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To test or not to test: Comparing the development of ex ante public service media assessments in Flanders and Norway

ABSTRACT

Taking the implementation and impact of emerging assessment methods for new public service media activities – the so-called ex ante tests – as a case in point, this article analyses evolving means of governance and accountability, and evaluates the thesis that claims the locus of governance power shifts from government to commercial competitors. The article does so by way of a comparative analysis of Flanders and Norway, illustrating the path dependency in this process. Based on the overall context of the EU approach to public service broadcasting, and public service broadcasting’s history and position in the two countries, the article compares the legal aspects of the ex ante evaluations, their main procedural aspects, the services subject to evaluation, the implementation of the mechanisms and the challenges that arise from these new instruments of governance. It compares for a number of parameters

KEYWORDS
public service broadcasting
ex ante tests
comparison accountability governance Flanders Norway EU
including the actors involved (as initiators, executers and evaluators) and their leverage power, the procedures developed, the services targeted and the level of time, money and effort invested. The analysis serves as an illustration of a more general trend towards an audit culture and towards a shifting locus of power from government to include other stakeholders, especially commercial competitors that have a growing power to determine policies regarding public-funded media institutions. At the same time, the analysis confirms the path dependency thesis, showing how the organization of these processes still depends on historical, political, economic and cultural specifics. Such insight is important to assess the impact of the recent crisis of public service media. In closing, the article points to implications both for media research and for practitioners.

INTRODUCTION

Taking the implementation and impact of emerging assessment methods for new public service media activities – the so-called *ex ante* tests – in Norway and the Belgian region Flanders1 as a case in point, this article analyses evolving means of governance and accountability. The twofold aim is to test the thesis that contemporary governance instruments change who public service broadcasting (PSB) is accountable to, away from governments to private competitors, and to analyse the ways in which, and extent to which, path dependency counters the homogenizing force of the Europeanization of PSB policy and legislation.

As a public institution, PSB across Europe traditionally was regulated and evaluated by the government, which set the regulatory framework that stipulated the rules of the game, including the remit and its limits, the financial constraints, internal and external hierarchies and control, and criteria to evaluate legitimation. In terms of accountability, PSB answered only to government in some way or another, often ensured through the institution’s politicization (Bardoel and Lowe 2008; Van den Bulck 2007). Throughout the 1990s, views on accountability changed and were influenced by the growing interference of a common European policy framework and the New Public Management doctrine (Hood 1991). On the one hand, this led to new forms of governance, seen in the contractualization of relations with political principals, and the externalization of policy and watchdog roles from government to independent agencies (Pollitt and Bouckaert 2004). This resulted in elaborate and often costly external audit processes (Collins 2011). The question is if this also led to a shift in the locus of governance power, making PSB accountable to stakeholders other than the government representing the public interest. This article’s analysis of the *ex ante* test implementation in Flanders and Norway seeks to test this thesis.

On the other hand, the developments led to speculation about the homogenization across Europe of PSB’s roles and accountability. Since its inception, PSB has developed differently in different societal contexts. Institutionalization, output, popularity, legitimacy and regulatory frameworks all depended on national specifics (Donges 2007: 327). EU media policy efforts are believed by some to brush away these differences. However, new institutionalists claim path dependency remains strong. In the case of PSB it is even reinforced by the subsidiarity principle acknowledged in the EU’s Amsterdam Protocol (discussed below). Consequently, the ways in which new forms of media governance and accountability impinge on the status quo

1. Flanders is the Dutch-speaking region in the north of Belgium (a founding member of the EU), containing 60 per cent of the Belgian population. Despite not being a member of the EU, all relevant regulations are binding for Norway pursuant to the European Economic Area (EEA) Agreement. In the field of state aid, the powers of EFTA Surveillance Authority (ESA) mirror the competencies of the European Commission.
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depend on the legacies, continuities and dynamics of domestic conditions. The discussion of the impact of EU state aid regulations for PSB in Norway and Flanders allows for an in-depth analysis thereof.

The choice for a thorough, comparative analysis of Flanders and Norway is motivated by a number of arguments. In general, comparative analysis yields a better understanding of intricate, country-specific processes that push what seem at face value similar processes into different directions. For such a research interest, we opt for a ‘comparative case study’ that can account for complexities as well as specific circumstances and contexts surrounding a thematic subset of issues (Raats and Pauwels 2011: 25). To ensure valid comparisons, the selection of cases needs to take into account media market size. In the literature, much reference is made to ‘big’ institutions such as the BBC or ZDF, operating in large markets. This overlooks the specifics of the majority of ‘small’ corporations and their commercial competitors, which operate in limited media markets with little international appeal, and in some cases limited public means to translate EU legislation into desirable and affordable accountability measures (Lowe and Nissen 2011). Indeed, ‘small’ PSB countries such as Ireland, Denmark, Austria and Sweden are among the countries seeking to implement ex ante tests. To understand the specifics with regard to governance and accountability measures, the cases for comparison should vary on the nature of New Public Management adoption in the public sector (discussed below) (Pollitt and Bouckaert 2004). On this basis, we decided to compare Norway and Flanders. Although one is a nation state and the other is a region within a nation state, they are comparable in that they both represent independence in authority over media policy and regulation, fall under EU rules and are two small societies with a long-standing established PSB tradition.

