Bridgette Smith

From:           22 October 2015 15:00
To:             Brendan O'Reilly
Cc:             FOI UNIT; Conor Talbot
Subject:

Dear Brendan,

Thank you for your email.

Please consider acceding to an amended request along the following lines: “all records created since 13 March 2008 (i.e. since FOI 8/2008) relating to the case TV3 brought to the EU concerning the state’s subvention to RTÉ and, in particular, the resulting Commission Decision E4/2005”.

We reserve the right to appeal the decision below.

Given that the qualitative parameters of the search are the same as those deemed reasonable in FOI 8/2008, I trust that this amended request will not cause a substantial and unreasonable interference with or disruption of work of DCENR as suggested.

Kind regards
22nd December 2015

Re: FOI/2015/126

Dear,

I refer to the request which you made under the Freedom of Information Act 2014 for the following records held by this body:

“All records created between February 2008 (i.e. since FOI 8/2008) and February 2011, which relate to the case TV3 brought to the EU concerning the state’s subvention to RTÉ and, in particular, records which are substantially concerned with the resulting Commission Decision E4/2005”.

I have now made a final decision to part grant your request on 22nd December 2015. The purpose of this letter is to explain that decision. This explanation has the following parts:

1. a schedule of all of the records covered by your request;
2. an explanation of the relevant findings concerning the records to which access is denied, and
3. a statement of how you can appeal this decision should you wish to do so.

This letter addresses each of these three parts in turn.

1. Schedule of records

A schedule is enclosed with this letter, which shows the documents that this body considers relevant to your request. The schedule describes each document and refers to the sections of the FOI Act which apply to prevent release, where applicable. The schedule also refers you to sections of the detailed explanation given under heading 2 below, which are relevant to the document in question. It also gives you a summary and overview of the decision as a whole.
2. Findings, particulars and reasons for decisions to deny access

Access to records 15 and 20 has been partly granted as sections of each of these documents are outside the scope of your request.

Access to record 16 has been partly granted as the section of the Draft Memo for Government providing the views of other Ministers has been redacted in line with Section 28(2) of the 2014 Act.

Access to all other records has been granted.

3. Rights of appeal

In the event that you are unhappy with this decision you may appeal. In the event that you need to make such an appeal, you can do so by writing to the Freedom of Information Unit, Department of Communications, Energy and Natural Resources, Elm House, Earlsvale Rd, Cavan, Co. Cavan or by e-mail to FOI_UNIT@dcenr.gov.ie. Your correspondence should include a fee of €30 for processing the appeal. Payment should be made by way of bank draft, money order, postal order or personal cheque made payable to the Department of Communications, Energy & Natural Resources. If you wish to make payment by electronic means, please contact the FOI Unit directly. You should make your appeal within 4 weeks from the date of this notification, where a day is defined as a working day excluding, the weekend and public holidays. However, the making of a late appeal may be permitted in appropriate circumstances. The appeal will involve a complete reconsideration of the matter by a more senior member of the staff of this body.

Should you have any questions or concerns regarding the above, please contact me by telephone on 01 678 3093.

Yours sincerely

[Signature]

Brendan O'Reilly
Broadcasting Policy Division
**FOI Request Reference:** FOI/2015/126

**Description of request:**

“All records created between February 2008 (i.e. since FOI 8/2008) and February 2011, which relate to the case TV3 brought to the EU concerning the state’s subvention to RTÉ and, in particular, records which are substantially concerned with the resulting Commission Decision E4/2005.”

<table>
<thead>
<tr>
<th>Record No.</th>
<th>Brief Description &amp; Date of Record</th>
<th>File Ref.</th>
<th>No. of Pages</th>
<th>Relevant facts</th>
<th>Findings/ conclusions (Public Interest Considerations, If applicable)</th>
<th>Grant/refuse/ part-grant</th>
<th>Basis of Refusal: Section of Act</th>
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<tr>
<td>1</td>
<td>Extract of briefing from Broadcasting Bill entitled: EU Commission/State Aid Complaint/RTÉ/Negotiated Agreement 2008</td>
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<td>Email of 5 February 2008 from Eoin Ó Domhnaill (Department of Foreign Affairs) to <a href="mailto:stateaidreffe@ec.europa.eu">stateaidreffe@ec.europa.eu</a>, cc’d to Paul Mulqueen (DCENR) regarding State Aid Case E 4/2005</td>
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<td>Email of 26 February 2008 from Kevin O’Brien (DCENR) to Peter O’Neill, Bill Morrissey, Nessa Lehane, Paul Mulqueen and Susan Fleming (DCENR) regarding State Aid Case E 4/2005</td>
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<td>Email of 27 February 2008 from Des Hackett (Department of Foreign Affairs) to Kevin O’Brien and Paul Mulqueen (DCENR) regarding a Press Release from the European Commission</td>
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<td>Irish Business Journal of Competition Law and Regulatory Affairs Press Release of 27 February 2008 regarding the establishment of a new Regulator, the BAI.</td>
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<td>Letter of 12 August 2008 from Wouter Pieke (European Commission) regarding CP 151/2005 - Acquisition of Sports Rights by RTÉ</td>
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<td>Official Journal of the European Union Volume 52 of 27 October 2009 including Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting (Pages 1-14)</td>
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<td>Email of 4 November 2010 from Paul</td>
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<td><strong>30</strong></td>
<td>Brief of 12 October 2010 for the Minister regarding the NNI Submission to the Minister.</td>
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<td>Extract from Presentation of 14 October 2010 by the NNI regarding Public Service Broadcasting and the Press.</td>
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<td><strong>33</strong></td>
<td>Brief of 11 January 2011 regarding the NNI Submission on Public Service Broadcasting and the Press</td>
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7. EU Commission/state aid complaint/RTE/negotiated agreement 2008

Funding of Public Service Broadcasting

The Amsterdam Protocol establishes the competence of Member States to provide for the funding of Public Service Broadcasting (PSB) in recognition of its direct relationship to the democratic, social and cultural needs of each society and to the need to preserve media pluralism.

The Amsterdam Protocol permits such funding insofar as it is granted to broadcasting organisations for the fulfilment of their public service remit and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest.

Background

In April 1999 the Department received notification from the European Commission that it had received a complaint alleging aid granted to RTÉ and TG 4 might infringe articles 92-94 of the EC Treaty. This was one of a number of complaints made by commercial television operators across the European Union against the funding arrangements in various Member States for public service broadcasters. The investigation was suspended until after the Commission published a Communication, in October 2001, on how it proposed to deal with the funding of Public Sector Broadcasters.

Negotiations

In February 2004 the European Commission recommenced its investigation into the complaint which culminated in the Commission forwarding an Article 17 letter to Ireland in March 2005 outlining the Commission's preliminary views on the funding of RTÉ.

The case was subject to detailed negotiations at official level between the Commission and Broadcasting Policy Division leading to finalisation of the case at the beginning of 2008.

Resolution

Departmental negotiations with the European Commission led to the resolution of these issues in early 2008 culminating with a letter of commitment by the Irish Authorities to certain undertakings, to be formally undertaken in the context of the Broadcasting Bill, 2008, and by the Commission announcement to close the investigation on 28 February 2008.
The agreement reached covers commitments in the areas of public service remit, supervisory mechanisms, entrustment, public value and sectoral impact tests and avoidance of overcompensation.
6. Oversight of the Public Service Broadcasters

Role of new BAI

The Broadcasting Authority of Ireland (BAI) will replace the Broadcasting Commission of Ireland (BCI) when the Broadcasting Bill 2008 is enacted. As well as replacing the BCI it will also have additional functions and responsibilities.

Under the Broadcasting Bill, the annual review process of the Public Service Broadcasters will be undertaken by the BAI.

