasting service;
>
> (c) Access to the (public) media by all political parties and not only by the two main political parties……[86]

[85] Federal Constitutinal Court of Germany (Second Senate), Case no: 2 BvF 4/03, 12 March 2008 (www.Bundesverfassungsgericht/press/ last accessed 17 May 2020)
[86] Aquilna (n59)

In the same paper, Aquilina then refers to two different options that could be considered. The first alternative would be that of having a political channel operated by the public service broadcaster under the supervision of a reformed Broadcasting Authority. Political parties would then have their own broadcasts on that channel. The second alternative would be for the Broadcasting Authority itself to organise its own schemes of political broadcasts throughout the year, without the existence of political stations.

Whatever alternative one could opt for in the future, Aquilina makes the salient point that -

> it would be futile to ask political parties to give up their own stations if they will not be one hundred per cent convinced that the public service broadcaster will abide scrupulously and impeccably by its constitutional and legal obligations of impartiality, balance and fairness.

In a subsequent paper presented at the President's Forum dealing with an overhaul of the Constitution of Malta, Aquilina re-iterates the same arguments while referring to the role of political parties in a democracy -

> Even if one argues against political parties holding their own broadcasting stations, one must bear in mind the seminal role political parties play in a democratic state and one cannot and should not silence the voice of such parties. Otherwise, this would lead towards a dictatorship. Nonetheless a compromise needs to be achieved which, whilst ensuring that political parties are given the means to air their views, they are prevented from owning or managing broadcasting stations. This is the position in the rest of the world and Malta should be no exception.[87]

In its 2019 fifteen points' document on Good Governance, the Nationalist Party has very much endorsed this line of thought and pointed out that once it is ensured that the country will have a Broadcasting Authority that enjoys the trust of both political parties, that public broadcasting would be truly and totally autonomous from

[87] Aquilina (n60)

government, and that a fair playing field is established that would guarantee access to broadcasting in favour of political parties and civil society, then the political parties would no longer have the need for broadcasting licences.[88]

Borg and Lauri have correctly asked whether this 'distinctive feature of Malta's mediascape (will) be a permanent or transitory one'.[89] Clearly what was meant to be of transitory nature is taking its time to be resolved, but the author is confident that once all issues relating to the future of public broadcasting and its regulatory structures will be tackled thoroughly and seriously, in their own right, or as part of the ongoing broader discussion about changes required in our legal system to strengthen democracy, thereby empowering the people over any traditional political considerations, then the right decisions will be made with regard to the future of political stations in Malta.

9.6 Conclusion

One mechanism that could be employed to be better equipped and prepared for all the present and future challenges facing us with regard to public service broadcasting is an overhaul of Malta's National Broadcasting Policy. Issued in 2004, the author then in his capacity as Minister responsible for Culture together with Austin Gatt, as Minister responsible for Information Technology and Investment, in their introduction to the said Policy had already pointed out –

> Government does not view the document as final but believes that it should be regularly re-visited since experience and changes in the broadcasting world will require that it will be altered from time to time.[90]

[88] PN – GGHD (n70)
[89] Borg and Lauri (n58), xii
[90] NBP (n60), 3

Sixteen years down the line from the publication of that document, the time is more than ripe for its updating and for including within its purview the challenges addressed in this chapter as well as other relevant issues.

As referred to in the beginning of this chapter, one of the present and future challenges regards the impact of social media on the future of public service broadcasting.

Hendy addressed this issue in the following terms –

> …. I want to suggest that public service broadcasting – whether disaggregated into its three constituent words or taken together as a unitary idea – is emphatically *not* True, the word 'broadcasting' itself is a little vulnerable. We probably now need to accept the phrase public service *media* as being more sensible than one which regards radio and television as an exclusive and natural pairing. But even if we accept the inherent multi-media character of contemporary society, with sounds and images melded seamlessly with text on a large range of platforms, we're confronted with the stubborn survival of radio and television well beyond the moment of their predicted demise. Indeed, we need to recognize that new forms of social media sometimes serve old media rather than replace them, and that new symbiotic relationships are even now being forged. One area to be explored then, is the way broadcasting is adapting to the new media age rather than being overwhelmed by it.[91]

9.6.1 The notion of *trust*

Hendy argues that public service broadcasters have a crucial role to play to ensure 'that the global forums being created by new media are truly democratic and accessible, through helping to develop the notion of a "digital public space" where more than ever it will be the notion of *trust* that will have the most determining bearing. Hendy points out –

> What is needed is a fundamental commitment not to deceive, as well as a reinvigorated ethos of 'questioning and revising'. And it's in creating spaces for the nurturing of this culture of truth and reasoning that public service broadcasters will perhaps find a new sense of purpose for the twenty-first century.[92]

[91] David Hendy, *Public Service Broadcasting* (Palgrave Macmillan 2013) 109
[92] Ibid 110

To stand by that commitment and earn trust in an age where society needs more than ever before to have reliable sources of information that filter out fake news, as well as any form of manipulation or deception, where society needs to have its culture and identity safeguarded, and where our values and fundamental rights are celebrated, is the ultimate challenge that any worthy public service broadcaster will live up to. 'When we confront the sheer profusion of information and opinion on the Internet, the concept of trust moves centre-stage.'[93] In defining his role and obligations by living up to that challenge, the public service broadcaster will be enhancing what he needs to cherish most – to serve as a beacon of reliability, a guiding light, at the service of society as a whole, of its citizens and of democracy. Trust needs to be earned on a daily basis. Put simply, the public service broadcaster can never and should never let the public down.

[93] Ibid 119

CONCLUSIONS

Throughout the various chapters the author has sought to examine the role, duties and obligations of the public service broadcaster in Malta. This examination has been carried out within its historico-legal context since it is suggested that certain anomalies can only be explained within that context, through the perspective of relevant legislation, in particular the Constitution and the Broadcasting Act[1], through a number of judgments that have dealt with the issue, by making comparisons with the situation in the United Kingdom and Italy, through an analysis of what different authors that deal with media law in general or with the role of public service broadcasting in particular have written on what is expected in this day and age from the public service broadcaster, and finally through an examination of future trends and challenges.

While suggestions have been provided in the various chapters, the author would like to highlight the main conclusions and recommendations that result from the examination carried out.