To allow for a systematic analysis, we discuss the development of the ex ante tests at three different stages – the trigger, the development of the legal framework and the implementation – and for a number of parameters: what actors are involved (as initiators, executers and evaluators) and what leverage power they have, which procedures were developed, which services were targeted and what level of investment in terms of time, money and effort went into it. After an overall contextualization of the EU approach to PSB, and the institutions’ history and position within the two societies, the article compares these parameters at the different stages for both cases. We then discuss the challenges that arise from these new instruments of governance. Our comparative analysis serves as an illustration of a more general trend in PSB governance towards an audit culture, while showing that this general trend has different implications in different contexts. Such insight is important, we argue, to assess the impact of the often referred to recent crisis of public service media. In closing, we point to implications both for media research and for practitioners.

THE EU CONTEXT: STATE AID RULES AND PSB

Since the 1980s, the EU – especially the Commission – has shown increasing interest in the area of media and ICT. Much policy-making in this field is positive, driven by a desire to push European industries and a single market. By contrast, the EU’s interest in PSB is negative in the sense that it aims to set limits for the use of state aid funding to not hinder the market (Biltereyst and Pauwels 2007; Collins 1994; Donders and Pauwels 2010; Goodwin and Spittle 2002; Jakubowicz 2004; Michaelis 2007). The Amsterdam
Protocol (1997), the cornerstone of EU policy on PSB, recognizes it as a crucial institution in maintaining media pluralism, and confirms member states’ competence to provide funding for PSB. Still, the Protocol stipulates that such funding must not ‘distort trading conditions and competition rules in the European Union’ (Bardoel 2009: 1). On this basis, a wave of cases brought against publicly funded broadcasters by commercial broadcasters and press companies has protested the wide scope of activities, the position of PSB vis-à-vis technological developments and new media services, and the market distortion effect of PSB funding (cf. Bardoel 2009; Pauwels and De Vinck 2007; Soltész 2010). Complaints from the commercial sector have often been substantiated by the fact that, for reasons of technological nationalism, many European states have given PSB institutions a leading role in digitization and the development of new media technologies. This applies to the pioneering BBC (Smith and Steemers 2007), but also to institutions in smaller states like VRT in Flanders (Van den Bulck 2008) and NRK in Norway (Moe 2010).

These complaints led the EU to gradually introduce more detailed regulations, and the European Commission to replace the 2001 Broadcasting Communication on state aid rules for PSB, with the new 2009 Broadcast Communication.2 The latter identifies three main stipulations (Soltész 2010: 32):

1. The public service remit must be clearly defined and formally entrusted upon the PSB institution;
2. Financing must be limited to actual costs;
3. Commercial activities must conform to the market.

Of specific impact on member states’ economic and legal framework is the introduction of an ex ante control mechanism for any significant new services planned by a PSB institution (European Commission 2009: para. 84 et seq.). It is up to each member state to decide if a new service is significant, ‘after taking into account the characteristics and the development of the broadcasting market and the range of services already offered by the public broadcaster’ (Ridinger 2009: 10). If a new service is considered significant, the state is obliged to order an ex ante test, to be executed by a body ‘which is effectively independent from the management of the public broadcasters, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties’ (European Commission 2009). The actual test must be an ‘open consultation’ of all relevant stakeholders about their views on the envisaged new service. This should allow for the inclusion of relevant information and guarantee transparency, further enhanced by the obligation to make the results publicly available (Ridinger 2009: 10–11). On this basis, the member state should assess whether the new initiative serves the democratic, social and cultural needs of society (as required by the Amsterdam Protocol), and what the overall market impact is, that is, whether or not the proposed service will distort trade and competition. The latter can, according to Soltész (2010: 33), involve looking at market structure, the position of PSB in the market, the level of competition and potential impact on private initiatives. Market impact and public value need to be balanced.