This legislation will require that the BAI assist and advise the Minister in the monitoring of RTÉ and Teilifís na Gaeilge's performance as against their public service remits, and in particular obliges that the BAI;

(a) on an annual basis carry out a review of, and report to the Minister on,

the extent to which RTÉ and Teilifís na Gaeilge have, during the previous financial year, fulfilled the commitments outlined in their annual statement of commitments for that financial year (a new Annual Performance Commitments Framework has been agreed with RTÉ. Detailed briefing on this framework is attached at Appendix 1; and

(b) every five years, or such shorter period as directed by the Minister, carry out a review of, and report to the Minister on, the adequacy or otherwise of the level of public funding made available to RTÉ and Teilifís na Gaeilge in order to fulfil their public service objectives as enunciated in statute.

These reviews are designed to safeguard against overcompensation of public service broadcasters and to ensure that the use of public funding is limited by statute to the public service objects enunciated in statute.

The remit of the BAI in the new legislation will be much more extensive than the current BCI/BCC.

The new legislation will provide a statutory mechanism for the oversight of public funding to RTÉ and Teilifís na Gaeilge, in line with the agreement of the European Commission.

The commitments made to the European Commission relate to proposed changes in the supervisory framework for the public service broadcasting to be carried out by the new BAI, in particular:

- The provision of independent advice to the Minister on the funding of public service broadcasting on an annual and 5-year basis by the BAI;
- Sectoral impact and public value tests of certain new public service broadcasting activities;

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- Clarity in Irish law around the remit (objects) and entrustment of public service broadcasters; and
- Various other oversight matters to be carried out by the BAI.
State Aid complaints by TV3.

In April 1999 Ireland received notification from the European Commission that it had received a complaint alleging aid granted to RTÉ and TG4 might infringe articles 92 to 94 of the EC Treaty. This was one of a number of complaints made by commercial television operators across the European Union against the funding arrangements in various Member States for public service broadcasters.

In March 2005 the Commission forwarded an "Article 17" letter to Ireland outlining the Commission's preliminary views on the funding of RTÉ and TG4 including recommendations which the Commission consider must be implemented before funding for RTÉ and TG4 can be considered as compatible with the relevant provisions of the EC Treaty. The subsequent negotiation between the Commission and the Ireland on this matter resulted in closure of the Commission investigation in February 2008, based on commitments from the Irish Authorities. These commitments, to be implemented by way of the Broadcasting Bill 2008, relate to proposed changes in the supervisory framework for public service broadcasting, in particular:

- The provision of independent advice to the Minister on the funding of public service broadcasting on an annual and 5-year basis by the BAI;
- Sectoral impact and public value tests for certain new public service broadcasting activities;
- Clarity in Irish law around the remit (objects) and entrustment of public service broadcasters; and

Ireland also committed to endeavour to enact the Broadcasting Bill 2008 by the end of 2008.
Dear Sir,

May authorities asked me to send the attached letter in relation to the abovementioned case to you. This letter was delivered to your offices on 30 January last. I would be obliged if you could confirm receipt.

Yours Sincerely,

Eoin Ó DOMHNAILL
Industry & Competition Attaché
Permanent Representation of Ireland
Phone: +32 2 282 3242
Fax: +32 2 230 6384
GSM: +32 496 597 796
Email: eoin.o'domhnaill@dfa.ie
Email for State Aid matters: stateaid@dfa.ie

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Attention:

This e-mail is privileged and confidential. If you are not the intended recipient please delete the message and notify the sender. Any views or opinions presented are solely those of the author.

This email was scanned by Ironport and has been certified virus free with the pattern file currently in use. This however cannot guarantee that it does not contain malicious content.

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Tabhair aire:

Tá an r-phost seo faoi phribhléid agus faoi rún. Mura tusa an duine a bhí beartaithe leis an teachtaíreacht seo a fháil, scrios é le do thoil agus cuir an seoltóir ar an eolas.

Is leis an údar amháin son dearcaí nó tuairimí a léirithe. Scanadh an r-phost seo le Ironport agus deimhníodh go raibh sé saor ó vioras leis an bpatrúnchomhad atá in úsáid faoi láthair.

Ní féidir a ráthú leis seo áfach nach bhfuil ábhar maillseach ann.

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Paul,

Got your message that Nuala had dispatched this to Commission last week. I had done a belt-and-braces on it, just in case - acknowledgement attached herewith for your files.

E.

---Original Message-----
From: Stateaidgreffe@ec.europa.eu
Sent: 05 February 2008 14:34
To: #BRUSSELS PR State Aid

EUROPEAN COMMISSION
Competition DG
State aid
Registry

Brussels, 31/01/2008

StateAidIreland@entemp.ie
StateAid@dfa.ie

Subject: E4/2005 - State aid financing of RTE and TNAG (TG4)
Dear Sir,

The Directorate-General for Competition has received your email dated 30/01/2008 concerning the subject referred to above.

Yours faithfully,

Martine Ben Kaida
State Aid Registry

COMP/ SUB - A - 1956

-----Original Message-----
From: StateAid@dfa.ie [mailto:StateAid@dfa.ie]
Sent: Tuesday, February 05, 2008 10:14 AM
To: COMP STATE AID GREFFE
Cc: Paul.Mulqueen@dc.mnr.gov.ie
Subject: "Ireland: State Aid No E4/2005 - State financing of RTE and TG4"

Dear Sir,

May authorities asked me to send the attached letter in relation to the abovementioned case to you. This letter was delivered to your offices on 30 January last. I would be obliged if you could confirm receipt.

Yours Sincerely,

Eoin Ó DOMHNAILL
Industry & Competition Attaché
Permanent Representation of Ireland
Phone: +32 2 282 3242
Fax: +32 2 230 6384
GSM: +32 496 597 796
Email: eoin.o'domhnaill@dfa.ie
Email for State Aid matters: stateaid@dfa.ie

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Ní féidir a ráthú leis seo áfach nach bhfuil ábhar maillseach ann.

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Ní féidir a ráthú leis seo áfach nach bhfuil ábhar maillseach ann.
Commission decision tomorrow as expected and all sounds positive.

I've since discussed with DG Comp - their press release will be broadbrush and general about the commitments made re Broadcasting Bill.

I'll follow up with a draft press release for Department to consider issuing.

We'll need to inform RTE and TG4 at some early stage tomorrow.

Dear Kevin;

I refer to your last email.

I have just tried to phone you at work and on your mobile to inform you that tomorrow the Commission should adopt its decision on this case closing the investigation on the basis of the commitments that your authorities submitted.

It is foreseen that the Commission will issue a press release around 12.00h (brussels time) tomorrow.

I will give you a ring tomorrow morning in this respect.

Best regards,

Eric

Eric Van Ginderachter
Head of Unit C-4
Information, Communication and Media - State Aid
DG Comp
European Commission
B-1049 Brussels
J-70 4/08
Tél. : 02/295.44.27
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eric.vanginderachter@ec.europa.eu

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From: Eric.Vanginderachter@ec.europa.eu [mailto:Eric.Vanginderachter@ec.europa.eu]
Sent: 26 February 2008 16:53
To: Kevin O'Brien
Subject: RE: Case E4/2005 Ireland State Financing of RTE and TG4
State aid: Commission welcomes proposed changes to financing of Irish public service broadcasters and closes investigation

The European Commission has decided to close its investigation under EC Treaty state aid rules into the financing regime of the Irish public service broadcasters RTÉ and TG4 following commitments from Ireland to amend the current regime. The main modifications concern the clarification of the public service remit, the entrustment of new activities, the transparency of accounts, supervision and control. The Commission concluded that the commitments were suitable to bring the regime in line with the state aid rules and ensure the necessary transparency and proportionality of funding. Ireland has now until December 2008 to implement these commitments in national law.