1. Within the historico-legal context, the author has sought to explore whether public service broadcasting introduced in Malta by virtue of the 1991 Broadcasting Act could still be considered as still carrying the baggage of provisions that pertain to the more anachronistic system of the national broadcaster that is there to serve the Government of the day, be it of a colonial or independent nature. Even if explainable within its historical context, the licensing of public broadcasting services in Malta directly by Government as opposed to allowing the Broadcasting Authority to act as licensor in respect of all broadcasting stations, including public service broadcasting is an anomaly that needs to be addressed as urgently as possible.

[1] Cap. 350 of the Laws of Malta

2. In conducting a comparative analysis with the U.K. and Italy models, the author sought to examine where the law and practice as prevalent in those countries contrasts or compares with our own system of public service broadcasting in order to recommend changes that are deemed necessary in Malta. As seen in Chapter Three,[2] the fact that even in the United Kingdom, where the different treatment given to the BBC has been abandoned over three years ago in favour of subjecting it to OFCOM makes the situation in Malta stand out as more anomalous. In Italy's case, while the public service broadcaster (RAI) still operates in virtue of a concession agreement with Government, the ultimate control has shifted from the Executive to Parliament. Such a system of parliamentary oversight with necessary safeguards regarding access to the different political parties is one option that could be considered for regulating broadcasting in Malta for the future.
3. In examining the remit of the public service broadcaster, the author has carried out a critical evaluation of our legislative framework. An issue that deserves to be addressed is the possible incongruence between the provision of the Constitution that the Broadcasting Authority is to ensure due impartiality in such sound and television services as may be provided in Malta[3], and the provision that the Broadcasting Authority 'shall be able to consider the general output of programmes provided by the various broadcasting licensees and contractors, together as a whole' in virtue of art. 13 (2) (Proviso) of the Broadcasting Act. When the law was about to be enacted, the Broadcasting Authority had written to the Prime Minister recommending an amendment to this proviso to avoid this incongruence but that advice was not heeded to.[4] The

[2] pp 105 - 106
[3] Art. 119 CM
[4] *See* Chapter 4, p 150

idea of looking at the whole mix of what is offered through the different broadcasting stations basically allows political party stations to balance each other out. Considering that as suggested *infra* the future of political stations needs to reconsidered within the context of a broader reform of Malta's entire broadcasting landscape, the author would be in favour of ensuring impartiality in all broadcasting services, and not only with regard to the public service broadcaster.

4. In this work after providing a critical appraisal of our legislative framework, the author sought to examine the main substantive duties and obligations of the public service broadcaster. The duty to ensure impartiality in broadcasting services as a safeguard for listeners and viewers to have access to diverse points of view and be able to form their own opinions has in general evolved positively through a number of judgments that have been given by Malta's Courts of Justice.[5] In particular, the Courts have asserted that the obligation is one that can be enforced directly against all broadcasters, and even more so, against the public service broadcaster rather than only through the Broadcasting Authority. The enunciation of the 'seven principles on impartiality following introduction of pluralism' by the Court of Appeal in 2003[6] should provide, at least in part, the basis of an updated National Broadcasting Policy that was issued in 2004[7], but which for over sixteen years has not been revised. The updating of this Policy following a process of consultation should be considered a priority. The Policy needs moreover to provide for a clearer and more expedited mechanism of redress with regard to

[5] *See* Chpater 5

[6] *Chairman tal-kumpanija Public Broadcasting Services Limited et noe v Awtorita' taxXandir (Broadcasting Authority) et,* Court of Appeal, per Mr Chief Justice Vincent de Gaeatno, Mr. Justice Joseph D. Camilleri, and Mr. Justice Joseph A. Filletti, 15 January 2003. *See:* Chapter 5 p 32 - 33

[7] Ministry for Information Technology and Investment, & Ministry for Tourism and Culture, Government of Malta, *National Broadcasting Policy,* (April 2004)

different forms of complaint that could arise as regards the public service broadcaster.

5. After examining the substantive principles relating to public service broadcasting as established by our Courts of Justice, the author has re-examined the same judgments from a jurisdictional and procedural angle. In cases relating to the role and obligations of the public service broadcaster, the concept of juridical interest has been interpreted within its more restrictive civil law meaning. The right to receive information as a vital component of the fundamental human right to freedom of expression should not be dependent on whether the 'aggrieved party' (the entity whose views were not properly communicated or censored by the broadcaster) files or not a complaint. Court judgments have acknowledged that the Broadcasting Authority should act as the guardian of that right, irrespective of whether or not a complaint is filed by the 'aggrieved party'.[8] The author would recommend a broader interpretation of the concept of 'juridical interest' to cater for viewers who feel that their right to receive information deserves to be safeguarded and a failure by a public service broadcaster in this regard does not only violate the right of the party whose message was not adequately covered, but also the right of all those who are entitled and want to receive that message.[9]

6. Another important element pertaining to the public service broadcaster that has been researched in this work is its cultural role. That duty is essential not merely as a goal in its own right, but even more so for safeguarding each country's sense of identity, its language, its history and its different art forms – thereby promoting a sense of belonging by citizens. At the European level,

[8] *See in particular: Onor. Dr Eddie Fenech Adami noe v Dr Joe Pirotta noe et noe* (Court of Appeal), 17 July 1997, Kollezz. Vol. LXXI.I.32, p 615

[9] *See* Chapter 6, p 234

this role is given as justification for derogation from State aid rules, as provided in terms of the Amsterdam Protocol that 'refers to funding of public service broadcasting for the fulfilment of their public service remit.'[10] Moreover, there are support programmes, inclusive of financial aid, towards creativity, fostering talent, and funding of audiovisual works. This is, in particular, provided at the EU level through the Creative Europe MEDIA programme. The author refers to and endorses the recommendation for devising a concerted plan of action as drawn up by Prof. Kevin Aquilina[11] through which Malta could be better prepared to avail itself of the different opportunities presented through that programme.

