



THE DUTCH SYSTEM OF FINANCING OF PUBLIC BROADCASTING

by Prof. Egbert Dommering¹

1 Some brief historical remarks about the Dutch system²

In most European countries broadcasting was institutionalized in the twenties of this century by means of public service organizations, more or less independent of the State. This institutionalization process placed broadcasting, compared to the United States, in a political non-commercial environment. In the Netherlands the institutionalization process took a different turn. The Netherlands were an ideologically divided country (the so called 'pillars') which caused the formation of different broadcasting associations based on religious and political convictions: a catholic, several protestant, a liberal and a socialist organization thus came into existence. This division corresponded to the political representations in parliament. As a matter of fact the political parties had much influence with their counterparts in broadcasting. The main revenues of these organizations were contributions of the members.

The system had some striking advances compared with the other European public broadcasting systems. It had a high democratic quality because of what we call its *external pluralism*. Contrary to the monopolistic supply structure of the public broadcasting systems elsewhere it created competition from the outset. The public could choose its own organization and programmes. Broadcasting in the Netherlands was in the beginning a sort of *club good*. The broadcasters made programmes for the members of the club who were willing to pay to their organizations.

After the second worldwar a system of compulsory license fees was introduced along the existing system of contributions to the private organizations. This would become an important source of income for the broadcasting associations. They were entitled to a share in the revenues from the license fees proportional to the number of their members which also determined the amount of airtime they were allowed to program. In the same time attempts were made to create an umbrella organization that would produce programmes of common interest (news, sports, arts, etc), the so called Netherlands Broadcasting Organization (NOS). This created an everlasting antagonism within the system: the private broadcasting associations claimed that in fact *they together* were the public broadcasters. In their view the function of the NOS ought to be supplementary to their tasks. The NOS, of course, took an opposite stand.

In the early sixties Dutch Parliament debated the possibility of allowing commercial organizations, such as the press, to start commercial broadcasting along with the public broadcasters. It was too early yet for the creating of a dual system. The result of the political debate was that the system remained

¹ Director of the Institute for Information Law of the Law Faculty of the University of Amsterdam; off counsel of the Amsterdam based Law firm Stibbe Simont Monahan Duhot.

² For a more extensive analysis of the Dutch system, see Egbert Dommering, *The Dutch Audiovisual Landscape: An Interesting European Case*, in: Santiago Munoz Machado (ed.) *Derecho Europeo del Audiovisual Tomo I* (Madrid 1997), 521-534 (in English).

more or less the same, but that commercial elements were introduced by allowing commercial advertising. The time available for advertising was fixed by the government and assigned to an organization called the Foundation for Aether Advertising (STER) which exploited the advertisements on behalf of all the public organizations. From then on the commercial forces in the public system became stronger and stronger, beginning by an increasing amount of advertising airtime, to be followed by the allowing of sponsoring, merchandising etcetera.

In the seventies the development of a high penetration grade of cable facilitated the introduction of a dual system from outside the Netherlands. The European concept of freedom of services proofed so strong that competition by commercial broadcasting services originating in other countries became inevitable. The concept of broadcasting as a transfrontier service was developed by the European Court in Dutch cases.³

In reaction to these developments the Dutch legislator liberalized the closed public broadcasting system.

2. A mixed system of financing

2.1. Some statistics

In 1994 the total allocated budget out of the income incurred from license fees and the STER advertising amounted to Dfl 1,4 billion. 65 % came from the collected license fees and 35 % from advertising. The NOS received approximately 25 % of the total, eight public broadcasting organizations less than 50 %. The remainder went to the educational organization (a separate entity) and minority organizations. In 1994 the broadcasting associations earned from other sources (broadcasting magazines, sponsoring, donations etcetera) Dfl. 448 million.⁴ The budget decreased in 1997 to Dfl. 1.1 billion, partly due to the loss of advertising money to commercial competitors of which the most important are RTL and SBS.

2.2. Legal framework

2.2.1. The allocation mechanism of license fees and advertising income

According to the articles 101 and 102 Media Act (Mw) the Minister of Culture responsible for broadcasting fixes the total budget and transfers the amount to the Commissioner for the Media (Commissariaat voor de Media). The budget is based on a long range plan (four years) submitted by the NOS to the Commissioner (article 99 Mw), which accounts for the financing of the envisaged programmes and an estimate of the money the broadcasting organizations themselves are going to contribute out of their own sources of income. The Commissioner distributes the money according to the principles laid down in the articles 103-104 Mw. The Commissioner controls the yearly accounts of the broadcasters.

2.2.2 Legal and economic character of the license fee.

Some arguments for creating a system of license fees have been lost in history and new ones have been invented. Historically this way of funding has to do with the scarcity of receiver sets. Only

³ Case 352/85 ECJ 26 April 1988, ECR 1988, 2085 (*Bond van Adverteerders*); Cases 288/89 and 11/95, ECR I 1991, 4007 (*Collectieve Antenne Inrichting Gouda and Nederlands Omroepbedrijf*).

⁴ Source: Proceedings of Dutch Parliament 1996-1997, 25120, nrs 1-2, 7.

those who could afford a receiver set had to pay for the service. A more sophisticated argument draws from economic theory. In this view broadcasting is considered to be a public good, because once a programme has been broadcasted its use by one person does not exclude the use by others.⁵ We need, therefore, a fiscal instrument to avoid the 'free rider' who takes advantage of a facility he does not have to pay for. A last argument often used in favour of the license fee is that it is a safeguard for more independency of the broadcasters, because they are not dependent on the whims of day to day politics. The license fee fund is a permanent resource of the public broadcasters. To be brief, historically there are three different rationales for the license fee: payment for a service received, a fiscal instrument or a cultural instrument of media policy.