Competition Commissioner Neelie Kroes commented: “I am satisfied that the co-operation between Ireland and the Commission has brought the funding system of public service broadcasters in Ireland in line with EU state aid rules. The new system will provide more transparency, proportionality and accountability and public funding will be limited to what is necessary to allow public service broadcasters to fulfil their
The Commission initiated the procedure concerning the financing of the Irish public service broadcasters in March 2005, following a complaint from a private competitor (see IP/05/250). The complainant argued that the public service remit of the public broadcasters was not sufficiently precise and that they were not properly entrusted with public service obligations. Furthermore, the complainant claimed that the use of public funds lacked the necessary transparency to verify that the level of funding was proportionate and to make sure that public funds were not used for commercial activities.

Following discussions between the Commission and the Irish authorities, Ireland submitted in January 2008 commitments aimed at ensuring compliance with the state aid rules. The Commission’s decision identifies the requirements for the future funding system to be in line with the state aid rules and concludes that the commitments proposed by Ireland are adequate to remove the competition concerns.

The amendments aim at ensuring that the scope of the public service remits of the public service broadcasters RTÉ (Radio Teilifís Éireann) and TG4 (Teilifís na Gaeilge) is sufficiently precise. In a number of circumstances, public value and sectoral impact assessments will be introduced and an explicit entrustment will be required for new activities. The fulfilment of the public service tasks will be supervised by an independent body. Transparent accounts and enhanced controls will be introduced to prevent overcompensation and cross-subsidisation of commercial activities. Finally, there will be safeguards to ensure that public broadcasters carry out their commercial activities on market terms.

As in other cases, the Commission will monitor the implementation of the commitments at national level.

The non-confidential version of the decision will be made available under the case number E 4/2005 in the State Aid Register on the DG Competition website once any confidentiality issues have been resolved. New publications of state aid decisions on the internet and in the Official Journal are listed in the State Aid Weekly e-News.

Deirdre Farrell
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2
Is leis an údar amháin aon dearcaí nó tuairimí a léirítear. Scanadh an r-phost seo le Ironport agus deimhníodh go raibh sé saor ó fhoras leis an bpatrúnchomhaí atá in úsáid faoi láthair.
Ní féidir a ráthú leis seo áfach nach bhfuil ábhar mailíseach ann.

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EU agrees new Broadcasting Authority regulator to adjudicate on public broadcasting subsidies

Brussels, 27 February 2008—The European Commission announced here today that it had closed a complaint file against the Irish Government over public service broadcasting subsidies given to RTE and TG4. It did this on the understanding that a new Regulator promised by the Irish government, to be called the Broadcasting Authority of Ireland (BAI), would be set up by legislation not later than the end of this year (2008), and that this new and independent body would supervise the fulfilment of public service broadcasting tasks that get public subsidy.

The new BAI’s “implementation” of the commitment given by the Irish government will be “monitored” by the EU Commission, the Commission said today.

Many details of the settlement reached by the Irish Government and the Commission remain confidential. More information will emerge when a “non-confidential” version of the agreement is published here in the State Aid Register of the Commission, but how long that will take is not clear.

The Irish Government had to promise the Commission that it would not only set up the independent regulator BAI, but that the accounts of RTE and other broadcasters would be “clarified” in order to show what public subsidies were received for; what the “public service remit” amounted to; and what supervision and controls existed.

In a statement supplied with today’s settlement, Commissioner Neelie Kroes was quoted as saying: “Public funding will be limited to what is necessary to allow public service broadcasters to fulfil their mission.” The scope of public service remits, her directorate said, needed to be “sufficiently precise.” It added that in a number of circumstances, “public value and sectoral impact assessments will be introduced and an explicit entrustment will be required for new activities.”

One of the objectives of the reformed regime, the Commission added, was “to prevent over-compensation and cross-subsidisation of commercial activities.”

The Commission’s investigation of the Irish situation started when commercial television station TV3 complained to it in 1999 about the licence fees and grants paid to RTE. Similar complaints were made in other Member States about “public service” broadcasting subsidies being made by custom and practice, with only vague or portmanteau justifications offered. ✪
Broadcasting changes plan satisfies EU

Wednesday, 27 February 2008 13:31

The European Commission says it has closed an investigation into the funding of RTE and TG4.

It said it had received commitments from Ireland that the current system would be changed to comply with rules on State aid.

The Commission said the changes would include clarifying the remit of public service broadcasters and ensuring more transparency in how licence fee money was spent.

The complaint was brought by TV3 in 2005. It argued that the public service remit of RTE and TG4 was not precise enough and the use of licence fee funds was not transparent enough.
State Aid

Draft Press Release

The Minister for Communications, Energy and Natural Resources, Mr Eamonn Ryan T.D. today welcomed the announcement by the European Commission on the closure of its investigation into the compatibility of the public funding arrangements for RTÉ and Teilifís na Gailge (TG4) and EU State Aid rules. This followed negotiation between the sides.

Minister Eamonn Ryan said that the positive outcome of the negotiations confirmed the absence of any illegal state aid and provided for more transparency in the framework for public funding of the Public Service Broadcasters RTÉ and Teilifís na Gailge (TG4).

The Minister spoke of the central role of Public Service Broadcasting in the democratic, social and cultural life of society. This ongoing role, and the competence of Member states to provide for its funding, was specifically recognised and protected in the Amsterdam Protocol amendment to the European Treaties. Notwithstanding this the Minister said that where greater transparency could be introduced into the system this should be welcomed. This approach, the Minister said, is reflected in the agreement reached with the EU Commission and will bring greater clarity to the current framework. The Minister indicated that, where appropriate, implementation of various aspects of the agreement reached will be encompassed within the forthcoming Broadcasting Bill.

The Minister thanked the Commission for the cooperative approach adopted in the negotiation and resolution of this case.
Note for Editors

The investigation into the funding of public service broadcasting in Ireland arose in the context of a formal complaint by TV3, made originally in 1999, alleging infringements of Articles 92 – 94 of the EC Treaty relating to, among other things, the payment of licence fee revenue and direct grants to RTÉ. This was one of a number of complaints made by commercial television operators across the European Union against the funding arrangements in various Member States for public service broadcasters.

Following a period of investigation, the EU Commission forwarded an Article 17 letter to the Irish Authorities on 3 March 2005 setting out its preliminary views in relation to the compatibility of the funding arrangements for RTÉ with the requirements of the EU Treaty.

The case has been subject to detailed negotiations at official level between the Commission and the Department of Communications, Energy and Natural Resources leading to today’s announcement. The implementation of various aspects of the agreement reached will be encompassed within the forthcoming Broadcasting Bill.
Minister Ryan welcomes Commission’s closure of investigation into public funding for public service broadcasting

- Agreement will provide for greater transparency

Dublin, 27th February 2008

Communications Minister Eamon Ryan welcomed the announcement today by the European Commission on the closure of its investigation into the compatibility of the public funding arrangements for RTÉ and Teilifís na Gáilge (TG4) and EU State Aid rules. This followed negotiation between the sides.

Minister Ryan said “The positive outcome of the negotiations confirms the absence of any inappropriate state aid and provides for more transparency in the framework for public funding of the Public Service Broadcasters RTÉ and Teilifís na Gáilge (TG4) in Ireland. I will bring forward proposals for a comprehensive new Broadcasting Act, which will set up the Broadcasting Authority of Ireland (BAI). It is my intention that this new Authority will carry out the necessary supervisory functions in relation to RTÉ and TG4 that have been decided in conjunction with the European Commission.

I strongly support the vital role Public Service Broadcasting plays in Ireland. In European terms, Member States are free to fund Public Service Broadcasting as they consider appropriate, and this is specifically recognised and protected in the Amsterdam Protocol amendment to the European Treaties. The Minister added: “Where greater transparency can be introduced into the system this is to be welcomed and expedited. This approach is reflected in agreement reached with the EU Commission and will bring greater clarity to the current framework.”

The Minister indicated that, where appropriate, implementation of various aspects of the agreement reached would be encompassed within the forthcoming Broadcasting Bill. Transparent accounts and enhanced controls will be introduced and there will be safeguards to ensure that public service broadcasters carry out their commercial activities on market terms.