7. A serious gap that has been identified in this work is with regard to internet based television stations where it has been deemed, in the author's opinion wrongly, that there is no regulatory structure to control programme content by such providers. The author's recommendation in this regard is that Malta needs to adopt the single convergent regulator concept – that is we would have a single regulator responsible for both broadcasting and communications. The revised EU Audiovisual Media Services Directive[12] recognises that traditional television broadcasting and new on-demand services are to be regulated together. Although the Directive does not make the adoption of the single regulator model obligatory, the convergence of different media forms calls out loudly for an updated legal framework. Adopting that model would, apart

[10] *See* Chapter 8, p 353

[11] Kevin Aquilina, Five Years On and Looking to the Future, (Paper published in 2009 Civil Society Project Report on Malta in the European Union) EDRC, University of Mata, May 2009, pp 129 – 143; *See:* Chapter 8, p 363

[12] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 Novembeer 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

from other considerations, address the serious lacuna in Malta's regulatory system through which internet based television stations end up not subject to any regulation as regards broadcast content since the role of the Malta Communications' Authority is limited to allocation of frequencies to internet platforms, and these stations are not licensed by the Broadcasting Authority.[13] To the author's mind this is leading to a breach of the Constitution and the AVMSD which extend to all broadcasting, irrespective of the method of transmission. It is in this respect felt that the need for a single convergent regulator has become urgent, while at the same time, Malta has begun the parliamentary process leading to the transposition of the 2018 amendments to AVMSD which need to form part of our law by 19 September 2020.

8. In examining the role, duties and obligations of the public service broadcaster, the author has in this work delved into the structure that provides this service in terms of law and practice. The independence of Malta's public service broadcaster is a *sine qua non* to guarantee the capability of that broadcaster to live up to the remit expected of it in a modern and democratic society. Apart from the issue that Government should no longer remain the licensor of this broadcaster, our legislation needs to be amended to provide for broader participation in the very ownership of public service broadcasting that to date is wholly owned by Government as sole shareholder of the entity concerned, thereby appointing its Board of Directors, and Editorial Board. Various options need to be considered including providing for the appointment of the Board of Directors and the Editorial Board through a two-thirds majority of the House of Representatives, thereby as has been done in Italy shifting control from the Executive to the Legislature.

[13] *See* Chapter 9, pp 367 - 373

9. An examination of the legislative framework underlying our system of public service broadcasting does not only involve the provider of that service but also the regulator. That is why the author recommends that it is moreover time to revise the method of appointment of the Broadcasting Authority. The present practice where membership is split between representatives of the two mainstream political parties and the Chairman who ends ups burdened to have to decide on any issue that is of a controversial nature, leaves much to be desired. It means that the setup is too much based on simply trying to balance different political interests without providing for civil society representation. Moreover, there is no guarantee in the present set up against having a Chairman who would not guarantee the desired level of balance and impartiality expected of the Broadcasting Authority. Adopting a system where the Chairman cannot be appointed unless his nomination is supported by at least two thirds of all Members of the House of Representatives would be a step in the right direction, but that apart, representation of interests on a broader basis to comprise civil society is crucial.
10. In this work, the author has then sought to examine broader issues pertaining to our broadcasting landscape. The ownership of radio and television stations by the mainstream political parties was originally meant to be of a transitory nature but over thirty years later, those stations are still there. There is a clear link between the need to reconsider the future of political stations and the wider broadcasting spectrum.[14] It could even be argued that such a reform needs to be seen within the context of the broader ongoing discussion about reforming Malta's Constitution, and strengthening democracy. That

[14] *See:* Chapter 9, pp 401 - 403

discussion cannot be limited to political parties but requires the engagement of society as a whole.

11. Undeniably, there is a *nexus* between the independence and quality of service offered by the public service broadcaster and the level of democracy in any country. That is why the author has sought to focus on various aspects of the role, duties and obligations of the public service broadcaster in Malta, and why the recommendations presented in this thesis are not aimed merely at strengthening and giving more value to that role, but ultimately through that role, aimed at strengthening one of the most important and fundamental pillars of democracy in a modern European country. Primarily, public broadcasting services fulfil their mission by being at the forefront as guardians of freedom of expression – safeguarding society's right to know, to be informed, to receive factual and objective broadcasting and to be exposed to the broadest possible spectrum of different points of view to be able to form its opinion and make mature judgments.

Annex – Excerpts and Quotations in the Maltese Langauge

Chapter Five

Duty to Ensure Impartiality

P 183:

(a) Il-limiti stretti li għandhom jikkontjenu u jarġinaw il-"ministerial broadcasts" kompriżi dawk tal-On. Prim Ministru, fid-dawl stess tal-"policy statements" ta' l-Awtorita' konvenuta;

(b) Il-kriterju tal-kontroversjalita' jew kritika jew propaganda politika li minnu jitnissel id-dritt ta' tweġiba dwar ħwejjeġ ta' kontroversja politika jew "politika pubblika kurrenti";

(c) Il-manifestazzjoni ta' l-interess pubbliku fil-materja medjanti d-dottrina ta' l-imparzjalita' u "fair apportionment of time and facilitiies" meħtieġa skond il-Kostituzzjoni u l-Ordinanza u li jikkonkretizzaw ruħhom fid-dirtt tal-kommunita' "as a whole" għad-diversita' ta' "sources" ta' informazzjoni u edukazzjoni fil-qasam politiku aljen għall-ispirtu tas-Sezjoni jew partiġanerija;

(d) Il-konsegwenti responsabilita' kbira ta' l-Awtorita' konvenuta, tendenti obbjettivament, fil-klima tas-soċjeta' demokratika eżistenti f'Malta, għal "affirmative obbligation";

(e) Il-limiti diskrezzjonali fid-disimpenn ta' din l-obbligazzjoni, min naħa ta' l-Awtorita', li m'għandiex pero' tonqos ..... b'mod rilevanti minn dak li hu minnha mistenni fil-ġjudizzju prudenzjali tagħha speċjalment fil-kontest tas-sensitivita' politika tal-mument tax-xandira;

(f) Il-ħtieġa li d-dritt ta' tweġiba, jekk għandu jingħata, għandu jkun serju, reali u effettiv.

