

Public Service Broadcasting in Greece: Back to the Future or Point of No Return?ⁱ

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Introduction

The Greek media landscape changed dramatically after the deregulation of broadcasting in the late 1980s which ended the public broadcasting monopoly. Many media outlets appeared in a small market of just 11 million people to the extent that the media landscape today is characterized by an excess of supply over demand. From a broadcasting field of two public TV channels and four radio stations, in the late 1980s, it has become an overcrowded environment comprising 160 private TV channels and 1200 private radio stations, all of them lacking an official licence to broadcast (Papathanassopoulos, 2014). Traditional media, such as newspapers, magazines and the Hellenic Broadcasting Corporation ERT, the public service broadcaster, faced an unprecedented challenge as competition increased first from powerful (unregulated) commercial analogue broadcasters and then digital media. To address sharp decline in sales, the main publishers, helped by a weak regulatory regime, moved to electronic media, thereby raising levels of media market concentration. The interdependence between political and media elites and the strong clientelistic relations which characterize the Greek political system are identified as the main factors behind the ineffective and contradictory nature of broadcasting regulatory policies. The ongoing financial crisis and recession has affected the media sector as a whole and turned some media outlets financially unsustainable. However, the most dramatic development occurred in 2013 with the sudden closure of public service broadcaster (PSB) ERT.

More specifically, in early June 2013 the Greek government decided to close down ERT and make its employees redundant as part of the latest public spending cuts imposed to meet the terms of the country's bailout deal. The rationale behind this unprecedented move was that the public service broadcaster was overstaffed and inefficient. In effect, this has left Greece as one of the very few Western European countries without a public channel and its citizens entirely dependent on the private media sector for the provision of information, entertainment and education. Even though ERT can be rightly accused of lacking clear public interest objectives, overstaffing, bureaucracy, wastefulness and over-rewards for senior management, its abrupt closure without consultation and a strategic plan is an attack on free speech and public space by the Greek government. ERT required restructuring, but not closing down. True, previous attempts to restructure ERT and strengthen its independence from government and political parties failed as they faced resistance from politicians and trade unions, but ERT's 2013 shutdown created an impasse that has divided the Greek nation. PSBs play a crucial role in producing and disseminating public service output that brings citizens together and enhances the educational and cultural aspect. Greece needs to establish a PSB framework with clear public interest objectives in whose independence the Greek public has faith. ERT's role as an impartial public service broadcaster is important especially today given the increase of social tension and the rise of the far right in Greece.

This article is concerned with analysing the reasons behind, and consequences of seizing a PSB such as ERT.ⁱⁱ By using documentary research, own experience and discussions with academics and journalists in Greece this work describes the Greek anarchic and largely unregulated broadcasting scene and the close relations between media owners and politicians, and sheds light into the reasons behind closing down ERT. Special attention is paid to the consequences of silencing a PSB on democracy, pluralism and freedom of speech. Part one of the article provides a background of the Greek broadcasting landscape, the regulatory framework and the historical role and remit of ERT. The second part focuses on the legal questions surrounding the Council of State decision regarding ERT's closure. The third and final part examines the legality of ERT's closure from the EU and ECHR perspective. The overall argument is that in the current Greek political and economic environment one should expect the political elite to strengthen the role of the PSB as a guarantor of pluralism and diversity, rather than closing it down.

Overview of the Greek broadcasting market

Broadcasting in Greece began in 1938, initially limited to radio services from the capital Athens. EIR (National Radio Foundation) started broadcasting out of Athens, as a state-owned monopoly. (Elliniki Radiofonia Tileorasi) Test television broadcasts began in 1965 and full TV service started in 1966. In 1970, the company was renamed EIRT (National Radio and Television Foundation). At that time there were only two TV services – ERT and a second one (YENED) that was operated and controlled by the Greek Army. It was used as a propaganda medium by the military government of Greece until its fall in 1974. The station retained its name and military orientation until the early 1980s, when it was renamed ERT2 by the then PASOK government. On

1 September 1987, a third station was added – ET3, based in Thessaloniki, with mostly regional programming focused on Macedonia and the rest of Northern Greece.

However, throughout the 1980s, as the country began to reform and modernize at an unprecedented pace, audiences demanded a wider choice of viewing options, following the example of other European countries which had already allowed private television. Also, as a member of the European Union, Greece had to adapt to TV market liberalization policies pursued by the European Commission. But similarities with other European TV markets stop there, for the development of the Greek TV sector is distinctly different from that of most EU Member States.

In more particular, public television took its first steps during a military junta (which ruled Greece in 1967-1974), in an environment hostile to the development of objective TV broadcasts. The direct dependence of public television on political authority continued even after the restoration of democracy and undermined the validity and reliability of ERT. The problem was intensified by frequent changes in ERT's management. This was not conducive to long-term planning and action-taking. The process of liberalization at the end of the 1980s was conducted without any prior economic analysis of the consequences on existing companies. ERT was the main victim of this de-facto liberalization as it lost a significant part of its advertising income almost overnight and today has in fact the lowest audience share of all European public TV broadcasters. The first attempt to regulate the TV sector occurred in the mid-1990s, but even at the time of writing private TV channels are operating under a quasi-legal state as they only have provisional licences. The penetration of cable and satellite services is negligible, mainly because of the wide availability of free-to-air national channels.