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ENDS

http://www.dcmnr.gov.ie/Press+Releases/Minister+Ryan+welcomes+Commission’s+... 28/02/2008
State aid: Commission welcomes proposed changes to financing of Irish public service broadcasters and closes investigation

The European Commission has decided to close its investigation under EC Treaty state aid rules into the financing regime of the Irish public service broadcasters RTÉ and TG4 following commitments from Ireland to amend the current regime. The main modifications concern the clarification of the public service remit, the entrustment of new activities, the transparency of accounts, supervision and control. The Commission concluded that the commitments were suitable to bring the regime in line with the state aid rules and ensure the necessary transparency and proportionality of funding. Ireland has now until December 2008 to implement these commitments in national law.

Competition Commissioner Neelie Kroes commented: “I am satisfied that the cooperation between Ireland and the Commission has brought the funding system of public service broadcasters in Ireland in line with EU state aid rules. The new system will provide more transparency, proportionality and accountability and public funding will be limited to what is necessary to allow public service broadcasters to fulfil their mission.”

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The non-confidential version of the decision will be made available under the case number E 4/2005 in the State Aid Register on the DG Competition website once any confidentiality issues have been resolved. New publications of state aid decisions on the internet and in the Official Journal are listed in the State Aid Weekly e-News.
Paul,

Commission decision herewith. If you want a hard copy, please let me know. It'll no doubt take you some time to make it through the document, but I should point out the final paragraph re withholding confidential information contained in the decision prior to publication - a response will need to issue to the Commission within 15 working days, which of course will be compounded by this coinciding with the Easter break.

Eoin

Eoin Ó DOMHNAILL
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Subject: State Aid n° E 4/2005 - Ireland

The Secretariat-General would be obliged if you would forward to the Minister for Foreign Affairs, the enclosed decision from the Commission on the subject specified above.

For the Secretary-General,

[Signature]

Karl Von KEMPIS

Encl.: C(2008)723 final

State financing of Radio Teilifís Éireann (RTÉ) and Teilifís na Gaeilge (TG4)

Sir,

The Commission has the honour to inform you that the commitments given by Ireland in the context of the present procedure remove the Commission's concerns about the incompatibility of the licence fee financing of Radio Teilifís Éireann (RTÉ) and Teilifís na Gaeilge (TG4). Consequently, the Commission decided to close the present investigation in accordance with Article 18 and 19 of the "Procedural Regulation".1

1. Procedure

(1) In March 1999, TV3 Television Network Limited ("TV3") submitted a complaint to the Commission regarding alleged incompatible state aid to RTÉ. According to the complainant, the legal provisions do not contain a proper definition of the public service remit, RTÉ is not properly entrusted with public service obligations and the use of public funds by RTÉ's lacks the transparency needed to verify that the public funds are proportionate and not used for other than public service activities.

---


Mr Dermot AHERN
Ministry of Foreign Affairs
St. Stephen's Green 80
Dublin 2
Ireland

Commission européenne, B-1049 Bruxelles – Europese Commissie, B-1049 Brussel – Belgium
Telephones: 00 32 (0) 2 299.11.11
(2) Following several requests for information, the submission of addition information from the complainant as well as meetings with the Irish authorities, the Commission informed the Irish Government by letter dated 3 March 2005, in accordance with Article 17 (2) of the Procedural Regulation, about its preliminary concerns regarding the compatibility of the State aid granted to RTÉ, also outlining possible ways of addressing these concerns (hereafter "Article 17 Letter").

(3) In May 2005, the Irish Government submitted its views and already came forward with a number of proposals to change the existing framework. The Irish Government also informed the Commission about plans to reform the Broadcasting Act.

(4) The Commission met with representatives of the Irish Government on several occasions (March 2005, April and November 2006). The Irish authorities submitted additional information in January and December 2006, including the latest draft proposals for the new Broadcasting Bill (hereafter "draft Bill"). Additional clarification was provided in the course of 2007\(^1\), including an update on the draft Bill.\(^3\)

(5) The Commission met with representatives of the complainant on several occasions (August 2005 and May 2007). On several occasions, the complainant submitted additional information\(^4\), illustrating – for instance – the alleged inadequate supervision of RTÉ's performance\(^5\) as well as the distortions of competition resulting from overcompensation\(^6\). As regards the draft Bill, the complainant reiterated its initial concerns and took the view that the proposed changes would not ensure full compliance with the requirements set out in the Broadcasting Communication. In this respect, the complainant claims that the draft Bill still does not contain a clear public service definition or allows for an

\(^1\) The Commission services sought additional clarifications on specific issues in January, April, May and June 2007. These clarifications were submitted by the Irish authorities in February, May and June 2007.


\(^3\) In particular in September, October and November 2005, November 2006 as well as May and October 2007.

\(^4\) More particularly, TV3 claimed that RTÉ (Two) would not fulfil the quota of European works as required by Article 4 of the TVWF-Directive. The Commission notes, however, that the proportion of European Works included in RTÉ's combined output (RTE1, RTE2 and TG4) was in excess of the 50% required under the Directive (cf. Commission staff working document - Background documents to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Seventh communication on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2003-2004 (COM(2006) 459 final)). Apart from this observation, the adequacy of control mechanisms ensuring that RTÉ fulfil its public service mission and respect of legal requirements is assessed in the present decision; see below paragraph...

\(^5\) More particularly, TV3 alleged that RTÉ was emptying the market. The Commission would like to point out that the scope of the present procedure as outlined in the Article 17 letter covers the question of the public service remit as regards sports broadcasts, whereas possible disproportionate effects on competition related to the scope of sports rights acquired by RTÉ are assessed separately.
overly broad scope of the public service remit, would not provide for adequate supervision of the fulfillment of the public service mission and would still not exclude overcompensation.

(6) In October 2007, the Commission asked the Irish authorities to formally submit commitments on the necessary changes which had been discussed in the context of the procedure (and which were already outlined in the draft Broadcasting Bill) and - where necessary - to complement them.

(7) In January 2008, the Irish Government submitted formal commitments to change the current financing regime by December 2008 at the latest.

2. DESCRIPTION OF THE BROADCASTING MARKET AND THE RELEVANT PLAYERS

2.1. The Irish broadcasting companies

2.1.1. Radio Telefís Éireann (RTÉ) and Teilifís na Gaeilge (TG4)

(8) RTÉ is the main public service broadcaster in Ireland. In 2006, RTÉ’s total revenues amounted to approximately €405 million. Approximately €182.8 million (or 45%) were derived from licensee fee attributions and approximately €222.2 million (or 55%) constituted commercial revenues. See RTÉ’s Annual Report 2006, page 49.

(9) RTÉ’s operations are divided into six main business divisions: RTÉ television, RTÉ Radio, RTÉ News and Current Affairs, RTÉ Performing Groups, RTÉ Publishing, and RTÉ NL (Networks).

(10) RTÉ’s core activity is the broadcast of public service, free-to-air television (RTÉ One and RTÉ Two) and radio. Its television broadcasting can be received by over 99% of the population in Ireland. RTÉ’s other public service activities include the operation of the RTÉ National Symphony Orchestra, the RTÉ Concert Orchestra and other performing groups. RTÉ also provides free-of-charge web based online services. See RTÉ’s Annual Report 2006, pages 14 and 35.