Article 110 Mw imposes on the holder of a receiving set the duty to pay a license fee. Dutch law clearly chooses for the fiscal approach, because it calls the license fee a 'heffing', which means a tax levy.

2.2.3. Public Service requirements and legal constraints on Dutch public broadcasters to refrain from commercial activities

A public broadcasting organization according to article 50 Mw is obliged to offer a general programme to the public containing culture, information, education and entertainment. Article 8 of the Media Decree fixes these elements on percentages of 20 %, 25 %, 5 %, 25 % respectively. The carrying out of these programming obligations is supervised by the Commissioner of the Media. Within this framework the broadcasting organizations are free to spend their budget the way they like. The programming section of the NOS (the Nederlandse Programma Stichting, NPS) has a duty to make programmes of general interest. Article 8 of the Media Decree puts in this respect the emphasis on news, parliamentary reporting, reporting of events of national interest, cultural events of outstanding interest and sports.

Article 52 Mw forbids broadcasting organizations to broadcast commercials and mix advertising in their programmes. Sponsoring is allowed within strict rules devised by the Commissioner of the Media. Article 57 forbids public broadcasters to engage in commercial activities, but these rules have been softened by recent legislation to allow public broadcasters to cope with commercial competitors on the dual market (articles 57a and 57b). The rule now is a general obligation not to distort competition.

3. The Dutch system of financing and European Law.

3.1. ECRM

The Dutch license fee has been challenged once before a Dutch Criminal Court as an illegal interference in the sense of article 10 ECRM, but in vain.⁶ European case law on this subject is still not clear. After the European Court ruled in favour of a dual system in the Lentia case⁷, it is still not open to debate how the Court will define a public service and what interferences on the basis of article 10 section 2 to maintain such a service it will allow.

⁵ Cfr. Ejan Mackaay, An Economic View of Information Law, in: Willem F. Korthals Altes and others (eds.) *Information Law Towards the 21st Century* (Deventer|Boston 1992), at 48.

⁶ Supreme Court (Criminal Law Section) 15 December 1992, Dutch Law Reports 1993, nr. 374; See also Wouter Hins *Ontvangstvrijheid en buitenlandse omroep* (Deventer 1991), 239.

⁷ EHRM 24 November 1993, Series A Vol. 276.

3.2. The Portuguese Decision⁸ by the Commission and the Treaty of Amsterdam

The Commission has ruled on a rather specific case relating to the Portuguese system. Some general conclusions, however, may be drawn from the decision. The financing of specific public service requirements does not fall within the scope of the general prohibition of State Aid in the articles 92-93 of the Treaty of Rome, provided there is a clear connection between the fulfilment of the public service and the funding by public means, which has to be proven by a transparent bookkeeping. The approach chosen by the Commission seems similar to the one it has developed under article 90. In my view the Dutch system of mixed financing can hardly meet these standards. The link between financing and the fulfilment of specific public service obligations is difficult to proof. The recent softening of the prohibition to engage in commercial activities have made things worse. The Dutch government hopes to save the Dutch system of financing a public broadcasting because the Protocol of Amsterdam express concerns over the maintenance of a public broadcasting service in Europe⁹. The recognition of public broadcasting as a public service to be funded out of public means does not alter the obligations of transparency and proportionality as developed in competition law.

4. Why public funding?

Why do we pay public broadcasters out of public funds? This is the overriding question all over Europe. The general public is not as dedicated any more to public broadcasters as it used to be in a more monopolistic environment. It seeks entertainment, sports and news, and it can find its choice everywhere in commercial programmes. Public and commercial broadcasters are competing on the same markets to acquire the same sports and film rights. This reopens the debate on the justification of the funding of the public broadcasters. Is it still a 'basic service' ('Grundversorgung' as they call it in Germany)? But how could it be so if the majority of the audience fulfills its 'basic needs' with commercial programmes. Are they fulfilling the wrong needs and does a paternalistic government come to rescue them? This 'basic service' idea seems rather out of the way. In my view, there is still a justification for a public service as a vehicle and stimulator of the democratic debate in an open society. Government could also use the public service as an instrument in its cultural politics. This puts the public service in a more modest position. It requires also that the public service will be stripped of all commercial elements.

Let me look back at the three arguments used in favor of the licence fee: the service argument, the tax argument and the cultural argument. The service argument seems out dated because nowadays everybody owns a receiver. The majority of the owners, more over, spend most of their watching time with broadcasters who don't receive a penny from the license fee. Turning to the tax argument it is questionable whether the argument is still valid, because by the present state of the art the use of a programme by one can be excluded from the use by another. This can be achieved by encryption and decoder techniques. Pay tv channels now become a reality in Europe. Another refutation of this public good argument is the fact that the broadcasts can be produced out of the income of advertising, a resource also available to the public broadcasters. The cultural argument is not convincing anymore because all cultural institutions that are subsidized by the state find the protection of their independency in the constitutional framework of the democratic society, rather than in a separate public fund.

⁸ Decision 7 November 1996, State aid NN 141/95. Portuguese TV.

⁹ Helga Zeinstra and Herman van der Plas (both employees of the Ministry of Culture), 'Het Protocol bij het Verdrag van Amsterdam inzake de financiering van publieke omroepen', in: *Mediaforum* 1997/9, 124-127.

There is no final answer yet. In the Netherlands we see the rather hybrid approach to increase on the one hand the public service obligations on the other hand to allow more competition. The situation in other European countries is not unlike the Netherlands. In the end the public will decide the issue.