The restoration of democracy in 1974 brought new impetus to the Greek media landscape and television became the dominant medium of information and entertainment, penetrating citizens' everyday life. The TV sector is characterized by cataclysmic changes which have continued with undiminished intensity since the end of the 1980s, when the first private television stations MEGA (owned by Tyetypos, a consortium of the major newspaper publishers Lambrakis, Tegopoulos and Pegasus) and ANT1 (owned by ANT1 TV S.A. with interests also in radio, publishing and recording) went on air. Alongside these pioneer private services and (until recently) the three public channels ET-1, NET and ET-3, there is a multitude of national terrestrial private channels, funded mainly by advertising.

Private TV grew and expanded rapidly, but it strives to adjust to a pluralistic profile in a highly politicized and commercialized environment, driven by an increasing populism. In 1994 Multichoice Hellas (owned by multinational NetMed BV) started offering analogue subscription TV services and in 1999 introduced the digital service NOVA, initially occupying a monopoly status in the digital satellite pay-TV market after the collapse of rival digital satellite platform Alpha Digital Synthesis. NOVA has acquired the rights to broadcast latest blockbusters as well as live football matches from the Greek League and European Champions League (Iosifidis, 2007, 2012).

However, since 2009 NOVA has been facing competition from giant incumbent telco OTE. In particular, in 2009, Greek Telecommunications giant OTE launched an IPTV service Conn-x-TV, initially available in Athens, Thessaloniki, Patras, Larisa & Iraklion, but currently available in most of Greece. In October 2011, Conn-x TV was re-branded as OTE TV via Conn-x. At the same time, OTE launched their long anticipated satellite service known as OTE TV via Satellite. Both services operate under the OTE TV brand and contain the same logo. In March 2012 OTE TV had merely 63,497 subscribers, but thanks to a rigorous promotion and the acquisition of sports rights (especially live football from major European Leagues) in November 2013, OTE TV reached 230.000 subscribers, most of them under the satellite service. In August 2014, the number of OTE subscribers surpassed 300.000, taking the lead from Nova.

On the contrary, Digital terrestrial Television (DTT) seems to be taking off, boosted by the Greek government's decision to switch-off the analogue terrestrial frequency by the end of 2015, responding to the European Commission's intention to harmonize switch-off dates. As it is the case in most other European countries, the government has introduced a new law (see below) which intends to achieve the migration from analogue to DTT through the public broadcaster in collaboration with commercial analogue TV broadcasters. ERT responded by setting up a subsidiary, ERT Digital, and therefore acting as a pioneer in introducing DTT services. More specifically, since 2006 the public broadcaster has launched three digital terrestrial channels which are available in big cities – Prisma Plus, Cine Plus and Sport Plus. The reception of the signal was free-to-view and the plan was to extend the coverage nation-wide, but ERT's closure has put this venture on hold. However, the digital channels Cine+ and Sport+ ceased broadcasting, and their programming were incorporated into that of the company's two major domestic channels. In March 2012, Cine/Sport+ and Prisma+ terminated their pilot broadcasting period and closed permanently and their frequencies gave way to the transmission of programming from the BBC World, DW and Vouli Tileorasi - Parliament Television).

To sum up, the Greek audiovisual landscape has undergone many upheavals since the late 1980s, when the market was liberalized and allowed the entry of private radio and television stations. In 2012 the saturated audiovisual market comprised of three public TV channels (ET-1, NET, ET-3) and 135 private TV channels (of which the most important national TV channels in terms of market share were MEGA, ANT1, ALPHA and

STAR). In the following, we will consider ERT's audience share, its revenues and the regulatory framework in which it was operating in the period prior to its demise so readers gain a clearer picture of the public broadcaster's financial and regulatory status during its short life.

Audience share figures

Greeks are avid viewers. It is striking that in the multi-channel, Internet era television is still considered the most important medium for news, followed by the press, the Internet and radio. In 2012 the average daily TV viewing totaled 260 minutes, well above the European average. This could be attributed to the wide availability of popular national TV series, US blockbuster movies and sporting events, in particular football.

Table 1 gives us a snapshot of the trends in audience shares in the 20-year period 1992–2012, indicating that the three channels of ERT combined went up by about seven percentage points in 2012 compared to their poor performance in 1995, thanks to an ambitious restructuring plan which changed the programming profile of the two main services (ET-1 became a general interest and NET a purely news channel) so there was no longer any overlap between them. ET-3 was mostly addressed to citizens of Northern Greece. This, however, did not change the fact that public broadcaster ERT had one of the lowest audience shares among its European counterparts. The other noticeable change is that the two leading commercial channels MEGA and ANT1 continued to attract large audiences, but their shares declined steadily due to the fierce competition from other private operators, like ALPHA and STAR.

Table 1: Annual % audience shares of the main Greek TV channels (1992-2012)

<i>Year</i>	ET-1	NET	ET-3	ANT1	MEGA	ALPHA	STAR
1992	10.5	5.9	2.5	30.7	33.6	-	-
1995	4.7	3.3	1.0	25.5	25.6	10.8	11.7
1998	6.1	4.0	1.2	24.1	21.2	15.8	14.3
2001	5.9	4.1	1.5	22.9	21.3	14.6	12.7
2005	4.2	8.7	2.0	20.6	18.4	13.1	11.6
2008	3.3	9.4	3.7	15.4	19.4	12.9	10.1
2012	2.7	9.0	1.8	16.1	18.4	11.8	10.0

Source: AGB Nielsen Media Research

Revenues

ERT was primarily funded by the licence fee, paid by all Greek households via their electricity bill. Revenues from the licence fee had only slightly increased in the period 1997 – 2005 amounting 176.4 million Euros in 1997, 188.7 million Euros in 2001 and 215 million Euros in 2005 (see Table 2). However, ERT's licence fee income in 2007 reached 281 million Euros, following a 2006 government decision to increase the TV licence by 31 per cent (the first significant increase for a number of years – the last TV licence increase by 33 per cent was allocated in April 1997). In 2012, Greek households paid 51.84 Euros licence fee per annum via their electricity bill – this was still much lower than the European average and certainly lower than the monthly subscription fee of 53.90 Euros for the NOVA package. Commercial income, mainly from advertising and sales, totalled 8.5 million Euros in 1997, 18.5 million Euros in 2001, 23 million Euros in 2005 and fell slightly to 21 million Euros in 2007. Government grants, the third source of income, totalled 1.9 million Euros in 1997, 2.6 million Euros in 2001 and remained unchanged in 2005 and 2007.