(11) RTÉ’s commercial activities consist primarily in the sale of advertising and sponsorship and in the provision of transmission network service to broadcasters (through RTÉ NL) including the renting out of surplus tower/mast space. In this respect, the complainant alleges for instance that the scope of TG4’s activities should be limited to only Irish language content, that the broadcasting of sporting events in respect of which commercial demand exists should be excluded from the public service remit of RTÉ and that the possibility for RTÉ and TG4 to offer pay-services, which should be regarded as manifestly wrong.
addition, RTÉ Television and RTÉ Radio generate commercial revenue from the
release of television programs on DVD/VHS and radio programs on audio CD,
the licensing of RTÉ brands for events/magazines, the sales of television
programs, the sale of television facilities (including studio facilities and fixed
contribution links to programs makers and broadcasters), the sale of television and
radio commercials production and the sale of television and radio archive material
and clips. Furthermore, RTÉ Publishing earns commercial revenue from the sale
of the RTÉ Guide (a television and radio listing magazine), sales of advertising
and sponsorship in the magazine itself. RTÉ Publishing also hosts the Audience
Interactive Unit which is a telecom service and responsible for the generation of
revenue from all television and radio programs that have an interactive element
(e.g. competitions and voting). Commercial revenues are also generated through
e-publishing activities such as text service, online advertising and the operation of
the rtc.ie shop. Finally, RTÉ Performing Groups generate commercial revenues
from the sale of public performances of the RTÉ orchestras and the release of
audio CDs.\textsuperscript{12}

\begin{enumerate}
\item RTÉ has a number of 100%-owned subsidiaries, such as RTÉ Commercial
Enterprises Limited (publications and other commercial activities), RTÉ Music
Limited (music publishing) and RTÉ Transmission Network Limited RTENL
(management of transmission network assets).
\item TG4 offers a third public service channel with a focus on Irish language
programmes.\textsuperscript{13} Until recently, TG4 was operated as a wholly-owned subsidiary of
RTÉ.\textsuperscript{14}
\end{enumerate}

2.1.2. TV3 Television Network Limited (TV3)

TV3 is an Irish commercial television channel 100\% which started operations in
1998. It is owned by the United Kingdom-based private equity firm Doughty
Hanson & Co. TV3’s turnover amounts to approximately € 50 million.\textsuperscript{15}

TV3 is the second national broadcaster\textsuperscript{16} and its transmission network covers
more than 90\% of the population in Ireland. TV3’s revenues are derived from
advertising, sponsorship and promotions, as well as certain programming and
interactive applications.\textsuperscript{17}

2.2. Television broadcasting in Ireland

In 2005, around 21.5\% of the Irish television households were “Irish terrestrial
households” \textit{i.e.}, they received only the four Irish channels: RTÉ One, RTÉ Two,

\textsuperscript{12} See RTÉ’s submission of 22 June 2007.
\textsuperscript{13} See RTÉ’s Annual Report 2006, page 23, as well as TG4’s submission of 28 June 2007.
\textsuperscript{14} As of 1 April 2007, TG4 became an independent statutory entity, see S.J. No. 98 of 2007, Teitifis na
Gaeilge (establishment day) order 2007.
\textsuperscript{15} http://www.doughtyhanson.com/Portfolio_PE.aspx.
\textsuperscript{16} European Audiovisual Observatory Yearbook 2006: Television in 36 European States, volume 1, page
163.
\textsuperscript{17} http://www.doughtyhanson.com/Portfolio_PE.aspx.
TG4 and TV3. Approximately 15.7% of the Irish television households were “Multi terrestrial households” i.e., they received the four Irish channels and at least one of the United Kingdom channels.\textsuperscript{18} In total there are, however, around 10 Irish television channels operating on the island in addition to the about six to ten foreign channels (mainly British) which are targeting Ireland.\textsuperscript{19} Since 2005, two new thematic channels, Setanta Sports and Paramount Comedy, are available in Ireland. In addition, Channel 6, a new Irish free-to-air commercial channel, was launched in 2006.

(17) In 2005, the Irish television advertising market generated revenues of €258 million.\textsuperscript{20} In that year, RTÉ's net television advertising income amounted to approximately €124 million or 48% of television advertising sales in Ireland.\textsuperscript{21}

(18) In terms of audience shares, RTÉ One and Two had, during the period from 2001 to 2006, a constant share of around 40% (all day) and 44-45% (peak time), TG4 of 2-3% (all day as well as peak time) and TV3 of 12-14% (all day and peak time). Foreign channels such as the BBC had a market share of around 13%; see figures 1 and 2 below.\textsuperscript{22}

Figure 1: Television audience share (2001 – 2006), all day

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\textsuperscript{18} See RTÉ’s Digital Television and Radio Services in Ireland – An Introduction, July 2005.

\textsuperscript{19} European Audiovisual Observatory Yearbook 2006: Television in 36 European States, volume 1, pages 162 to 164, and page 167.

\textsuperscript{20} European Audiovisual Observatory Yearbook 2006: Television in 36 European States, volume 1, page 162.

\textsuperscript{21} See RTÉ’s Annual Report 2006, page 50. This figure does not include TG4’s 2006 advertisement revenue amounting to approximately €3.2 million.

\textsuperscript{22} Figures for the nine main television channels 2001 to 2005 come from the European Audiovisual Observatory Yearbook 2006: Television in 36 European States, volume 1. Figures for 2006 come from RTÉ’s Annual Report 2006, which cites AGB Nielsen Media Research as source of the figures.
Figure 2: Television audience share (2001 – 2006), peak time

Figure 3 below gives an overview of RTÉ’s television output, including a breakdown of RTÉ programs by genre in 2006. The overview includes indigenous programmes and acquired programmes, totalling about 17715 broadcast hours. As can be seen from Figure 4 below, indigenous programmes account for almost 50% of RTÉ’s programme output. As illustrated, RTÉ’s most important program genres are drama (approximately 34%); young people (approximately 18%), news, current affairs and weather (approximately 12%) and factual (approximately 11%). Sports programmes account for approximately 5% and entertainment and music for approximately 6%.

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2. Indigenous programs are programs produced by RTÉ and programs commissioned by RTÉ from independent production companies. RTÉ includes sports programs in its “indigenous program” category because all RTÉ coverage of sporting events (whether the footage used in such coverage is filmed by or on behalf of RTÉ or is licensed by RTÉ from another broadcaster or sports rights-holder) is customized by RTÉ for the Irish audience. Sports program is therefore a combination of the acquisition of the sports right as well as the total cost of production.
Figure 3: RTÉ television output by genre, all day 2006

(20) Figure 4 below gives an overview of RTÉ's indigenous broadcasting during peak time, including a breakdown by genres. Here again, the main genres are: news, current affairs & weather; and factual.

Figure 4: RTÉ indigenous output by genre, peak time 2006

(21) TG4's total number of broadcast hours in 2006 amounted to 6935. A share of 51% constituted indigenous programs,\textsuperscript{25} approximately 10% were advertisement and the remaining 39% were acquired programs.\textsuperscript{26} Overall, the focus was on drama (approximately 46%), factual and news (23.6%) and music and entertainment (11.2%); sports accounted for approximately 6.5% of TG4's total broadcast hours.

\textsuperscript{25} Drama 1292 hours; factual 823 hours; music/entertainment 776 hours; sports 452 hours; and promos/presentation 182 hours (cf. TG4's submission dated 10 July 2007).

\textsuperscript{26} Drama 1908 hours, and factual and news 812 hours (cf. TG4's submission dated 10 July 2007).
3. **Description of the Legal Framework Governing Public Service Broadcasting**

3.1. Public service remit and entrustment

(22) RTÉ was established as a non-profit making organization and statutory corporation under the Broadcasting Authority Act 1960.

(23) RTÉ's functions are laid in the Broadcasting Authority Act 1960 as amended and in the Broadcasting Act 2001.

(24) The main functions (duties and powers) are laid down in Section 16 (1) of the Broadcasting Authority Act 1960, which provides that "the Authority" (RTÉ) shall establish and maintain a national television broadcasting service and shall have all such powers as are necessary for or incidental to that purpose. In addition, Section 16 (2) lists a number of specific powers granted "the Authority" (RTÉ) in order to fulfill its functions. These powers include for instance the organization of concerts in connection with the broadcasting service or the publication, "with or without charge", of magazines, books, papers and other printed matter as well as aural and visual material which "may seem to be conducive or incidental to its objects". They also include the possibility to establish and maintain broadcasting services of a local, community or regional character, to provide broadcasting services which are of a special interest to only certain members of the community and which are made available on a subscription or pay-per-view basis and to transmit by electronic means (other than by means of broadcasting) its programme schedules.