Several states have set up legal frameworks which accommodate these requirements. The United Kingdom introduced a so-called public value test already in 2007 as a response to both domestic political developments and the budding EU approach (e.g. Collins 2011). Germany has enforced a Drei-Stufen-Test since 2009, following a lengthy process with the Commission
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(e.g. Moe 2010; Radoslavov and Thomass 2011). In both cases, tests have been
implemented a number of times, leading to diverse results, but always with
a considerable workload (administrative cost) and price tag (financial cost).
The Commission has made it clear, though, that it is up to individual member
states to develop mechanisms taking into account the specifics of the state’s
media system (Ridinger 2009: 10). The question is how smaller states tackle
the new requirements. Not only do they face different challenges concerning
administrative and financial costs. As will become clear, the revisions also take
different routes, not necessarily ending up in the same place. Scrutiny and
comparison of such cases, then, should allow for a discussion of the impact of
the common European policy framework in quite unlike contexts.

To compare the road to ex ante tests in Flanders and Norway, and its impli-
cations so far, we first need to contextualize PSB in the two cases, focusing on
their starting positions when entering the digital era and facing the EU as a
force of broadcasting policy.

THE NATIONAL CONTEXT: PSB IN FLANDERS AND NORWAY

Founded as a radio institution in 1930 and ‘self-evidently’ incorporating tele-
vision in 1953, PSB in Flanders enjoyed a monopoly backed by a licence fee
in return for a ban on advertising for almost 50 years in radio and more than
55 years in television (Saëys 2007; Van den Bulck 2001). The advent in the
late 1970s, and the subsequent liberalization, of local radio did not hit PSB at
its core. Yet, the 1987 ‘cable bill’, which made room for commercial television,
and the successive 1989 introduction of commercial channel VTM (an alli-
ance of the Flemish press) took PSB’s breath away. Immediately, the cumber-
some, centralistic, hierarchically organized and strongly politicized institution
witnessed a dramatic drop in audience ratings. The introduction of advertis-
ing on radio in 1990 did not bring the necessary change. After a failed (too
limited) restoration attempt in 1991, a massive clean out commenced in 1995,
first and foremost at the level of charter and organization, following the New
Public Management doctrine.

Flexibility in structure and personnel was enhanced by replacing an
administrative hierarchy with a more flexible management structure and by
turning the corporation into a public liability company – VRT (1997). The relation-
ship between state and PSB was redefined through the introduction of a
management contract, to be renewed every five years. In this way, the Flemish
government wanted to work with long-term agreements allowing for a level
of freedom and independence, with accountability based on performance
rather than hierarchy. The scope of the remit reaffirmed PSB’s responsibility
to educate, inform and entertain. While the first contract (1997–2001) intro-
duced performance indicators based on viewing and appreciation figures, subse-
quent editions added quality standards (2002–2006), a re-enforced cultural remit
(2007–2011) and diversity standards (2012–2016). Throughout, VRT was given
a prominent role in technological innovation (beheersovereenkomst 2007–2011:
art 1, §1). Its performance was to be monitored by independent bodies such as
the Flemish Media Regulator, amongst others (Van den Bulck 2012).

The early history of the Norwegian PSB shares some basic characteristics
with the Flemish. Norsk rikskringkasting (NRK) was established in 1933 as a
publicly owned PSB by law, and enjoyed a monopoly on radio and later tele-
vision until the early 1980s (Dahl and Bastiansen 1999). At that time, the NRK
met its first competitors in the form of local radio and satellite-distributed
television channels from abroad. By 1992, the advertising-funded, privately owned PSB TV2 was launched (e.g. Enli et al. 2010). For the NRK, a line of expansions and favourable re-regulations marked the 1990s. The public institution introduced a third radio channel and a second television channel, was transformed into a state-limited company, pursued a leading role in the transformation to digital broadcasting and started selling advertisements through its teletext service – all to face budding competition, and all blessed by a broad political consensus. The NRK still enjoys stable conditions and is comparatively well funded through a licence fee on television sets. It remains by far the most popular radio provider in Norway and struggles with TV2 for the leading market position on television (e.g. Moe 2009).

In meeting the competition in the 1990s, then, the success of the VRT and the NRK differed significantly. Both governments sought to secure a strong PSB, but while Flemish VRT became subject to a detailed and quite strict regulatory framework and increasing market scrutiny, the NRK enjoyed stable conditions with generous leeway. There was nothing comparable to management contracts to worry about for the NRK – only broadly defined statutes. The development of online services illustrates the consequences.