Table 2: ERT's income (in million Euros, 1997-2007)

Type of Income	1997	2001	2005	2007
Licence fee	176.4	188.7	215	281
Commercial revenues	8.5	18.5	23.0	21.0
Government Grants	1.9	2.6	2.6	2.6

Source: author analysis based on market reports

It can be seen that commercial income (mainly advertising) accounted for less than 10 per cent of the public company's total income as ERT never recovered from the loss of about 80 per cent of its advertising revenue in the decade 1989-1999.

The regulatory framework

Law 1730/1987 allowed private radio stations and paved the way for the end of state monopoly in TV broadcasting. It also united public TV into one corporate body titled ERT S.A. (Hellenic Broadcasting Corporation). As stipulated by law, the mission of ERT S.A. was the organization, the exploitation and the development of state radio and TV, their contribution to public education and entertainment, as well as the presentation of the activities of the Greek Parliament. It was further provided that state radio and TV should reach diverse social groups and cover a wide range of fields, since their purpose was not to make profits but to promote the public interest.

Law 1866/1989 was the first step towards abolishing state monopoly by permitting local private TV channels and made provision for the establishment of an independent regulatory agency, the National Council of Radio and Television (NCRTV), to oversee the operation of broadcast media, grant licences to private stations, and supervise programs. The Council's members are appointed by political parties represented in Parliament. Its independence was questionable as until 2004 it was actually the Ministry of the Press and the Mass Media that granted the licences and the NCRTV only had a consultancy role. However, in the context of a major transformation that took place in 2005 the Ministry ceased to exist and was replaced by a General Secretary of Information and Communications and the NCRTV was awarded a more independent status (backed by the revised Constitution of 2001 and Law 2863/2000 – see below), and was made the sole body responsible for licensing radio and TV broadcasters.

In 1993, Law 2173/1993 was finally passed allowing for the establishment of national private TV channels, therefore legitimising the stations that had already entered the market without a licence. Today, the basic operational framework of private television media is defined by Law 2328/1995, in essence the first serious attempt to regulate the commercial broadcasting market effectively. The commercial stations are obliged to provide programs of high quality, objective information and news reports, and to promote cultural diversity. The NCRTV has the authority to request information from radio and TV stations concerning their organization and financing. Law 2644/1998 made provision for the supply of broadcasting subscription services, and regulated all new pay-TV services regardless of their process (digital or analogue) and means of broadcast (terrestrial, cable or satellite).

Law 3592/2007 titled the “New Act on Concentration and Licensing of Media Undertakings” was passed by the Greek Parliament in late 2007. This Law provided for a number of issues, among them licensing for analogue TV, DTT and media concentration. More specifically, the text made a provision for the licensing procedure for analogue television since, as indicated above, in Greece most radio and TV stations did not hold such a licence. The granting of licences would be based on a tender initiated by the NCRTV. Candidates would be classified based on the following criteria: duration of service; economic viability; number of employees; programming; negative marking; and merging.

Moreover, Law 3592/2007, dealt with the issue of digital television, independently of platform such as terrestrial, satellite, cable or IPTV, and made a clear distinction between platform, or multiplex (network) operator, and content provider. The platform or multiplex operator was placed under a general licence regime, provided that the undertaking/company was registered by the Hellenic Telecommunications and Post Commission (EETT). The law allowed licensed TV stations to digitally transmit their analogue TV programming using frequencies that were to be allocated for the period up to digital switchover. In effect, commercial analogue TV broadcasters were encouraged to collaborate with public broadcaster ERT in forming a single multiplex operator company that would act as the network operator for the whole DTT platform. As Papathanassopoulos and Negrine (2010) mentioned, the venture was politicized. One of the main points of contention for opposition parties for this new ERT's digital subsidiary was that in this way ERT Digital would be a mixed public-private company, with the state retaining a 51 per cent stake. The opposition parties charged that this signaled the gradual beginning of the end of the public nature of ERT since private investors would participate in its capital.

Finally, the Law also dealt with media concentration and attempted to update the strict ownership rules passed with Law 2328/1995. This strict regulatory framework had not prevented high levels of concentration of media ownership, as evidenced by the control of electronic media (particularly MEGA) by powerful publishing interests. In light of various changes in proprietary issues, the new law attempted to address the dominance of the private broadcasters, by simplifying and liberalizing rules. It is worth mentioning that the law was never implemented due to political indecision and resistance from powerful business interests. As a result, a large number of important issues, such as TV channel licensing, media market concentration and the development of digital television remained unresolved. But even when legislation was existent media owners tended to ignore it. In this largely unregulated media environment, dominated by private interests, the political elite took an unprecedented decision to cease the operation of ERT. It is to this issue we are now turning our attention. More specifically, the next section considers the Greek Council of State's suspension decision while the final one deals with the legality of ERT's closure under EU and European Convention on Human Rights (ECHR) Law.