(25) According to Section 17, RTÉ shall in its programming reflect the interests and concerns of the whole community, as well as the varied elements which make up the culture of the people of Ireland and have special regard for the elements which distinguish that culture and in particular for the Irish language. It shall also uphold the democratic values and have regard to the need for the formation of public awareness and understanding of the values and traditions of countries other than Ireland.

(26) Section 28 (1) declares that the national television and sound broadcasting service maintained by RTÉ is a public service which shall continue to be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.

(27) Pursuant to Section 28 (2), the programme schedules shall provide a comprehensive range of programs in Irish and English that reflect the cultural diversity of Ireland; include programs that entertain, inform and educate; cover sport events, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests. Programmes shall also cover news and current affairs in Irish and English, including proceedings in the Houses of the Oireachtas and the

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European Parliament. Finally, programme schedules should facilitate contemporary culture and encourage innovation and experimentation in broadcasting.

(28) The functions as laid down in the Broadcasting Authority Act 1960 also applied to TG4. With the adoption of the Broadcasting Act 2001, these functions were laid down separately. However in substance, they largely mirror those of RTÉ with a particular focus of TG4's programs on the Irish language.

(29) RTÉ's remit was further specified in the so-called public service broadcasting charter which was published by the Department of Communications, Marine and Natural Resources (DCMNR) for the first time in June 2004. The charter is a statement of principles that clarifies what is expected of RTÉ, including RTÉ's accountability to its audience. However, at present, the charter does not have a statutory basis. RTÉ issued a set of guiding principles "Implementing the Public Service Broadcasting Charter", in which RTÉ sets out the commitment to meet the expectations outlined in the charter and presents RTÉ's vision, mission, values, goals and strategic corporate plan. Since 2003, RTÉ publishes annual statements of commitments, including more specific commitments on how to deliver on its public service obligations. These statements should be such as to allow a measurement and independent verification at the end of each year. As part of its annual reporting RTÉ has committed to demonstrate how each specific commitment has been met (see on the reviews which are carried out in this respect below, paragraphs (157) to (159)).

3.2. Supervision

(30) Within RTÉ, the RTÉ Authority has the task of ensuring that RTÉ meets all its obligations. The RTÉ Authority is required to forward to the Minister information and annual reports concerning the financial performance as well as information regarding the performance of RTÉ's functions. The Minister submits these documents to the Irish Parliament.

(31) The Broadcasting Commission of Ireland (BCI), an independent statutory organisation which was established in September 2001 has regulatory and control functions with regard to television and radio services in Ireland, but mainly as regards commercial broadcasters (key functions include for instance the licensing of independent broadcasting services, the development of codes and rules in relation to programming and advertising standards and the monitoring of all licensed services to ensure that licence holders comply with their statutory obligations and terms of their contracts). There is, however, no specific competence for supervising how RTÉ delivers on its duties.

29 See http://www.rte.ie/about/organisation/psb.pdf
30 See http://www.rte.ie/about/guiding_principles.html
31 The RTÉ Authority and RTÉ are one and the same legal entity; see the Broadcasting Authority Act 1960, RTÉ's Annual Report 2006, page 32, and RTÉ's submission dated 8 April 2004.
(32) It appears that since 2003, compliance with RTÉ's commitments is subject to control in the context of the annual reviews on a possible licence fee adjustment (see also below on the financial aspects, paragraph (36) et seq.).

3.3. The financing of public service broadcasting

(33) According to the Wireless Telegraphy Act 1926, every person or undertaking that has a television or equipment capable of receiving a television signal must pay a television license. The licence fee is collected through the Irish Post Office An Post, which subsequently transfers the monies to the DCMNR. Each year, the Minister allocates almost the totality of revenues from the license fee (net of collection costs) to RTÉ.32

(34) In 2002, the Irish Government decided to base the annual adjustment of the licence fee on the consumer price index (CPI), with an adjustment for the extent to which RTÉ's programme output commitments were achieved. Any such possible increase in the licence fee level is preceded by an annual review, the exact terms of which are set by the Minister. These reviews comprise the financial performance of RTÉ, but also the achievement of its output commitments. The review is carried out by an independent expert which also makes recommendations to the Minister.33 The Minister may then decide to increase the licence fee level. The last such increase was decided by the Minister in 2007. Based on the Television Licences Regulation 2007, the level of the licence fee was increased as of 14 January 2008 to € 160.34

(35) The amount paid to RTÉ shall only be used for the programme schedules set out in Section 28(2), for complying with its duties under Section 17, in exercising its powers under Section 16 (with the exception however of the powers related to subscription or pay-per-view services as well as programme schedules transmitted by electronic means), but also for providing, pursuant to its powers, any service (other than a broadcasting service) for the benefit of the public.35

(36) According to RTÉs Annual Report 2006, all licence fee money was used to partly fund RTÉ's television division, radio division, news & current affairs division and its performing groups (this also includes the cost of the support provided to TG4). On the other hand, licence fee revenue is not directly attributed to RTÉ Publishing, RTÉ Network, and Corporate HQ or to any other non-channel activity or service (such as RTÉ’s free-of-charge web based online public services).

32 See Broadcasting Authority Act 1960, Section 22 as well as Broadcasting Authority (Amendment) Act, 1976, Section 8.
33 See for instance the RTÉ Licence Fee Adjustment Review 2006, provided by Indecon in November 2007: http://www.dcmnr.gov.ie/NR/rdonlyres/B22A0ED5-82E1-4498-A72A-0D8AF5646D5C/0/RTÉLicenseFeeAdjustment2006Report.doc
34 Before this, the licence fee level was last increased in 2006 to € 158 (i.e. an increase by 1.3%).
35 Cf. Section 28 (8) of Broadcasting Act 2001 for RTÉ and Section 45 (6) for TG4.
(37) In 2006, RTÉ received license fee revenues totalling approximately €182.8 million. This corresponds to 45% of total revenues which amounted to approximately €405 million in that year. Approximately €125 million was allocated to RTÉ’s television business division.56 Within the television business division, license fee money currently contributes only to RTÉ’s indigenous programs. No license fee money is attributed to the cost of acquired programs or the funding of other than programme costs.

(38) At the same time, the television business division incurred costs of approximately €257 million on public service television. Out of this amount almost €202 was spent on indigenous programs.37

(39) In total, RTÉ’s 2006 public service television activities incurred a deficit amounting to approximately €132 million.38 This deficit was covered with revenues generated from RTÉ’s commercial activities which amounted to €222.2 million. With total operating costs amounting to €380.5 million, RTÉ achieved an operating surplus of €24.5 million and after deduction of financial costs a surplus of €10.2 million.

(40) In 2006, TG4’s revenues amounted to approximately €42 million. Approximately €38.4 million (or 91%) constituted state funding and approximately €3.5 million (or 9%) were derived from commercial activities.39 TG4’s commercial activities comprise advertising and sponsorships, as well as program sales and ancillary activities.

4. PRELIMINARY ASSESSMENT AS SET OUT IN THE "ARTICLE 17 LETTER"

(41) Based on the information submitted by the complainant and the Irish Government, the Commission carried out a preliminary assessment of the financing regime in favour of RTÉ under the EU State aid rules and informed Ireland of its preliminary findings in the Article 17 letter of March 2005.

(42) The main conclusions were that the payments of license fee revenues constituted state aid within the meaning of Article 87 (1) of the EC Treaty. Considering that the legal basis for the license fee was adopted prior to Ireland’s accession to the EU in 1973, and remained applicable without significant subsequent alterations, the Commission also considered that the licence fee funding could be regarded as existing aid.

56 See RTÉ’s Annual Report 2006, pages 52 and 53. Approximately €14.2 million was attributed the RTÉ performing groups and €33.7 million to RTÉ Radio.