P 184: Fil-ħwejjeġ poltiċi l-Awtorita' tax-Xandir għandha tiddefendi l-imparzjalita' kull meta jkun metieġ "against all comers"..... Id-dritt ta' tweġiba hu il-garanzija stess ta' l-imparzjalita' li l-Kostituzzjoni trid tiddefendi. Iż-żmien permess għat-tweġiba mhux xi sempliċi dettal ta' bla importanza, jew xi "loophole" biex il-valur ta' dak id-dritt jiġi ridott għax-xejn jew kważi xejn, imma fil-każijiet partikolari hu l-essenza stess tad-dritt ta' tweġiba u ħaġa waħda mas-sustanza tad-dritt, b'mod li jekk jiġi stabbilit,

kontra dik l-Awtoirta', id-debitu tad-dritt, meta hi ma tagħtix dritt għal żmien konfaċenti maċ-ċirkostanzi tal-każ, tiġi qiesa id-debitur li ma jħallasx id-debitu b'mod integru, u b'hekk jiġi skond il-liġi, qisu ma ħallas xejn.

P 185: Fil-konċett tad-dritt tat-tweġiba tidħol mhux biss li statistika imma ukoll l-interpretazzjoni tagħha, bl-ispjegazzjonijiet li jistgħu jingħataw dwar l-inferenzi li għandhom isiru miċ-ċifri kwotati fil-kwadru ġenerali tal-pajjis u l-bażi politika tagħhom.

P 186: ... imħabba inesattezzi fix-xandira li l-Qorti tirritjeni li għandhom jiġu korretti jew li persuna oħra jkollha d-dritt li tagħti l-veduti tagħha fuq l-istess suġġett.

P 187: L-Onorevoli Prim Ministru kompla jgħid li hija x-xewqa tal-Partit li jibni nazzjon soċjalista li jaħseb għall-fqir, jaħseb għaż-żgħir u l-batut, u għall-marid – ħsieb dan li huwa l-bażi tal-Partit tal-Onorevoli Prim Ministru – ħaġa magħrufa minn kull min isegwi l-politika tal-Partit Laburista hawn Malta – ħaġa li ma hija kontenżjuża bl-ebda mod. L-Onorevoli Prim Ministru hawnhekk ma jagħmel ebda paragun mal-partit li tiegħu l-Onorevoli attur huwa l-Kap u għalhekk ma jistax l-Onorevoli attur jippretendi dritt ta' risposta għall-kliem tal-Onorevoli Prim Ministru.

P 188: Hija l-opinjoni konsidrata ta' din il-Qorti illi dritt ta' risposta għandu jingħata jekk u meta min ikun għamel id-diskors ikun ħareġ mil-limiti tal-parzjalita' u biex tara dan ikunx avvera ruħu trid tħares lejn id-diskors bħala ħaġa sħiħa – as a whole – biex tara jekk il-kelliemi jkunx oltrepassa il-limiti tat-tolleranza, konsiderando dejjem li trid tagħmel ċerta latitudni lill-kelliem li jkun qed jagħmel messaġġ lin-Nazzjon fl-aħħar tas-sena, għal riferenzi għall-attivita' tal-Gvern tiegħu matul dik is-sena li jkun qed jgħaddi in rivista.

P 188: l-ispjegazzjonijiet li jistgħu jingħataw dwar l-inferenzi li għandhom isiru miċ-ċifri kwotati fil-kwadru ġenerali tal-pajjis u l-bażi politika tagħhom.

P 189: jista' wkoll ikun il-każ li dak li jgħid ikun fl-opinjoni tiegħu veru, iżda la l-Awtorita' u lanqas il-Qorti ma jistgħu jitgħabbew bil-pis li jiġġudikaw huma fuq l-esattezza ta' dak li jgħid. Il-punt involut hawn hekk hu preċisament li, fil-każi kongruwi, għandu jkun hemm opportunita' serja, reali u effettiva ta' risposta biex imbagħad fil-pubbliku jasal għal konkluzzjonijiet tiegħu jew almenu ikun gawda mid-dritt tiegħu ta' diversita' ta' informazzjoni.

P 197: Qari ta' l-Att kollu *tout ensemble ictu oculi* ma jistax ma jirriflettix leġislazzjoni moderna li tagħti affidament lill-Awtorita' tax-Xandir u lil-*licensees* tagħha – inkluż allura l-PBS Ltd. – li jkunu fdati bil-mezzi ta' komunikazzjoni tal-massa bħala entitajiet maturi u aperti għall-fehmiet ta' kulħadd li kellhom ikunu ispirati mill-konsiderazzjoni "illi l-prinċipji tal-liberta' ta' l-espressjoni u pluraliżmu jkunu l-prinċipji bażiċi li jirregolaw l-għoti ta' servizzi tax-xandir f'Malta" (subinċiż 1 (a) ta' l-artikolu 11). U jekk dawn il-prinċipji kienu jorbtu u jobbligaw lil-*licensees* ta' stazzjonijiet privati *multo magis* kellhom jorbtu u jobbligaw l-istazzjonijiet tax-xandir pubbliku.

P 198: Filwaqt li stazzjon privat ta' mezz ta' xandir ma jistax ma jkunx ukoll operazzjoni kummerċjali u bħal kull azjenda oħra hu ukoll regolat b'fatturi ekonomiċi u suxxettibbli għall-forzi tas-suq u tal-kompetizzjoni, hu jibqa' essenzjalment servizz pubbliku li jista' biss ikollu raġuni ta' eżistenza jekk ikun ta' ġid għall-kommunita'. Taħt dan l-aspett, allura d-detentur tal-liċenza ma jistax jopera motivat biss b'interess personali ta' profitt u spint b'implusi tas-suq u ta' gwadan u jinjora l-obbligi li għandu lejn l-utenti ta' dak is-servizz u s-soċjeta' in ġenerali.

P 199: Il-Kostituzzjoni tesiġi li l-Awtorita' taqdi l-funzjonijiet tagħha dejjem anki f'ċirkostanzi fejn ma jkunx forsi possibbli li xi ħadd iressaq ilment quddiemha. L-Att XII ta' l-1991, inoltre, jipprospetta Awtorità tax-Xandir b'saħħitha u proattiva b'responsabbilitajiet li timmotiva xandir ħieles u pluralistiku fir-rispett tal-kriterji tal-bilanċ u imparzjalita' sanċiti fil-Kostituzzjoni. L-Awtorità hi allura mgħobbija bid-dover li tintervjeni tempestivament biex tipprevjeni li jinħoloq żbilanċ jew parzjalità. Mhux biss sempliċiment biex tipprovdi rimedju korrettorju meta dawn jirriżultaw.