The Greek Council of State's suspension decision

The abrupt closure of the Greek PSB has been widely condemned by international, European and national organizations, including the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), the European Parliament and media organizations (Economou, 2013a). The European Broadcasting Union (EBU), the professional association of European PSBs of which ERT is a founding member, urged the Greek Prime Minister, Antonis Samaras, to immediately reverse the decision in question and to re-establish ERT's broadcasting service (EBU, 2013a). Given that this recommendation was not acted upon, the EBU took the unprecedented step of putting the Greek broadcaster's news coverage - previously only available via a live stream on the EBU website - back on air via the EBU's Athens earth station. These news programs were being produced at ERT's Thessaloniki studios in defiance of the Government's order to cease operations (EBU, 2013b).

The first legal breakthrough in the ERT saga came, however, with a suspension decision by the Greek Council of State, Greece's supreme administrative court, of 17 June 2013, following a suspension petition by the trade union of ERT employees (POSPERT).ⁱⁱⁱ The temporary injunction by the President of the Council of State ordered the suspension of the co-ministerial decision of 11 June 2013 exclusively with regard to the termination of the transmission of radio and television broadcasting, of the publishing, the operation of websites and of any other operation of ERT, as well as of all its frequencies until a new PSB is established. Moreover, the court ordered that it is for 'the competent Minister of Finance, the Deputy Minister assigned to the Prime Minister and the special liquidator to adopt all necessary organizational measures, . . . until the establishment and operation of a new public broadcasting organization which will be serving the public interest . . .'.^{iv} It is significant that the Council of State left the abolition of ERT and of its subsidiaries untouched.

The legal reasoning to the suspension decision was provided three days later by way of a decision of the Suspension Committee of the Council of State.^v The applicants had argued that the ministerial decision in question lacked legal basis and justification, violated ERT's right to be heard and was contrary to principles of the Greek Constitution and fundamental rights guaranteed by EU and international conventions such as: the principle of uninterrupted operation of a public broadcasting organisation and the principle of proportionality as safeguarded by Article 15 (2) and Article 25 (1) of the Greek Constitution respectively; Article 11 of the Charter of Fundamental Rights of the EU; the Amsterdam Protocol on public broadcasting and Article 10 ECHR.^{vi}

The Suspension Committee found, first, that the suspension of enforcement of the ministerial decision in question was not justified. It held that the ministerial decision was correctly based on Article 14B (1) of Law 3429/2005. This provision states that the Minister of Finance and the competent Minister may, by a joint decision, abolish ERT – along with certain other public companies and organizations (DEKO) - if it burdens the State budget directly or indirectly or if it has a similar purpose or so as to restructure its operational costs. The avowed objective of the co-ministerial decision was to restructure the operation and the organizational cost of PSB 'through the establishment of a new organization, serving the mandates of the Constitution, the democratic, social and cultural needs of society as well as the need to insure polyphony in public media'.^{vii} This broadly framed objective is problematic given that Article 14B allows the abolition of ERT on fiscal policy considerations only, but not so as to generally improve its operation by replacing it with a body better able to fulfil its public service mission. Such a replacement would require a legal basis, not a simple ministerial decision (Kaidatzis, 2013).

Nonetheless, the Suspension Committee conceded that the turning off of all ERT activity caused irreparable damage in view of the special role provided by law for the public radio and television. Its overall verdict was that the co-ministerial decision should be suspended in so far as it provided the stopping of radio, TV and internet services and the deactivation of ERT frequencies, but left unscathed with regard to ERT's closure.

The Council of State's interim judgment is laudable in so far as it emphasized the important societal role performed by public service broadcasting (PSB) and said a resounding no to the interruption of its provision in Greece. However, it is deeply unsatisfactory as it created an artificial dichotomy between ERT – the sole PSB provider in Greece – and the institution of PSB as such. The lacuna left by ERT's elimination was especially problematic in view of the fact that ERT had been the sole legal audiovisual operator in Greece. The Suspension Committee ordered that its decision be complied with as soon as possible, but did not clarify how this could happen.

More than three weeks passed before the Council of State's decision was implemented. A new interim body with the initial name 'Hellenic Public Television' (EDT), later to be changed to 'Public Television' (DT), was launched on 10 July 2013. Its unlicensed operation initially consisted in the broadcast of movies, series and documentaries, and was then supplemented by a news programme, and a website. The transitional service has been fiercely criticised by the laid-off ERT employees and the Greek social media as 'illegal, dictatorial and unconstitutional', a 'pirate construct' and an imitation of ERT (Arkouli, 2013). It is perhaps ironic that the government announced 2,000 positions for the new broadcasting service, far exceeding the originally promised

halving or even reducing to one third of the public broadcaster's size. In the meantime, a large percentage of the former ERT staff has been reappointed by DT (Saul, 2013).

The ruling coalition of the New Democracy and Pasok parties also passed a bill for the establishment of the permanent PSB, the New Greek Radio, Internet and Television (NERIT). The bill was closely modelled after a draft bill for the re-organization of ERT drawn up in February 2012 by a committee of independent experts. The committee was initially formed in October 2011 by the then Minister of State, Elias Mosialos, with the aim of strengthening ERT's independence from government and political parties and of rendering it more efficient (Papaioannou, 2012). The Mosialos plan of August 2011 envisioned *inter alia* the closure of some of the ERT television and radio channels, the reduction of ERT employees' numbers (Economou, 2013b). However, these proposals foundered on the vehement opposition of the Greek political parties and POSPERT.