57 The difference between the amount of licence fees attributed to RTÉ’s television business division and the amounts spent is due to the fact that only indigenous programs (or around 50% of total broadcast output) are funded by license fee money.

58 This information is based on RTÉ’s Annual Report 2006.

59 See RTÉ’s Annual Report 2006, pages 25 and 60, as well as TG4’s submission of 28 June 2007.
(43) As regards the compatibility of the licence fee funding regime, the Commission had raised concerns regarding the definition of the public service remit, entrement and control of the public service obligations as well as the proportionality of the aid. The Commission also indicated ways in which compliance with EU State aid rules could be achieved.

(44) More particularly, the Commission considered that the legal provisions did not clearly and precisely define the scope of activities other than broadcasting (comprising activities such as publication of magazines, books or papers, or recorded aural and visual material with or without charge), and which of those activities could - as part of the public service tasks of RTÉ - be financed through the licence fee. Consequently, there was a risk that purely commercial activities would ultimately benefit from State aid. The Commission also objected to the possibility of RTÉ to use licence fee revenues to provide “any service (other than a broadcasting service)”, without there being a further specification of the actual nature or scope of such service and formal entrement by the Irish authorities.

(45) The Commission also considered that there were no satisfactory ex-post controls to verify whether state funding exceeded the net public service costs (overcompensation) or whether commercial activities had been unduly benefited from licence fee revenues (cross-subsidisation) or whether RTÉ’s commercial activities were in line with market principles (market-conform behaviour).

5. IRELAND’S RESPONSE TO THE ARTICLE 17 LETTER

(46) In May 2005, the Irish Government submitted observations on the Commission’s preliminary assessment as well as proposals to address the concerns identified in the Article 17 letter. It also informed the Commission about the work on a new Broadcasting Act.

(47) In relation to activities other than broadcasting, the Irish Government accepted that the current legal framework does not sufficiently ensure that license fees can be used only in pursuance of RTÉ’s public service remit. In this respect, the Government suggested to clarify that RTÉ could only use state resources in pursuance of its public service mandate as defined in the Broadcasting Act and to remove the general authorisation to use state resources to provide any service (other than a broadcasting service).

(48) The Irish Government also informed the Commission that it envisaged expanding RTÉ’s public service remit so that RTÉ may use state resources to transmit programs by electronic means (i.e. by means other than broadcasting) and by imposing an obligation on RTÉ to maintain an audio-visual archive.

(49) The Irish Government further agreed that the establishment of a more independent supervisory body would be appropriate.

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As stated above, under the current legislation, this is part of RTÉ’s powers, but the legal provisions do not allow RTÉ to use licence fee money in this respect (paragraph (24) and paragraph (35)).
The Irish Government confirmed that the Transparency Directive was transposed into Irish law in 2004. It also explained that RTÉ had refined its reporting system so that its reports now reflect the invoicing of inter-company charges, the provision of additional reporting information on public service and non-public service activities and a refined treatment of corporate HQ costs. RTÉ’s financial statement now also include revenue and expenditure information by business division, by channel, service and broadcast genre, and an analysis of revenues and costs of RTÉ’s public service and non-public service activities. Similar information is also available in relation to TG4.

Furthermore, the Irish Government agreed with the introduction of an ex-post monitoring mechanism to evaluate the necessity of the public funding. To this end, the Government proposed that the envisaged new supervisory body could provide the Government with an assessment of the necessity of public funding.

Finally, the Government agreed to require RTÉ to conduct its commercial activities (including those of its subsidiaries) under market conditions and to seek to maximize the commercial exploitation of its public service products. The new independent control body would periodically report to the Government on the compliance of RTÉ with these requirements.

6. FINAL ASSESSMENT OF THE CURRENT LEGAL FRAMEWORK

6.1. State aid under Article 87 (1) of the EC Treaty

For a measure to be characterized as state aid within the meaning of Article 87 (1), (1) there must be a transfer of state resources; (2) the measure in question must involve an economic advantage to the recipient and (3) the measure must distort, or threaten to distort, competition and affect trade between Member States.

6.1.1. Transfer of state resources

The Commission considers license fee money used to finance public service broadcasting in Ireland to constitute state resources within the meaning of Article 87 (1) EC Treaty. In line with its established decision-making practice, the Commission examines in this respect in particular whether the measure in question constitutes a compulsory levy and whether the revenues from the levy are under the control of the State.\(^41\)

The television license fee is a compulsory levy imposed by law. The licence fees are paid to the Government, which then distributes the revenues to RTÉ in accordance with national legislation.\(^42\) The license fee is destined to finance the activities of RTÉ as a public service broadcaster (a service in the general interest). The Commission therefore considers that the Irish State exercises control over the licence fee revenues.

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\(^{41}\) See for instance Commission decision in State aid E 3/2005, paragraphs (143) et seq.

\(^{42}\) See on this aspect also BBC 24-hours news channel Decision, paragraph 22 and TV2 Decision, paragraph 59 as well as Commission decision in State aid E 3/2005 paragraph 146.
6.1.2. Economic advantage

(56) The Commission considers that financing from license fee money reduces the operating costs that RTÉ would normally have to bear and provides RTÉ with an economic advantage compared to other broadcasters which finance their activities based on commercial revenues only.

(57) The Commission considers that the Altmark-conditions are not fulfilled. It is recalled that in this judgment, the Court held that compensation payments to an undertaking which discharges public service obligations do not qualify as State aid if four conditions are cumulatively fulfilled.\(^{43}\)

- First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
- Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.
- Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
- Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate production means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(58) As discussed in more detail below (cf. paragraphs (88) to (90) and (108) to (113)), it does not appear that the first and third conditions can be considered as fulfilled. In any event, the Commission considers that the second condition is not fulfilled. Based on the information submitted, it appears that the payments to RTÉ consist of the (almost) totality of licence fee revenues collected from citizens/undertakings. This amount is determined based on the licence fee level. Even though the Government has introduced a review mechanism, the review carried out in the past (which admittedly examined past performance and future outlook) does not clearly reveal the parameters on which the final determination of the licence fee level/revenues is based. Thus, it does not seem that the compensation for public service obligations is calculated by the Irish authorities

based on parameters which have been established in advance in relation to the provision of the public service activities.\(^{44}\)

(39) As to the fourth condition, the Commission notes that RTÉ has not been chosen by a public procurement procedure to fulfil the public service tasks. Also, the Commission has not received any information which would have demonstrated\(^{45}\) that the financing granted to RTÉ has been determined on the basis of an analysis of the costs which a typical well-run undertaking. In this respect, the Commission observes that the 2006 review into the financial performance and delivery on its public service remit referred to the need for benchmarking of RTÉ's cost structure with public service broadcasters in other Member States as well as other commercial operators in Ireland. However, there is no evidence that RTÉ’s costs were reduced to such "benchmarked" costs. In light of these observations, the Commission considers that the fourth condition is not satisfied either.

6.1.3. Distortion of competition and effect on trade between Member States

(60) According to established case law, "...aid must be found to be incompatible with the common market if it has or is liable to have an effect on intra-Community trade and to distort competition within such trade. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid..."\(^{46}\)

(61) The Commission generally considers that the State financing of public service broadcasters is liable to distort competition and affect trade between Member States given the international trade in programmes and programme rights, the cross-border effects of advertising (in particular in areas close to the border and where both sides of the border the same language is spoken) and because the ownership structure of private competitors may extend over several Member States.\(^{47}\)

\(^{44}\) See on this aspect TV2 decision, paragraph 71 where the Commission pointed to the fact that whereas there was no publicly available annual budget establishing a link between compensation and output.