P 199: li tassumi l-paternità tagħhom u allura l-obbligu li dawn ma jkunux jivvjolaw kemm l-artikolu 119 tal-Kostituzzjoni fir-rigward tar-rekwiżit ta' bilanċ u imparzjalità

kif ukoll u aktar il-provvedimenti ta' l-Att XII ta' l-1991 li taħthom ingħatat il-liċenzja tax-xandir.

P 200 – 201: Li wieħed ma setgħax jeżamina l-artikolu 20 tat-Tieni Skeda ta' l-Att XII ta' l-1991 iżolatament mill-kumplament tad-disposizzjonijiet ta' l-istess liġi imma kellu jitqies fil-kuntest tal-liġi kollha *tout ensemble.* Dan l-artikolu kellu jiġi kkunsidrat taħt il-kappell ta' l-artikolu 11 (1) (ċ) li miegħu hija strettament allaċċjata t-tieni skeda taħt it-testatura "National Broadcasting Plan". Dan l-artikolu 11 jiddisponi li meta l-Awtorità toħroġ *broadcasting licences* hija għandha tkun ispirata u ggwidsata mill-konsiderazzjonijiet senjalati fil-vari subinċiżi li jsegwu fosthom dak indikat fis-subinċiż (ċ) tiegħu.

P 207: Jekk jirriżulta li l-Awtorità imxiet fuq direttivi li irċeviet mill-Gvern, dan jista' jwassal għad-deċiżjoni ta' l-istess Awtorità tkun annullata għax ma tkunx ittieħdet "mill-Awtorità" jew għax ittieħdet *"for the wrong reasons"* jew wara li ħadu in konsiderazzjoni ċirkustanzi li ma kellhomx jieħdu.

P 213 - 214:

1. Fil-qasam tax-xandir liberalizzat u pluralistiku kif inhu llum f'Malta, hu xorta waħda meħtieġ li tinżamm imparzjalità xierqa f'materja ta' kontroversja politika jew industrijali kif ukoll f'materja ta' *current public policy*;
2. Id-dmir li tinżamm din l-imparzjalità jinkombi fuq kull min jagħti servizz ta' xandir ta' smigħ jew ta' televiżjoni, iżda jinkombi b'mod speċjali fuq is-servizzi pubbliċi tax-xandir, inkluża għalhekk il-P.B.S., tenut kont ukoll tal-fatt li hija ffinanzjata in parti minn fondi pubbliċi;
3. Fejn tali imparzjalità xierqa ma tinzammx, hemm id-dmir fuq l-Awtorità tax-Xandir li tintervjeni u li tagħti dawk id-direttivi kollha meħtieġa sabiex dik l-imparżjalità tiġi ripristinata;
4. Sabiex tkun tista' twettaq dan id-dmir tagħha, l-imsemmija Awtorità għandha poteri vasti u diskrezzjoni wiesgħa ħafna;
5. Dawn il-poteri u din id-diskrezzjoni ta' l-Awtorità tax-Xandir iridu, iżda, jiġu eżerċitati entro il-limiti ta' prinċipji ġenerali li fuqhom hija mibnija s-saltna tad-dritt f'soċjeta' demokratika kif mifhuma fl-Ewropa llum; fi kliem ieħor dawn il-poteri u din id-diskrezzjoni jridu jiġu eżerċitati (1) skond il-liġi, (2) b'mod raġjonevoli, u (3) b'mod li jiġu mħarsa d-drittijiet fondamnetali tal-bniedem;

6. L-arbitru aħħari ta' jekk l-Awtorità tax-Xandir tkunx aġixxiet skond dawn il-prinċipji ġenerali jew, f'każ li jiġi allegat li l-Awtorità tkun naqset milli taġixxi meta kellha suppost taġixxi, ta' jekk tkunx hekk naqset milli taġixxi, hija l-Qorti;
7. Meta l-Awtorità tax-Xandir tagħti ordni jew direttiva li tkun *prima facie* regolari fil-forma u fil-kontenut tagħha, dak l-ordni jew dik id-direttiva għandha, bħala regola, tiġi minnufih obduta, salv id-dritt tal-persuna li tagħti s-servizzi ta' xandir ta' smigħ jew ta' televizjoni u li lilha jkun indirizzat dak l-ordni jew dik id-direttiva li tikkontesta il-legalità ta' l-istess ordni jew direttiva u, jekk ikun il-każ, tirreklama d-danni wara li tkun ottemperat ruħha ma' l-istess ordni jew direttiva.

P 217: Illum huwa rikonoxxut li tali *spots* huma effikaċi ħafna, forsi aktar effikaċi minn dibattiti politiċi jew intervisti jew diskorsi, biex iwasslu l-messaġġi politiċi.

P 217: Il-Malta Labour Party kien qed jingħata mezz sabiex jinfluwenza lill-elettorat fil-għażla fir-referendum li kien mistenni, filwaqt li l-partiti politiċi l-oħra ma kienux qed jingħataw tali faċilita', ċioè permezz ta' *spots.*

.....

Bid-deċisjoni tagħha intiża biex iżżomm bilanċ taħt aspett wieħed tal-Artikolu 119 (1) tal-Kostituzzjoni, l-Awtorità appellanti ħolqot żbilanċ palesi taħt aspett ieħor billi, filwaqt li l-MIC kien qed jagħti informazzjoni dwar sħubija sħiħa fl-UE biex l-elettorat ikun jista' eventwalment jifforma l-opinjoni tiegħu jekk Malta għandhiex tissieħeb jew le bħala membru sħiħ, il-Malta Labour Party, bl-i*spots* dwar l-alternattiva għal tali sħubija sħiħa, kien effettivament (għalkemm s'intendi b'mod indirett) qed jgħid lill-istess elettorat biex fir-referendum li kien mistenni jivvota kontra tali sħubija sħiħa.

P 219: huma biss il-partiti politċi li għandhom dritt li jingħataw sehem xieraq fit-tqassim tal-faċilitajiet u l-ħin tax-xandir, taħt it-tieni parti ta' l-art. 119 (1) tal-Kostituzzjoni.