NERIT launched its first programme on 4 May 2014 and its second channel on 15 May 2014 temporarily and on 12 July 2014 on a regular basis under the name NSports. However, the ill thought-out ambush on ERT that was perpetrated on the night of 11 June 2013 bodes ill for its future independence. How is it possible to create an independent PSB when the shadow of government intervention without prior democratic debate in Parliament looms large? Admittedly, ERT has been suffering from maladministration, state dependency and a low audience share. However, it has also been suffering from lack of funds with its licence fee, levied on electricity bills, one of the lowest in Europe (Economides, 2011). Yet, ERT has also been accused of wastefulness. Its closure with immediate effect at the whim of two government ministers, intended to appease Greece's international moneylenders, has left Greece more impoverished than ever. Placing a long-standing cultural institution on the Procrustean bed is not the way to overcome the financial crisis. What are most needed are social cohesion and a broad public consent (*ibid*). Yet, ERT's closure has left Greece more divided than ever. The two parallel ERT and DT services, both accusing each other as 'rogue', constitute a vivid symbol of this division. Remarkably, at the time of writing, around 700 unpaid former ERT employees still continue providing programs around the clock, which are accessible via various websites but also short waves, satellite, and in Western Greece through the analogue signal.^{viii} The online ERT programme attracts significant numbers of viewers and listeners and has been characterized as 'a unique experiment in the history of public service media in Europe (Sarikakis, 2014).' Moreover, a recent wave of resignations of leading members of NERIT's Supervisory Board and Board of Directors, attributed to government interventions, have left NERIT paralysed and the future of public television in Greece uncertain.^{ix}

Perhaps the only credible way out of this stalemate could have been found in Councillor Karamanof's dissenting opinion to the Council of State's verdict which argued that the enforcement of the entire decision had to be suspended. In other words, not only the interruption of ERT's service, but also its closure should have been rolled back. Regrettably, neither the majority of the Council of State nor the Government concurred with this view. The plenary session of the Council of State recently spoke its final word on the legality of ERT's closure. In its decision of 10 June 2014, it held that ERT's closure was in conformity with the Greek Constitution, which did not guarantee the operation of PSB.^x Nor were such guarantees provided by the ECHR as long as quality of programming and pluralism were safeguarded otherwise. The Council of State maintained that this was the case in view of the large number of private TV and radio stations operating in Greece. However, this was not a unanimous verdict, with a minority of ten councillors arguing that ERT's closure was unconstitutional, especially in view of the illegal operation of private broadcasters in Greece to date. The following section will be devoted to the examination of the legality of ERT's closure, first, from an EU and, secondly, from an ECHR perspective.

The legality of ERT's closure under EU and ECHR Law

Having examined the Council of State's findings as to the legality of ERT's shutdown under Greek Law, this section will consider the same question under the lens of, first, EU Law, and secondly, the European Convention of Human Rights (ECHR). Does EU Law or the ECHR offer any guarantees that militate against the closure, or substantial diminution, of a PSB?

The Legality of ERT's closure under EU Law

Even though PSB is not explicitly mentioned in the Treaties, the European Union has considerably influenced its development. The 1997 Amsterdam Protocol recognizes the importance of PSB for the democratic, social and cultural needs of each society and for media pluralism. At the same time, the Amsterdam Protocol makes abundantly clear that PSB funding will be closely scrutinized to ensure that it will 'not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest'. The EU's main activity in this area has hence served to police national PSB systems and their expansion in the digital domain by means of state aid law instruments as these have been fleshed out in the 2001 and 2009 Broadcasting Communications (EU, 2001, 2009).

However, more recently, the Commission has started taking a more proactive part on media pluralism.^{xi} The appointment of Commissioner and Vice-President Neelie Croes brought with it a strategic reorientation in this area. In 2011, a High Level Group of experts on Media Freedom and Pluralism was appointed with the mandate of drawing up a report with recommendations for the respect, protection, support and promotion of pluralism and freedom of the media in Europe. The first recommendation that the High Level Group put forward has been that ‘The EU should be considered competent to act to protect media freedom and pluralism at State level in order to guarantee the substance of the rights granted by the Treaties to EU citizens, in particular the rights of free movement and to representative democracy’.^{xii} In particular, the High Level Group argued that certain national policies that restrict media freedom and pluralism are also likely to hinder the free movement of media companies or journalists to those Member States. Relying on the judgement of the Court of Justice of the European Union (CJEU) in Case C-34/09, *Zambrano*, the High Level Group argued that ‘a case of systematic restriction of media freedom and pluralism in a Member State must be considered as having “the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”’.^{xiii} Moreover, the argument was put forward that restrictions on media freedom and pluralism at EU level would affect the EU democratic process by depriving EU citizens of their right to form informed opinions and thus to meaningfully participate in the European Parliament and local elections.

The link drawn between media freedom and EU citizenship seems to have been inspired by an article by von Bogdandy et al (2012), which was published in the *Common Market Law Review* in 2012. The authors of the said article observed that the Court in *Zambrano* conceptualized EU citizenship not merely as transnational citizenship, enabling its holders to move freely without suffering discrimination, but as a broader ‘fundamental status’ protecting EU citizens also in the absence of any cross-border element against ‘excesses even of their Member States of origin which would deprive that status of practical meaning’ (ibid: 505). Indeed, the *Zambrano* case revolved around the question whether the refusal to grant a right of residence and work permit to the non-EU parent of dependent minor children of Belgian nationality, who were born in Belgium and had never left that Member State, deprived them of the substance of their rights as EU citizens by forcing them to leave the EU to accompany their parents. The Court answered this question in the affirmative. The authors of the abovementioned article argued that this notion of EU citizenship as a ‘fundamental status’ would be incomplete if it remained separated from fundamental rights questions. They held that the connection between the two was particularly obvious and compelling as regards media freedom, which is quintessential for EU citizens’ rights to democratic participation (ibid: 506).