During the first decade of Internet activities, the NRK was left to its own. There were no formal restrictions put on the scope of the NRK services. As late as in May 2007, the Ministry of Culture and Church Affairs (MCCA) – doubling as NRK owner and regulator – stated that ‘today’s NRK services on the new media platforms can […] be said to be a result of the company’s own priorities more than a consequence of political signals or decisions’ (Government 2007: 99). By contrast, by 2007, the VRT had lived with its management contract for a decade, and had thus had its remit repeatedly subjected to political, competitive and public scrutiny. For instance, fierce debates about the relationship between PSB and new media in the run up to the third contract resulted in VRT launching only one digital channel (instead of the requested eight), with a compulsory focus on culture rather than commercially interesting areas such as sports or children’s programmes (Van den Bulck 2008). While the VRT experienced crisis and permanent commercial and political scrutiny throughout the 1990s and into the 2000s, the turn of the millennium found the NRK with more stable conditions. The only substantial political process that concerned this part of the NRK’s activities took place outside the Norwegian Parliament – on the European level.

NORWAY AND FLANDERS FACE THE EU: TRIGGER AND LEGAL FRAMEWORK ADJUSTMENT

In April 2003, the NRK’s strongest competitor in television, TV2, filed a complaint to the EFTA Surveillance Authority (ESA) on alleged cross-subsidy of the institution’s teletext and Internet services. During 2004, ESA extended the investigation to include the complete model for funding the NRK, and the definition of its remit (ESA 2005).

The presence of advertising was not the only controversial matter with the NRK’s Internet activities: they also had a somewhat unclear status in relation to the overall remit. The MCCA argued that Internet activities in general constituted an ‘important element of the information aspect of the public service remit’ (MCCA 2004: 13). ESA rejected the Norwegian approach (ESA 2005). Instead, ESA assessed individual parts of the online activities in accordance with the overarching aim of catering to the democratic, social and
cultural needs of society – as opposed to serving individual demands. While
the Ministry admitted that NRK statutes ‘could be more precise in regard to
which new media services fall within the scope of the public service remit’
(MCCA 2005: 23), the competition law approach was discarded on a
fundamental level. The Norwegian government argued for a much more
dynamic take:

Interactivity, fragmentation, niche services and catering to individual
needs is precisely what defines new media services […] This new rela-
tionship between content providers and consumers presents consid-
erable new opportunities for the media, including public service
broadcasters.

(MCCA 2005: 24)

With this perspective, state aid rules could not block the remit from keeping
up with technological and social developments, and the scope of the NRK
remit had to be allowed to ‘evolve’ (MCCA 2005: 25).

In the early 2000s, then, Norwegian governments fought EU competition
rationales to help secure a safe haven for the NRK (Moe 2009). As a conse-
quence, the issue of state aid and PSB led to a long-winded process where
the national government set out to defend its practice of allowing the NRK
substantial room to dynamically develop. If we compare this to the Flemish
case, we find an equally lengthy but eventually more compliant process in
which the Flemish government seems happy (if not eager) to accommodate
the Commission.

Indeed, following complaints in 2004 of private competitors against vari-
ous aspects of VRT’s public funding, the EU started procedures resulting in
a number of consultation rounds (2004–2008), focusing, among other issues,
on a vague definition of the remit, and lack of formal control mechanisms.
In answer to an Article 17 letter of the Commission (July 2006) making these
points, the Flemish government took a number of measures, communicated
to the Commission in late 2007 and accepted by the Commission in its final
decision (European Commission 2008), conditional on the implementation of
all proposals by February 2009 (cf. VR 2009 2905 MED.0254).

The Commission’s acceptance was based on a list of commitments made
by the Flemish authorities, including four key provisions:

1) A legal framework ensuring VRT cannot launch new services or activ-
   ities not covered by the current management contract without an ex
   ante evaluation and explicit entrustment;
2) A set of criteria to determine a new service and to assess whether or
   not it contributes to the public service goals;
3) A promise to obtain advice of an independent specialist advisory
   body in charge of the ex ante test; and
4) A stakeholder inquest in the run up to every new management
   contract.

(Tosics, Van de Ven and Riedl 2008: 82)

To this end, the Flemish government made a number of adjustments to
the legal framework. The new Radio Broadcasting and Television Bill of
March 2009 reconfirmed the Flemish Media Regulator VRM’s (annual) control of VRT’s observance of the management contract (art 218, §2, 9°). It further provided a definition of VRT’s remit, including in the final paragraph: ‘VRT is on top of all technological developments so that, if needed or so wished, it can offer its programmes to listeners and viewers via new media applications’ (art 6, §1–2). At the same time, the Bill makes provisions for the introduction of new services:

Art. 18. § 1. VRT cannot perform any new services or activities not covered by the management contract, until after explicit permission of the Flemish government

§ 2. To this end, the Flemish government asks advice from the Flemish Media Council (SARC), […]. In its advice, Flemish Media Council takes into consideration observations of third parties, […] important evolutions in the media market and technology, as well as the evolving media landscape and the role of VRT herein.

§ 3. The Flemish Media Council evaluates the media market on the basis of changes in the economic situation of the Flemish media landscape, the overall media offer in the Flemish market, technological evolutions, international trends, protection and promotion of Flemish Culture and Identity and the expectations and needs of the media user.