P 220: Il-projbizzjoni aprioristika u totali *(blanket prohibition)* li wieħed ixandar reklam ta' natura politika ħlief bil-benplaċitu tal-Awtorità ("ħlief kif awtorizzat skond skema ta' xandiriet politiċi approvata mill-Awtorità .....") tikkozza ma' l-element tal-proporzjonalità li jrid ikun hemm bejn l-għan leġittimu li jrid jintlaħaq u l-mezz adoperat għalhekk.

P 223: Dan id-dmir ta' ħarsien m'huwiex obbligu legali lejn l-Awtorità imma wieħed lejn is-soċjetà in ġenerali li lejha huwa dirett is-servizz tax-xandir

P 224: Fil-qasam tax-xandir, u b'mod partikolari fil-kunċett ta' libertà tal-espressjoni li llum hija r-ruħ wara kull sistema ta' xandir pluralista, il-gwida hija provduta fl-Artikolu 10 tal-Konvenzjoni għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali, moqri flimkien mal-artikolu 41 tal-Kostituzzjoni....

Issa f'dan ir-rigward il-Qorti tifhem li l-obbligu tal-ħarsien tal-imparzjalità u l-bilanċ fix-xandir għandu żewġ destinatarji jew titolari ta' jeddijiet fondamentali: l-ewwel hija s-soċjetà in ġenerali li għandha l-jedd tistenna li tingħata xandir oġġettiv, u t-tieni huma dawk li bħala parti mill-jedd tal-espressjoni nnifsu, għandhom il-jedd li jingħtaw l-opportunità li jesprimu rwieħhom u jsemmgħu l-fehmiet tagħhom bħal ħaddieħor.

Chapter Six

Jurisdiction of Courts and ohter Procedural Issues

P 239 - 240: Dik l-eċċezzjoni kienet tgħid illi –
"l-organizazzjoni tal-broadcasts in kwistjoni ġiet magħmula mill-Awtorita' tax-Xandir ta' Malta taħt il-poter li għandha bħala parti mill-funzjonijiet mogħtija esklusivament liha mill-liġi u għalhekk mhix sindikabbli u ma tistax tiġi kontestata quddiem il-Qorti."

P 240: Din il-Qorti taqbel, mingħajr ebda eżetazzjoni, ma' l-ewwel Onorabbli Qorti illi l-eċċezzjoni preliminari ta' l-Awtorità konvenuta, kif opposta fi prim' istanza, ċioe' in kwantu kienet tinnega kwalunkwe ġurisdizzjoni lill-Qorti li ti(ssi)ndika l-operat ta' dik l-Awtorità għar-rigward ta' l-organizazzjoni ta' broadcasts magħmulin minnha, kinet infondata u kellha tiġi kif ġiet miċħuda.

P 241: F'dawn iċ-ċirkostanzi hu, naturalment essenzjali li jiġu mħarrsa id-disposizzjonijiet testwali tal-Kostituzzjoni u l-liġi tagħna. Fihom ma jirrikonoxux espressjonijiet bħal e.g. "in their opinion" or "are satisfied" etc. etc. – espressjonijiet li normalment jikkommotaw diskrezzjoni soġġettiva.

P 242: Iżda fl-istess ħin, id-disposizzjonijiet tal-liġi tagħna jawtorizzaw lill-Qorti li tintervjeni jekk, fil-fehma tagħha, l-arranġamenti magħmulin jew l-azzjoni meħuda mill-istess Awtorità konvenuta jonqsu b'xi mod rilevanti mill-osservanza tar-rekwiżiti imposti bil-Kostituzzjoni fil-qadi tal-funzjonijiet tagħha.

P 247: Din il-Qorti diġa fissret li ladarba l-Awtorità eżerċitat id-diskrezzjoni tagħha, mhuwiex kompitu tal-Qorti li tissostitwixxi d-diskrezzjoni tal-Awtorità sakemm ma jkunx jirriżulta nuqqas rilevanti fl-arrnġamenti ordnati mill-Awtorità.

P 247: Jibqa' dejjem tajjeb bħala punt ta' tluq li wieħed iżomm quddiem għajnejh li l-Awtorità mħarrka tgawdi minn diskrezzjoni fi grad mhux traskurabbli fil-mansjoni tagħha ta' għassiesa fuq dawk kollha nvoluti fil-qasam tax-xandir. Wiesgħa kemm hi wiesgħa dik id-diskrezzjoni, il-Qorti għandha s-setgħa tara (jekk isirilha lment għal daqshekk) jekk tkunx twettqet għall-għanijiet li għaliha tkun ħasbet il-liġi, jew taqbilx mal-qadi tal-funzjonijiet u d-dmirijiet tagħha skond il-Kostituzzjoni u l-liġi....

Illi ladarba wieħed jitkellem dwar diskrezzjoni, wieħed tabilfors ikun qiegħed jara sitwazzjoni fejn trid issir għażla bejn iżjed minn linja waħda ta' azzjoni. Jekk m'hemmx għażla ta' iżed minn triq waħda, allura wieħed ma jitkellimx dwar diskrezzjoni imma dmir.

P 248: Ladarba (l-Qorti) hija tal-fehma illi l-awtorità konvenuta qiegħda tħares dan id-dmir (li tinżamm l-imparzjalità), il-qorti ma għandhiex tieħu fuqha setgħat u dmirijiet li huma mil-liġi fdati f'idejn l-Awtorità tax-Xandir biex tagħmel hi l-eżerċizzju li tara kif l-aħjar li tinżamm dik l-imparzjalità.

P 249 - 250: Illi, kontestwalment mal-preżentata ta' dan l-appell tagħhom lil din il-Qorti, fit-13 ta' Ottubru, 1975, l-atturi ppreżentaw petizzjoni ta' l-appell mill-istess sentenza, in via ordinarja, quddiem l-Onorabbli Qorti ta' l-Appell, liema appell jinsab pendenti għad-deċiżjoni quddiem dik il-Qorti għal-lum stess;

Illi dan id-doppju appell, kif ġie spjegat fit-trattazzjoni quddiem din il-Qorti, milli jidher sar minħabba xi diffikultajiet proċedurali li l-atturi ħassew li setgħu isibu ruħhom fihom kieku ma imxewx b'dan il-mod;

Illi l-atturi allegaw fir-rikors odjern illi dan l-appell hu magħmul a tenur ta' l-art. 96 (2) (d) tal-Kostituzzjoni;

Illi, pero', kif tajjeb ġie sottomess mill-appellat nomine fir-risposta tiegħu fuq imsemmija, is-sentenza appellata ma fiha ebda interpretazzjoni tal-Kostituzzjoni, u

għalhekk m'hemmx lok għall-appell lil din il-Qorti ai termini tad-disposizzjoni minnhom ċitata;

.....