However, the linkage of EU citizenship with fundamental rights is contentious. It has been argued that there should be a careful separation between the two lest the CJEU jurisdiction be indefinitely expanded and the CJEU become a second human rights court (Jacobs 2010). Muir (2014) also refers to the tension between the expansion of the EU regime for fundamental rights protection and the principle of attributed competences. Indeed, a general fundamental rights review of Member State action would be incompatible with Article 51 (1) of the Charter of Fundamental Rights of the European Union (CFREU), which limits the Charter’s scope of application to ‘the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*.’

So as to counter these objections, von Bogdandy et al (2012: 511) qualified their thesis in two important respects. First, they posited that a domestic human rights violation outside the boundaries of Article 51 (1) CFREU would only fall under the scope of Union law if it infringed the *essence* of fundamental rights. Such a violation of the essence of media freedom is conceivable in their view if political speech or debate on questions of public interest is stifled, e.g. in the case of a ‘blanket ban’ on certain media. Secondly, von Bogdandy et al consider that on subsidiarity grounds there should be a presumption of respect of fundamental rights at national level in the fields that are autonomous from EU law. Consequently, EU citizens could only rely on their status to invoke a violation of their fundamental rights if they succeeded in rebutting this presumption. This presumption of compliance could not be rebutted by ‘simple and isolated fundamental rights infringements’ but by ‘violations of the essence of fundamental rights which in number or seriousness account for systemic failure and are not remedied by an adequate response within the respective national system.’ (ibid: 513).

This raises the question whether the closure of ERT constitutes such a violation of the essence of fundamental rights that would allow a claim on the basis of EU Citizenship to be made.^{xiv} In other words, has ERT’s closure deprived EU citizens living in Greece (but also diaspora Greeks and other Greek speaking EU citizens) of their right to a free, open and pluralist political space and thus compromised their participation in the EU democratic process? The arbitrary and irrational closure of the Greek PSB, which took place without any previous public dialogue and consultation, constituted a seismic event of such proportions that arguably met the high threshold for EU intervention as envisaged by the High Level Group. The government’s authoritarian move resulted in a blow to Greek democracy, but also to the European democratic process by cutting one of its valuable arteries and by degrading PSB as an institution.

However, ERT has in the meantime been succeeded by NERIT. The crucial question is whether the audiovisual landscape in Greece in the post-ERT era suffers from a pluralism deficit. This would be the case if NERIT was found to lack the necessary independence against political or economic interference or failed to provide an impartial and comprehensive programme diet comprising information, education, culture and entertainment.^{xv} The fact that these bodies carry the stigma of their undemocratic birth calls for extreme caution when conducting this assessment. More than that, it increases the likelihood that their independence is curtailed, justifying a reversal of the presumption stipulated by von Bogdandy et al. If the lack of independence of the new PSB structure is confirmed, EU Citizenship could provide a mechanism that is enforceable in the Greek legal order so as to protect pluralism and freedom of expression.

Also, it is worth considering whether the CFREU itself could come into play to pass a verdict on the legality of ERT's closure. Crucially, for the strength of protection under Article 11 CFREU to be tested before the CJEU, the closure of ERT would need to fall within the scope of the Charter. In accordance with Article 51 (1) CFREU, this would be the case if Greece was implementing Union law. One aspect of ERT's closure with an EU Law dimension was the deactivation of ERT frequencies as this had been ordered by the Greek Government (EBU, 2014). A further question that is worth asking is whether the overall shutdown of ERT took place in implementation of Union law. One of the reasons adduced by the Greek Government for ERT's closure was the need to lay off public employees so as to comply with the austerity demands of the 'troika', i.e. the European Commission, the European Central Bank and the International Monetary Fund (Baboulias, 2013). Does this mean that Greece acted in implementation of Union law? The European Commission did not dispute that ERT's closure was a reaction to the exigencies of the current economic climate. It held that '[T]he decision of the Greek authorities should be seen in the context of the major and necessary efforts that the authorities are taking to modernize the Greek economy (EC, 2013).' At the same time, the Commission washed its hands of responsibility by saying that the Greek authorities took the decision to close down ERT 'in full autonomy'. Even though the 'troika' had never demanded the actual closure of ERT, its substantial downsizing was part of the European Commission's Adjustment Program for Greece (EC, 2011: 47). Greece exceeded, however, the Commission's expectations. The notion is hard to discard that an important motive for ERT's closure was the wish to reap political credit by showing resolve to implement a tough reform agenda.^{xvi} The argument that Greece acted strictly in implementation of EU law appears therefore precipitate.

The Legality of ERT's closure under the ECHR

In considering whether ERT's closure violated Article 10 ECHR, it is necessary to note at the outset that the protection afforded to PSBs under the Convention is subsidiary to that afforded to them under their domestic legal systems.^{xvii} Not only do applicants need to exhaust national remedies as a matter of procedure before applying to the European Court of Human Rights, they might also enjoy a higher level of protection at national level if their domestic legal system guarantees their existence and development; as is the case under German constitutional law for example. In Germany, the *Grundversorgung* doctrine, which entrusts PSBs with the mission of ensuring the essential basic provision for all, guarantees, first, the maintenance of existing public service programs, and, secondly, their development in view of rapid technological change.^{xviii} Greek constitutional law does not offer similar guarantees to PSBs. The principle of 'continuity of public service', which is part of Greek administrative law, is less far-reaching, but goes in the same direction. The Convention for its part does not contain an existence guarantee for PSBs (Berka and Tretter, 2013). Nor does it mandate a dual broadcasting system or oblige Member States to establish a PSB if they have not yet done so, unless if private broadcasters are too weak to offer a pluralistic system.^{xix} This does not, however, mean that the closure of an *existing* PSB could not fall to be scrutinized under ECHR law.