Finally, the Bill stipulates that ‘[i]n preparation of each new management contract with VRT, the Flemish Media Council organises a public survey about the extent of the public service remit and the operationalization hereof’ (art. 20, §1). Importantly, the paragraph on the way in which the Flemish Media Council should come to its final advice copies the exact wording of the ex ante test. Together these provisions seem to provide at least a legal fulfilment of the requirements set out by the 2009 Broadcasting Communication.

In comparison, the Norwegian regulator had a longer road to travel. Not only did the NRK lack a sufficiently clear definition of its remit – it also lacked a fitting document to spell out the definition. To negotiate EU requirements, then, the Norwegian Ministry commenced work on a White Paper on the future of PSB. The White Paper, published in May 2007, included an outline of a so-called NRK manifesto, describing the overall aims of the organization’s public services (Government 2007). Parliament passed it in March 2008, and later revised it in February and May the following year. The manifesto directs the NRK to ‘be present on, and develop new services for, all important media platforms in order to reach as widely as possible with its complete program provision’ (Government 2007: 99). Yet, the document did not entail any new statutory regulations.

Such measures were presented as late as in mid-2009. Following up on its intention stated in the 2007 White Paper to assess potential new public services against their market impact, the Ministry now invited a public hearing on a ‘proposal for regulations of a procedure for advance approval of new NRK services’ (MCCA 2009). This is the Norwegian version of the ex ante test.

The scheme introduced a two-step assessment. The first step asks whether or not a new service needs advance approval. Only services that ‘constitute a significant change to the [NRK’s] existing public service broadcasting output’ warrant approval. In deciding, four further concerns are mentioned: whether or not the initiative stands out from existing services in the NRK’s remit;
whether or not the service is permanent; the effect on the market; and the
10. costs (MCCA 2009). If a new service needs formal approval, it moves on to
11. step 2. Here, it must first be said to fulfil democratic, social and cultural needs
12. in society. If so, its approval depends on a weighing of, on the one hand, its
13. contribution to the fulfilment of the NRK remit and the value it adds to exist-
14. ing market offers, and on the other hand, the service’s potential competition-
15. limiting effects. Including a plain market impact assessment, the Norwegian
16. procedure overall follows the design laid out in the 2009 Broadcasting
17. Communication and the corresponding ESA document.
18. The interesting question, then, is how these triggers and adjustments
19. played out in the actual implementation of the revised legal frameworks,
20. which is key to the possibilities and constraints of specific public service media
21. institutions.

IMPLEMENTING THE LEGAL FRAMEWORKS

According to the procedure proposed by the Norwegian Ministry in 2009,
22. the NRK should send an application for approval of a new service to the
23. Norwegian Media Authority – the country’s media regulator. The Authority
24. would be responsible, first, for judging whether the proposed service needs to
25. be tested, and, if so, for undertaking the whole test. No later than eight weeks
26. after submission of a proposal should the Authority communicate an advi-
27. sory statement to the Ministry, which then makes a final decision. During the
28. autumn of 2009, the proposal was given a formal public hearing, yielding nine
29. statements in total. Most welcomed the test, while commenting on unclear
30. points. The Media Authority, notably, pointed to the lack of detailed guide-
31. lines for handling different scenarios, including complaints. The Authority
32. also protested against the eight-week schedule.
33. By late April 2010, the ex ante test was formally confirmed by the govern-
34. ment, to take effect May 1st. The design of the procedure differs from the
35. original plan by granting a less ambitious time frame for the consultations. In
36. addition, an important change is introduced by assigning the task of market
37. impact assessment to the Norwegian Competition Authority. The task of the
38. Competition Authority is to enforce Norwegian competition law. It has never
39. before been involved in broadcasting policy, or assessed any NRK or other
40. PSB activities.
41. In the meantime, the Ministry ordered the Media Authority to under-
42. take a review of the NRK’s existing services on ‘new media platforms’
43. (MCCA 2009). This review was, along with the proposed ex ante test, part
44. of the measures to be implemented per agreement with ESA. The review of
45. existing services should make sure which NRK offers fall within the public
46. service remit as formulated in the statutes. As such, the review sets the basis
47. for a new regime where each subsequent service will be subject to a test before
48. its incorporation within the remit. Submitted in June 2010, the Authority’s
49. report recommended approval of the vast majority of existing NRK services
50. (Norwegian Media Authority 2010). Only one web service (UT.no, a coopera-
51. tion with the Norwegian Trekking Association) and a set of services for mobile
52. phones were criticized as problematic. In the end, the Ministry approved of
53. the complete NRK output online, including UT.no, following new editorial
54. guidelines for the site (MCCA 2011). Together with the quite general level of
55. discussion in the Authority’s report, this could be seen as a further example of
56. the generous leeway granted to the Norwegian institution.
In April 2011, the NRK applied for approval of a web-based travel planner site planned together with the Directorate of Public Roads as well as commercial bodies (Norwegian Media Authority 2011). The Media Authority found that the service required testing – which launched the first instance of an \textit{ex ante} procedure in Norway. A public hearing followed, together with an assessment by the Norwegian Competition Authority (2011) of the market impact, deemed ‘substantial negative’. The Media Authority then concluded that even though such a service could contribute to achieve certain socio-economic purposes by providing travel and route information in one web site, it could not be justified within the democratic, social and cultural needs of society as these are defined by the public service remit in the NRK’s current statutes.