Għal dawn ir-raġunijiet..... tiddikjara li m'għandhiex ġurisdizzjoni biex tieħu konjizzjoni ta' dan l-appell, u konsegwentement tastjeni milli tieħu konjizzjoni ulterjuri tiegħu. *(Dr George Borg Olivier et noe. v Prof. Dr Carmelo Coleiro, noe.,* Qorti Kostituzzjoni, per Aġent Prim Imħallef Maurice Caruana Curran, Imħallef V. R. Sammut, u Imħallef Giovanni Refalo, 26 ta' Frar 1976)

P 251 - 252: Din il-Qorti ma taqbilx ma' din is-sottomissjoni. Għall-kuntrarju hi tal-fehma illi l-foro kompetenti biex jisma' u jiddetermina dan l-appell huwa l-Qorti tal-Appell..... Ma saret qatt kontestazzjoni waqt it-trattazzjoni tal-kawża quddiem il-Prim' Awla dwar x'kien it-tifsira tal-kliem "kontroversja politika". Dan hu paċifiku. It-trattazzjoni kienet kollha ċċentrata dwar l-applikazzjoni ta' dawn it-termini għall-fatti ikkontestati tal-kawża. Is-sentenza appellata nfisha għamlet eżerċizzju analitiku biex tisabbilixxi jekk il-fatti kif jirriżultawlha setgħux jew le jinkwadraw ruħhom f'dak li kien aċċettat li hi l-interpretazzjoni korretta tal-kliem "kontroversja politika". Hi infatti waslet għall-konvinċiment li tali kontroversja – anki jekk f'sens pjuttost limitat – kienet tirriżulta ppruvata. Id-disakkordju allura ma kienx fuq it-tifsir tal-kliem tal-Kostituzzjoni imma fuq l-applikazzjoni ta' dan il-kliem għall-fatti. Dan ifisser illi l-Ewwel Qorti applikat in-norma tal-liġi għall-fatti mingħajr il-ħtieġa li tanalizza u tinterpreta d-disposizzjoni nfisha.' *(Dr Eddie Fenech Adami noe v Dr Joe Pirotta noe et,* Qorti Kostituzzjoali, per Prim Imħallef Joseph Said Pullicino, Imħallef Carmel A Agius u Imħallef Joseph A Filletti, 17 ta' Lulju 1997)

P 257: Din il-Qorti tifhem li rikors għal soluzzjoni kostituzzjonali għandu jkun *"a measure of last resort"* għax hu preżunt li ċ-ċittadin jista' u għandu jsib il-protezzjoni tad-drittijiet tiegħu fil-liġijiet tal-pajjiż.

.....

.....l-Ordinament Ġuridiku ... għandu jingħata l-opportunità li jsolvi hu stess il-problemi li jinqalgħu bl-eżerċizzju tad-drittijiet u l-poteri li hu stess jikkonferixxi, u hu biss meta dan l-Ordinament Ġuridiku jirriżulta li hu monk f'dawn is-soluzzjonijiet, li ċ-ċittadin jkun jista' jirrikorri għar-rimedju straordinarju taħt il-Kostituzzjoni tal-pajjiż.

.....

Għalhekk, il-Kostituzzjoni stess tipprovdi illi, qabel ma dak li jkun iressaq ilment taħt il-Kostituzzjoni, irid l-ewwel "to exhaust all ordinary remedies" għax qabel ma jallega nuqqas da parti tal-Awtorità Governattiva, irid l-ewwel, jipprova jieħu r-rimedju

tiegħu taħt il-liġi ordinarja li pprovdielu l-istess Gvern. Hu biss jekk jirriżulta li l-Gvern ma ipprovdhiex rimedju adegwat, li ċ-ċittadin jista' jakkuża lill-Awtorità b'nuqqas b'kawża kostituzzjonali.

P 258: Din il-Qorti tista' u għandha l-jedd tara li l-Awtorita', fil-qadi tal-funzjoni tagħha, ma aġixxiet b'mod diskirminatorju, altrimenti tkun aġixxiet *'for the wrong reasons"* jew *'for the wrong considerations",* f'kull każ, aġir sindikabbli minn din il-Qorti fl-applikazzjoni tar-rimedji ordinarji mitluba.

P 261: Wieħed għalhekk jistaqsi jekk kemm-il darba l-Awtorità mħarrka taqax taħt din it-tifsira. Fil-fehma tal-Qorti, din il-mistoqsija tista' faċilment tintwieġeb fl-affermattiv, għaliex fid-dispożizzjonijiet innifishom li bis-saħħa tagħhom hija mwaqqfa wieħed isib l-ingredjenti meħtieġa biex jikkostitwuha fost il-korpi magħquda maħluqa mil-liġi. Din il-fehma hija wkoll imsaħħa mid-dispożizzjonijiet relattivi tal-liħi partikolari li tirregola x-xandir (Art. 4 tal-Kap. 350)

P 263: Il-Qorti hija marbuta li timxi mal-parametri li l-liġi tipprovdi għal din l-għamla ta' stħarriġ, sakemm il-liġi nnifisha ma tipprovdix mod iehor.

P 263 - 264: Għalhekk l-artikolu 124 (10) jagħti mhux jedd lill-Qrati li jeżerċitaw ġurisdizzjoni, iżda saħansitra d-dmir li jaraw u jiżguraw li kull awtorità mogħnija bis-setgħa li twettaq xi funzjonijiet partikolari taqdihom u twettaqhom kif iridu l-Kostituzzjoni u l-liġijiet tal-pajjiż.