In order for the closure of ERT to violate Article 10 ECHR, it would be necessary to establish that there has been an interference with freedom of expression, first, of the employees working at ERT who had a right to impart information and ideas and, secondly, of the viewing public who had a right to receive the ERT programs. As has been astutely observed by the Committee of Ministers, threats to the continuity of the activities of PSBs, not least due to uncertainty of short- and longer-term funding, directly translate into threats to their editorial independence and institutional autonomy.^{xx} This has to apply even more so to the complete stopping of the ERT services and the deactivation of its frequencies, which made such threats a reality and thus gravely interfered with the right to freedom of expression.^{xxi}

Next, it is necessary to consider whether this interference was justified under Article 10 (2) ECHR. This would be the case if the interference was prescribed by law, if it was carried out in pursuance of one of the objectives listed in Article 10 (2) ECHR and if it was necessary in a democratic society. As we have seen above, the ERT closure took place on the basis of Article 14B of Law 3429/2005, which allowed the abolition of ERT on fiscal policy considerations only. It is doubtful whether the closure could have been based on this provision given that ERT was a profitable undertaking. In any event, as the Court noted in the *Di Stefano* case, 'the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned

measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.^{xxii} It is equally doubtful whether the ERT management and employees could have foreseen the possibility of an ERT shutdown on the basis of this provision.

Identifying a legitimate objective under Article 10 (2) ECHR on the basis of which the shutdown of ERT could have been carried out is even harder. The closure of a PSB on the basis of purely financial considerations is in any case not allowed under Article 10 (2) ECHR. The only legitimate objective that could come into question is the protection of rights of others. This provision has been interpreted expansively by the Court to also include the protection of pluralism and democracy.^{xxiii} As we have seen, the co-ministerial decision pursued *inter alia* the objective of replacing ERT with a new organization that would better serve the needs of pluralism in public service media. However, this objective could not have been legitimately pursued under the chosen legal basis, Article 14B of Law 3429/2005.

Moreover, it is not clear how the shutdown of ERT could have contributed to pluralism, especially given that ERT was the only broadcaster with a legal obligation to provide objective, unbiased news. Greece's drop by 14 places to the 99th place out of 180 countries, just one place before Bulgaria, the lowest ranked EU country, in this year's World Press Freedom Index is an unmistakable sign that media freedom and pluralism in Greece have deteriorated since ERT's closure, which was characterized in the report as 'a turning point in Greece's media history' (Reporters without Borders, 2014). Additionally, statistics show that Greek TV channels, and especially DT, devote a disproportionate amount of airtime to the ruling *Nea Dimokratia* party to the detriment of other political parties (NCRTV, 2014). The National Council for Radio and Television (NCRTV, 2013), Greece's independent broadcasting authority, recently issued a recommendation, stressing the need for all news and information programs to respect pluralism and to represent the views of all legal political parties.

Finally, the proportionality of the assault against ERT is also very doubtful. First of all, the appropriateness of this measure is questionable. If the aim of the measure was to reduce Greece's budget deficit, it was wholly unsuitable to achieve this aim. Firstly, ERT was a profitable company. Secondly, ERT's closure would not have relieved but burdened the state budget further if compensation for ERT's unfulfilled contracts had been paid out.^{xxiv} Thirdly, as has already been noted, the alleged objective of slimming down public service media in Greece has probably not materialized given that a big percentage of ERT's ex-employees have been reappointed by NERIT. The second step of the proportionality assessment, the necessity of ERT's closure, is not satisfied either.^{xxv} ERT's shut down was an unpremeditated move that took place without prior consultation. ERT could have gradually been restructured had PSB reform not been an untouchable topic in Greek politics in the past. If the government's intention was to clean the 'Augean stables' in a single day, then surely this could have better been achieved by opening the stables' doors to the waves of reform than by knocking the entire edifice down.

Conclusion

Since the late 1980s the Greek media system has been transformed by the entry of big industrial and merchant capital into the media scene and the 'savage deregulation' of broadcasting. This impacted greatly on public broadcaster ERT who never recovered from huge losses of audience share and advertising income. Despite the plethora of commercial channels entering the market, a major problem relating to media concentration has emerged. In most cases important media companies followed diversification strategies. They extended their activities in different sectors of the industry, and there were also a number of general conglomerates that incorporated media outlets in wider economic empires. Today, just a few leading players dominate the scene and account for about 70 per cent of the television market. Regulatory responses to the problems of unlicensed channels as well as to growing concerns over rising media concentration were contradictory and ineffective. On the one hand, the law which abolished state monopoly in television gave priority to existing media companies in granting a licence and, more important, the National Council for Radio and Television failed to establish enforceable licensing and content rules. Even when legislation was existent, media owners tended to ignore it.

In this environment one would have expected the political elite to strengthen the role of PSB as a guarantor of pluralism and diversity; instead, the government decided to close ERT down. After going through the shortcomings of the Greek broadcasting landscape (de-facto TV deregulation with no consideration as to the effects on market structure; inefficient regulatory framework; etc.), this paper presented 'the ERT story' and referred to the specific events leading to the shutting down of the Greek PSB. As mentioned above, this move was part of the latest public spending cuts imposed to meet the terms of the country's bailout deal. The new body to replace ERT was actually established in autumn 2013, after having left the country without a PSB service for a long time.