(Lilleborge 2011)

As of December 2011, the final decision on the issue is still pending.

In the Flemish case, some steps have been taken to turn the legal framework into action (see Van den Bulck 2011). The annual control of VRT’s performance by the VRM is firmly in place – with VRT coming out successful so far (e.g. Vlaamse Regulator voor de Media 2007, 2008, 2009, 2010). However, so far the operationalization of the \textit{ex ante} test has proven problematic.

The Flemish Media Council was set up in November 2007 as a follow-up from the old Media Council (Vlaamse Gemeenschap 2008). It is composed of a number of independent experts and the representatives of all main stakeholders in the field of media including VRT, private television stations, private radio stations, daily and weekly press, professional journalists, electronic communication networks (providers), Independent audio-visual production sector, copyright organizations and media users. All are appointed for a period of five years. The Flemish media minister is obliged by law to obtain the Council’s advice on any legislation. Funding of the SARC is limited to personnel and expenses. So while obliged by law to provide advice based on scientific research (cf. above), the Council has no financial provisions to commission any studies. For this purpose, the Council needs to turn to the cabinet of the media minister and/or the Culture, Youth, Sports and Media Administration of the Flemish government. However, the administrative and financial price tags of examples of \textit{ex ante} tests in the United Kingdom and Germany are beyond the means of both cabinet and administration.

To make both financial/administrative and principle/legal ends meet, the media minister, the Media Administration and the Council took a number of initiatives. On 6 June 2009 VRT and the Flemish government signed an explanatory addendum to the existing management, listing all ‘existing services’ implied in the current management contract: activities/services in radio, television, Internet, mobile services, distribution and innovation projects. The document further stipulates which services are not included in the management contract: namely any other than the existing linear radio and television services, and any operationalization of innovation projects after their two-year test period (Vlaamse Gemeenschap 2009). This addendum was announced as the last step towards a complete and clear definition of the public service remit as requested by the European Commission (perscommuniqué Vlaamse regering 2009). At the same time, it obliged the European Commission’s request to define ‘new service’, be it through a reversed approach of an exhaustive list of existing services. This move provoked criticism within the
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Flemish Media Council. Several stakeholders saw it as a means of PSB and the Flemish government to dodge future \textit{ex ante} tests, claiming the list exceeded VRT’s current/actual activities to include any foreseeable new service. Different from the stress on the digital theme channels in 2006 (cf. Van den Bulck 2008), concerns focused mainly on Internet and mobile phone services, considered as potential economic growth areas for commercial competitors.

The search for an affordable compromise was helped by the overlap in the wording of the Media Bill between the criteria set out for the \textit{ex ante} test and for the preparations of the Media Council’s advice on a new management contract between VRT and the Flemish government (cf. Van den Bulck 2008). With negotiations between government and VRT for the new (2012–2016) management contract starting in the autumn of 2010, the Flemish Media Council was expected to publish its advice in this regard by late 2010. In a minimal interpretation of the Media Bill, the Council could accept a scientific audience survey next to general observations with regard to the position of VRT in the Flemish media market. Yet, the Council opted for a maximum interpretation by commissioning academic research into the market impact of VRT, including of new services, next to the required audience and stakeholder survey. The Flemish Administration provided funding and an update of secondary studies of the way in which VRT (can) fulfil(s) its legal requirement to enhance and protect Flemish national identity, and of key technological developments in the field of media and ICT. The Council’s advice – based on these studies and negotiations between stakeholders – states that the ‘existing services’ addendum needs to be renegotiated, and demands a ‘clear definition and delimitation of VRT’s remit and goals’ (Flemish Media Council 2010: 5, 8).