P 265: Fi kliem ieħor, jista' jagħti l-każ li d-deċisjoni meħuda mill-Awtorità tax-Xandir fil-każ *de quo* ma kienitx l-aktar waħda feliċi li setgħet tittieħed fiċ-ċirkostanzi, u li Qorti, kieku kellha tiddeċiedi hi dwar l-ilment (f'dan il-każ tal-M.L.P.) kienet tiddeċiedi b'mod differenti. Iżda l-leġislatur ried li tali deċisjoni tittieħed minn awtorità pubblika minnu maħluqa, b'kapaċitajiet u b'tagħrif speċjalizzat, u b'poteri vasti biex tkun tista' toħloq dak il-bilanċ ġust u delikat fil-kamp tax-xandir li huwa essenzjali għall-funzjonament tad-demokrazija. L-Awtorità tax-Xandir ċertament m'għandhiex kompitu faċli, u trid dejjem iżżomm quddiem għajnejha li hija għandha rwol importnati f'dan il-kamp speċjalizzat tax-xandir kważi daqs dak tal-qrati fil-ħajja demokratika tal-pajjiż.

P 266: ... id-dewmin tal-Awtorità jikkostitwixxi nuqqas fih innifsu għax jiffrustra u jxejjen id-dritt tutelat mill-Kostituzzjoni u mill-liġi, bin-negazjoni tar-rimedju li għandu jkun pront, reali, u effettiv.

P 266 - 267: "failure to exercise discretion" ammontanti għal rifjut ta' imqar konsiderazzjoni tar-rimedju mitlub mill-attur / bħala tali 'denial of justice' li jittrasferixxi l-konjizzjoni tal-każ lill-Qrati tal-Ġustizzja, li huma "repositories of truth" li f'din il-materja fl-eżerċizzju tas-"supervisory powers" tagħhom.

P 267: Il-Qorti ta' sekond istanza bħala regola ma tiddisturbax l-eserċizzju ta' diskrezzjoni minn Qorti ta' prim' istanza jekk mhux għal raġuni gravi bħallikieku f'każ fejn l-ewwel Qorti tkun eżerċitat illegalment jew b'mod manifesament erroneu jew inġust dik id-diskrezzjoni.

P 267: Ir-rimedju minnu invokat ma jistax jitbiegħed eċċessivament fiż-żmien mix-xandir oriġinali mingħajr, min-natura stess tal-affarijiet, ma jitlef, l-effikaċja tiegħu ..... jitqies preġudizzju sostanzjali in kwantu jirrendi d-domanda "pro tanto" frustranea.

Chapter Seven

Duty of Imparting Information and Ensuring Objectivity

P 309: punt ġdid ta' importanza fondamentali għall-ħajja demokratika u għad-drittijiettal-pubbliku li jkollu opportunità li jisma' sew liż-żewġ naħat.

P 312: Il-prinċipju bażilari tal-Kostituzzjoni u tal-Ordinanza hu li l-politika mhux projita fit-trasmissjonijiet anzi hu doverus li l-pubbliku jiġi edukat u informat sew dwar id-diversi opinjonijiet politiċi, biex ikun jista' jimmatura politikament, imma kolox irid ikun arġinat fil-limiti tal-imparzjalità xierqa u tqassim tal-ħin.

P 312 - 313: In-nuqqas ta' fedeltà għall-oriġinal jista' jkun positiv, b'xi tibdil jew żieda ma' dak li jkun intqal jew sar, jew negativ, bit-tnaqis mir-realtà tal-ħaġa. Malli tittropela ombra ta' dan titfaċċa r-ras mostruża taċ-ċensura politika, li tista' tkun anke involontarja, pero' xorta tibqa' kolpevoli, ħlief naturalment jekk tkun tant marġinali li wieħed jista' jħalliha għaddejja mingħajr perturbazjoni.

P 314: L-iskop tal-liġi huwa li ċ-ċittadin meta jara u jisma' t-trasmissjonijiet fuq it-television u jisma' t-trasmissjonijiet fuq ir-radio ikun jista' jifforma opinjoni fuq dak li jkun qed jiġi trasmess, għaliex b'hekk ikun qed jakkwista edukazzjoni politika, ikun qed jifforma l-opinjoni tiegħu u ma jkunx qiegħed jiġi indebitament influwenzat mill-mod ta' kif ikunu qegħdin jiġu iprezentati l-affarijiet.

Chapter Nine

Present and Future Trends and Challenges

P 398: Peress li din il-Kamra taqbel li għandha ssir diskussjoni dwar ix-xandir pubbliku f'pajjiżna, liema diskussjoni għand(ha) tinkludi wkoll ir-regolamentazzjoni aqwa u aktar effettiva ta' l-istazzjonijiet tal-partiti politiċi fil-media lokali.

P 399: Meta fil-bidu u fin-nofs ts-snin Disgħin il-Gvern l-ewwel introduċa l-pluraliżmu fil-qasam tar-radju u mbgħad fis-settur televiżiv, ħalla lill-partiti politiċi jsiru sidien ta' stazzjonijiet tar-radju u tat-TV. Dak iż-żmien dan kien pass meħtieġ. Il-pajjiż kien għadu ħiereġ mit-trawma tas-snin Tmenin meta x-xandir għas-servizz pubbliku kien sar kontroversjali ħafna. Id-deċisjoni tal-Gvern iggarantiet li kull partit jista' jwassal leħnu b'media li jikkontrolla huwa stess.

.....

Il-Gvern kien għamilha ċara mill-ewwel li dan il-pass kellu jkun wieħed tranżitorju. Tant hu hekk li f'Diċembru 1990, il-Prim Ministru Fenech Adami kien qal li jawgura li l-pajjiż jasal fi stadju ta' maturità fejn il-partiti ma jibqgħux iħossu l-bżonn li jkunu s-sidien ta' stazzjon tat-TV.

Il-Gvern iħoss li l-lum l-pajjiż wasal f'dan l-istadju ta' maturità li kien awgura Dr Fenech Adami. Il-Gvern iħoss ukoll li Malta ma għandiex tibqa' l-uniku pajjiż fl-Ewropa fejn il-partiti politiċi jkunu sidien ta' stazzjonijiet tat-TV.

.....

Għalhekk il-Gvern jipproponi li l-partiti politiċi jaqblu bejniethom li ħadd minnhom ma għandu jkun sid b'mod dirett jew indirett kemm ta' xi stazzjon tat-TV kif ukoll ta' xi stazzjon tar-radju indipendentement mill-pjattaforma użata biex dawn jixxandru.

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