Was the government right in closing down ERT? The short answer is no! This paper contended that ERT's role as an impartial PSB is important especially today given the growth in social tension and the rise of the far right in Greece. It is not acceptable to close down a PSB without consultation and to dismiss its employees, just

to justify the wishes of the ‘troika’ for redundancies in the public sector. We have argued in this paper that the nexus between media freedom and EU Citizenship could provide a fruitful avenue to challenge ERT’s closure. The examination from an ECHR prism also found the intentions behind and the processes leading to ERT’s unravelling deficient.

The closure of ERT is an attack on free speech and public space by the Greek government. Without doubt, ERT required restructuring and an array of reforms (reduction in the number of high-level directors; removal of duplicate services; more autonomy among different divisions), but this should have been done under a strategic plan and after consultation with interested parties. It is a dangerous precedent to close down PSB entirely or even to link PSB reform to austerity (see Iosifidis, 2010, 2011). Greece is not the only country undergoing austerity measures and looking to cut public spending, and while some slimming of budgets is unavoidable, we need to consider carefully the position of PSB in these conditions and prevent such arbitrary axing becoming a trend.

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End Notes

ⁱ This article is a development of ideas set out in (Iosifidis, Katsirea, 2014).

ⁱⁱ For a more general discussion of the challenges faced by PSBs see (Iosifidis, 2007); (Katsirea, 2008, 2012).

ⁱⁱⁱ The Suspension Committee of the State Council, StE EA 236/2013.

^{iv} ΣτΕ 236/2013, para. 12.

^v Suspension Decision 236/2013 of the Suspension Committee of the Council of State (hereinafter referred to as ‘ΣτΕ 236/2013’) as translated into English by the European Broadcasting Union, ‘A closer look at the ERT decision’, 21 June 2013, www3.ebu.ch/cms/en/sites/ebu/contents/knowledge/media-law/Latest/a-closer-look-at-the-ert-decisio.html, 18 July 2013.

^{vi} The Constitution of Greece as revised by the Parliamentary Resolution of May 27th 2008 of the VIIIth Revisionary Parliament; European Union Charter of Fundamental Rights and Freedoms of 7 December 2000, OJ C 364/01, 2000; Protocol on the System of Public Broadcasting in the Member States, OJ C 340/109, 1997; European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 as amended by Protocols Nr. 11 and 14.

^{vii} Joint ministerial decision 02/11.6.2013 ‘Dissolution of the public company “Hellenic Radio- Television Societe Anonyme (ERT S.A)”’ (B’ 1414/11.6.2013).

^{viii} See www.ertopen.com; <http://www.greektvlive.net/et3-live.html>, 10 March 2014.

^{ix} ‘Deputy Chairman of NERIT’s supervisory Board submits resignation’, 3 October 2014, <http://www.tovima.gr/en/article/?aid=637711>, 5 November 2014. See also the concerns voiced earlier by the European Broadcasting Union as regards a change in the law concerning the appointment of NERIT’s

Supervisory Board. ‘EBU concerned about NERIT Board Change’, 25 August 2014, www.ekahimerini.com, 5 November 2014.

^x ΣτΕ 1901/2014.

^{xi} See Commission Staff Working Paper on Media Pluralism in the Member States of the European Union, 16 January 2007, SEC (2007) 32; European Commission, Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach, July 2009, www.ec.europa.eu/digital-agenda/sites/digital-agenda/files/final_report_09.pdf, 28 February 2014, 34.

^{xii} High Level Group on Media Freedom and Pluralism, ‘A free and pluralistic Media to sustain European Democracy’, January 2013, <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>, 3 March 2014, 21.

^{xiii} *Ibid.*, 20; Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECR I-1177.

^{xiv} The possibility of a suspension of Greece’s rights under Art. 7 (2) TEU is not discussed further in this paper given that it is very slim and not justiciable. The Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, 11 March 2014, COM (2014) 158 final could offer a more promising avenue.

^{xv} See Recommendation no. R (96)10 of the Committee of Ministers on ‘The Guarantee of the Independence of Public Service Broadcasting’, www.coe.int, 29 October 2014.

^{xvi} On the interests behind the closure of ERT see the Roundtable discussion hosted by the ORF, the University of Vienna and the European Parliament representation in Austria on 30 January 2014, www.stream.univie.ac.at/media/lvs/2014S/220023.8/33768_09bf976a660b3a7a2679c24e1c2308f3/angle0. Accessed 5 March 2014.

^{xvii} ECtHR, *Manole and others v Moldova*, judgement of 17 September 2009, no 13936/02, para. 83.

^{xviii} BVerfGE 73, 118 (1986); 83, 238 (1991).

^{xix} *Ibid.*, 21; ECtHR, *Manole and others v Moldova*, judgement of 17 September 2009, no 13936/02, paras 100, 101.

^{xx} Appendix to the Committee of Ministers ‘Declaration on the guarantee of the independence of public service broadcasting in the member states’, 27 September 2006, para 20.

^{xxi} See ECtHR, *Groppera Radio and Others v Switzerland*, judgement of 28 March 1990, no 10890/84, para. 55.

^{xxii} ECtHR, *Centro Europa 7 SRL and Di Stefano v Italy*, judgement of 7 June 2002, no. 38433/09, para. 140.

^{xxiii} ECtHR, *Bowman v The United Kingdom*, judgement of 19 February 1998, no. 141/1996/760/961, para. 38; ECtHR, *Groppera Radio and Others v Switzerland*, judgement of 28 March 1990, no 10890/84, paras 69, 70.

^{xxiv} See ORF Roundtable discussion.

^{xxv} See the concurring view of L. Woods as documented in (Iosifidis, Katsirea, 2014).

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