No tests have so far been initiated in Flanders. Yet, while the new management contract (2012–2016) confirms the government’s trust in VRT and the existing governance and accountability model, it has replaced the ‘existing services’ addendum with a list of services considered as ‘new’ and therefore subject to \textit{ex ante} testing (Vlaamse Gemeenschap 2011: 54), putting the need for an \textit{ex ante} procedure back on the table. If there are no more efforts to operationalize the test, there is distinct danger of further conflict with the EU. A 2008 EU press release stated, if Member States don’t do it, the Commission would be obliged to carry out the full assessment itself under the EC Treaty rules. However, the Commission’s \textit{ex post} intervention is likely to be significantly more ‘invasive’ than an \textit{ex ante} reflection at national level on the shape new services should take.

(MEMO/08/671)

In other words, unless the states manage to set up \textit{ex ante} assessment satisfying the EU requirements, increased invasion of PSB conditions can be expected. This remains a challenge in Flanders.

The situation, then, is far from settled in either of the cases. Yet, the processes so far yield insights into the national contexts, and also allow for comparison.

\section*{Comparing Flanders and Norway}

To assess the extent of similarities between the cases within the shared EU framework, we now compare the processes across a number of parameters: actors involved (as initiators, executers and evaluators), time frames, which
services were targeted and what efforts or resources were invested in the resulting regulatory schemes in the two cases.

Starting with the trigger phase, the actors involved are similar: in both Flanders and Norway, commercial broadcasters lodged complaints to the Commission, which in turn initiated the policy processes proper. This finding is not surprising, as commercial competitors’ use of the Commission as an outlet for protests against publicly funded media is well documented (e.g. Donders 2012; Mortensen 2008). More interestingly, once the processes reach the national policy level, the approaches start to differ. The regulatory conditions in both instances were clearly challenged by shared EU state aid processes. Both existing systems witnessed quite lengthy procedures, but the national rationales differed. The Norwegian case bears witness of continued government loyalty towards a strong and independent PSB, including in new media. The Flemish government, however, seems more willing to comply with EU’s ‘competition framework’ and the stress on close and continued scrutiny. These seem less favourable to a free development of VRT, including in the area of new media. Such differences continue in the actual adjustment of the legal frameworks.

At first glance it appears that adjustments were most extensive in Norway, constructing a whole new regulatory document – the NRK manifesto – to hold a sufficiently detailed definition of the remit and serve as the basis for a new regime introducing market assessments into broadcast regulation. In total, it took seven years, against four years in the Flemish case, from when the trigger was pulled to when the test was formally established. By contrast, the Flemish government built on the existing regulatory tool of management contracts, including new detailed instructions and procedures. Yet, the legal provisions in Flanders seem to indicate a move away from the original intention of the management contract, first, by undermining the long term nature of agreements through the introduction of semi-permanent control and accountability measures, and, second, by moving away from an original agreement on VRT’s remit and tasks in its own right to an interpretation vis-à-vis its commercial market context.

Another aspect, that brings to light differences as well as a pragmatic challenge for the future of PSB, concerns time and money. Although the original eight-week time frame for the Norwegian test got somewhat extended, the procedure still sets ambitious aims in that regard. It seems obvious that the costs of the proposed implementation in the long run will be considerable. For a small state and broadcast market like Norway, this could entail a disproportionate burden. By contrast, no real-time frame is set in the Flemish case. This could, however, lead competitors to stretch the process unnecessarily. Experiences in the run up to the 2012–2016 management contract indicate that it is not a swift process. It takes time to go through the administrative procedures of tender of academic institutions over actual research to formulate advice. This is combined with financial limitations that are not expected to be solved any time soon, given overall cutbacks in government expenses. The Flemish case further shows how the growing interference of the EU and the growing demand for evaluative and accountability measures lead to an evaluation overload: the advice of the Media Council regarding the next contract comes only months after the Administration’s mid-term evaluation of the existing contract, on top of the Media Regulator’s annual monitor and any number of potential ex ante tests. This paralyses both PSB activities and policy-making.
While adjusting to a common challenge, the two cases illustrate how the routes taken in the wake of competition in the 1990s laid the basis for the current situation when it comes to the policy tools available and the processes undertaken. According to arguments grounded in new institutionalism, the development of media organizations as well as regulatory agencies is, to a large extent, path dependent – based on their settings and histories (Donges 2007: 327). This view extends to the field of media policy where, according to Humphreys (2009: 9), ‘National institutional profiles are persistent and resistant to change’. Consequently, the ways in which new forms of media governance and accountability impinge on the status quo depends on the legacies, continuities and dynamics of domestic conditions. The discussion of the impact of EU state aid regulations for PSB in Norway and Flanders illustrates this point.

Starting from a stable situation in the 1990s with generous leeway for NRK expansion and a relative absence of detailed political assessment practices, the Norwegian case has taken a long road marked by a lengthy state aid process and the introduction of a new legal document to define the NRK remit, ending so far in a reluctant compliance with competition law requirements. In comparison, the Flemish approach seems less reluctant, looking at the relatively uncontested change in the legal framework. This was at least partly made possible by the 1990s fundamental rethinking of PSB with, amongst other measures, the introduction of a detailed management contract, so far absent in the Norwegian case. Flanders has, however, been very reluctant to operationalize the legal framework for new services. This can be brought back to a battle over the legitimacy and adequacy of the current model for accountability and transparency of PSB. The ex ante test appeals to those in favour of stricter, short-term control mechanisms instead of the current long-term agreements with a level of freedom for the institution. It could also be explained as Flemish government tactics to pay lip service to the EU by adjusting the legal framework, while resisting actual impact from EU interference by not setting up the actual tests.

In sum, so far, the roads towards new assessment practices in Norway and Flanders have followed different routes, thus confirming the impression of continued heterogeneity on a national level within a homogenized supranational framework. Nevertheless, there is a shared tendency also in another sense – concerning a shift in power. A shared key challenge in both cases concerns the regulatory agencies assigned with undertaking the new requirements. The Flemish Media Council’s independence from government is quite strong, but the Council shows greater dependence on commercial and other competing stakeholders as they are better represented in the Flemish Media Council than is VRT (only one member). The policy changes related to ex ante testing thus makes PSB accountable to commercial competitors more than government as representing the public interest, thus far grounded in cultural policy aims. A potential result is a PSB policy that starts from the competitors rather than from PSB in its own right. This is even more clear in Norway, where the ex ante test for the first time introduces competition concerns in the regulation of PSB. Concretely, the Competition Authority has never before been involved in the regulation of the NRK, nor to any substantial degree in broadcasting policy in general. The introduction of market impact assessment clearly matters: for the Competition Authority, the future well-being of global ICT giant Google is a concern when regulating Norwegian
PSB (Norwegian Competition Authority 2011). In a small linguistic community, with a strong and long tradition for wide-ranging policy intervention in the media based on cultural policy concerns, this is a novel thought, to say the least.

In this instance, the small societies compared here stand out from bigger ones, such as the United Kingdom, where not only competition arguments have a longer history and different role in PSB policy, but the very idea of an *ex ante* test was seen by the BBC as a way to ensure steady development between charter renewals (Collins 2011). It remains early days for the new *ex ante* regime in the cases compared here. Yet, the tendency of shifting power to market stakeholders clearly merits further attention.

**CONCLUSIONS**

Norway and Flanders are not the only small states struggling with EU requirements. For instance, in the wake of a complaint against Ireland’s RTE and subsequent action by the Commission, the Irish government committed itself to define the scope of the remit, improve transparency measures and the implementation of an *ex ante* test (Soltész 2010; Tosics et al. 2008: 83–84). In 2009, Ireland adopted a new Broadcasting Bill, which provides an enumeration of PSB aims and tasks, including new media activities. It further includes the establishment of a public value test and market impact assessment for significant new PSB activities. The newly founded Broadcasting Authority of Ireland (BAI) was authorized, among other things, to control the fulfilment of the RTE remit and the assessment of new PSB activities. So far, no evidence was found of actual operationalization or implementation of this framework. Other countries, including Austria, struggle to move from the legal framework to the actual testing. Meanwhile, Sweden and Denmark are among the countries that have recently introduced a full-fledged *ex ante* procedure (Svendsen 2011; Wormbs 2011). In the latter case, the test follows an earlier version that excluded a market impact assessment, which was applied to two different services, both limited in scope and cost. While it is early to tell from these cases, it appears that practical and pragmatic yet consequential issues such as administrative and financial costs will continue to matter for small states’ efforts.

A more fundamental challenge is that the *ex ante* tests and the wider requirement in the new Broadcast Communication 2009 that ‘the public service remit must be clearly defined and formally entrusted upon the PSB institution’ (European Commission 2009) may ‘lead to a further narrowing of the remit and revenue streams of public service broadcasters, especially in the field of new media’ (Bardoel 2009: 1–2). This observation is so far based on the British and German cases, but seems to function for smaller states too.

Despite this homogenizing impact of the EU’s Broadcast Communication on PSB legislation, our cases show that national singularities and specificities remain dominant. While the Flemish evolution towards increased control and accountability measures seems to coincide with a more critical political stance towards PSB, the Norwegian government has kept its belief in a strong and flourishing PSB. In this sense, the common framework of *ex ante* tests has different consequences depending on the political cultures and histories of policy in different countries. Still, there are common traits. The relevance of competition law arguments that comes with the *ex ante* procedures is a novelty.
in some contexts (including Flanders and Norway), but not in others (e.g. the United Kingdom). Analysing the further effect of this tendency remains a task for comparative research.

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SUGGESTED CITATION

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