\(^{45}\) See on this aspect, paragraph (166) of the Commission decision in State aid E 3/2005, where the Commission explained that "...it is for the Member States invoking the Altmark exception to submit the necessary proof and not for the Commission to show that the costs as recognised by the KEP are not those of an efficient undertaking."\(^{46}\)


\(^{47}\) Cf. Broadcasting Communication, paragraph 18.
(62) RTÉ competes with broadcasters and program producers at both national and international level (especially with those established in the United Kingdom). In addition, RTÉ also engages in a number of commercial activities at national and international level such as, for example, advertising sale, attracting sponsorships, the sale and acquisition of program rights and online services. Therefore, State funding strengthens RTÉ's position compared to those other broadcasters.

(63) Through its membership of the European Broadcasting Union, RTÉ also exchanges, acquires and sells television programs with other European broadcasters.

(64) In light of the above, the Commission considers the financial advantages granted RTÉ distort competition and affect trade between Member States within the meaning of Article 87 (1) EC Treaty.

6.2. The nature of the aid

(65) According to the Procedural Regulation, existing aid means all aid which was introduced before the entry into force of the EC Treaty in the respective Member States and which is still applicable. On the other hand, changes to an existing aid, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the Common Market, are to be regarded as new aid.

(66) In Namur-Les Assurances du Crédit SA the Court clarified that "... whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it." Where the relevant legal provisions were not changed as regards the nature of the advantage or the activities of the beneficiaries, there was no new aid.

(67) According to the case law in Gibraltar, not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Tribunal, "it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme."

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48 According to information available, most television viewers in Ireland also receive UK program services, which tend to be very popular among Irish viewers. There is also a wide choice of continental EU program services available to Irish viewers.

49 See Article 1(b)(i) of the Procedural Regulation.


51 Case C-44/93, Namur-Les Assurances, [1994] ECR I-3829, paragraph 28

(68) Based on the above, the Commission has examined whether the legal framework of the financing regime for the public service broadcasters was adopted before the entry into force of the EC Treaty in Ireland and whether subsequent modifications are severable from the original measure or whether the non-severable changes affect the actual substance of the original legal framework (i.e., the nature of the advantage or the source of financing, the purpose or legal basis of the aid, the beneficiaries or the scope of activities of the beneficiaries\(^{53}\)) so that the latter as a whole is transformed into a new aid.

(69) At the outset, the Commission observes that the practice of allocating annual licence fee payments to public service broadcasters from state resources was well established before Ireland joined the European Community in 1973. The financing of the national broadcasting system from license fee income dates back to 1926, when the legal base for collecting the levy – the Wireless Telegraphy Act – was adopted. RTÉ was established by the Broadcasting Authority Act 1960 and its functions and duties were laid down in Sections 16 (1) and (2) and 17 of the Broadcasting Authority Act 1960.

(70) Furthermore, the Commission considers that subsequent amendments to the Broadcasting Authority Act 1960 (as well as other legal acts governing the provision of public service broadcasting in Ireland) can be regarded as not affecting the existing aid nature of the financing regime as initially established:

(71) The Commission observes that the Broadcasting Authority Act 1960 initially provided for the allocation of licence fee to RTÉ for a five-year period.\(^{54}\) This allocation was regularly renewed until it was placed on a permanent footing in 1976 with Section 8 of the amended Act of 1976 providing for the annual payment of licence fee revenues to RTÉ.

(72) In the Commission’s view, the regular renewal as well as the setting up of a permanent financing system for RTÉ’s in the form of annual payments can be regarded as being a change of a more administrative nature, while the purpose, nature and source of financing as well as the beneficiary remained the same.

(73) Similarly, the Commission considers that the Irish Government’s decision in 2002 to base annual adjustment of the licence fee on the consumer price index (CPI), can be regarded as a technical modification comparable to a change in the methodology for determining the financial means available to public service broadcasters, which in accordance with Commission practice, is not regarded as a severable and substantive amendment.\(^{55}\)


\(^{54}\) See Section 22 of the Broadcasting Authority Act 1960.

\(^{55}\) Cf. Commission decision in the case E 3/2005 Aid to the German public broadcasters, paragraph 205.
Furthermore, the licence fee increases decided by the Irish Government in the past (the last one being the increase as of 1st January 2008) should not be regarded as new aid. As in similar cases, the Commission is of the view that the increase is the consequence of an increased financial need of public service broadcasters in fulfilling their public service mission, while the remit and the funding arrangements remained unchanged.\(^{56}\)

The Commission further considers that the establishment by RTÉ of wholly-owned subsidiary RTÉNL cannot be separated from or regarded as affecting the existing aid character of the initial funding regime. This company carries out some of the public service activities which previously fell under the responsibility of RTÉ (the tasks of RTÉ included transmission services) and hence, may also benefit from public funding.

The Commission also observes that the Broadcasting Act 2001 introduced new powers for RTÉ (see for instance as regards pay-per-view services or electronic transmissions). However, the Commission observes that the current Broadcasting Act explicitly excludes these services from receiving licence fee funds so that the introduction of these additional powers does not involve additional State funding.

Finally, the Commission observes that the Broadcasting Act 2001 introduced the possibility for RTÉ to use licence fee revenues to provide, pursuant to its powers “any service (other than broadcasting service) for the benefit of the public.”\(^{57}\) Based on the explanations given by the Irish authorities that this possibility was limited to services being incidental to the broadcasting tasks, the Commission considers that this possibility to offer ancillary activities cannot be regarded as severable substantive amendment to the initial funding regime.\(^{58}\)

The Commission concludes that the licence fee financing, including the above mentioned amendments, can be regarded as constituting existing aid.

6.3. Compatibility of the aid under Article 86 (2) of the EC Treaty

The compatibility of the aid measures identified above has to be assessed under Article 86 (2) of the Treaty, taking into account the Amsterdam Protocol as well as the Communication on the application of state aid rules to public service broadcasting, laying down principles and methods for assessing compatibility of State funding for the public broadcasting sector (hereafter “Broadcasting Communication”\(^{59}\)).

\(^{56}\) Commission decision in the case E 3/2005, Aid to the German public broadcasters, paragraph 206 with further reference to RAI licence fee financing Decision, paragraph 43. See also France 2 and France 3 licence fee financing Decision, paragraphs 34 and 35; and RTVE general financing regime Decision, State aid E 8/2005, paragraph 53.

\(^{57}\) See Section 28 (8) (d) of the Broadcasting Act 2001.

\(^{58}\) See also the Commission decision in the case E 3/2005 Aid to the German public broadcasters, paragraph 209, where the Commission considered that services which under national law show a close association to the main tasks and the scope of which is limited to serving and supporting the main TV programme tasks did not constitute in itself a substantial and severable amendment.

\(^{59}\) Published in OJ C 320 of 15 December 2001, page 5.
In accordance with the case-law of the European Court of Justice, the following conditions must be fulfilled in order for an aid to be declared compatible under Article 86 (2) EC Treaty:

- The service in question must be a service of general economic interest and clearly defined as such by the Member State;
- The undertaking in question must be explicitly entrusted by the Member State with the provision of that service;
- The application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community.

In light of these general conditions, the Broadcasting Communication lays down the specific requirements for the funding of public service broadcasters. In accordance with the Broadcasting Communication, the Commission has to assess whether:

- RTÉ’s and TG4’s public service broadcasting activities are clearly and precisely defined by the Irish state as a service of general economic interest (definition of the public service remit).
- RTÉ and TG4 are explicitly entrusted by the Member State with the provision of that service and subject to supervision as to the fulfilment of its tasks (entrustment and supervision).
- The funding is proportionate to the net cost of providing the public service; taking also into account other direct or indirect revenues derived from the public service, and does not lead to unnecessary distortions of competition (proportionality).

6.3.1. Definition of the public service remit

The Commission recognises that, the “definition of the public service mandate falls within the competence of the Member States...” whereas “…the role of the Commission is limited to checking for manifest error. ... The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet - in the wording of the Protocol - the 'democratic, social and cultural needs of each society’”, such as e-commerce (cf. paragraph 36 of the Broadcasting Communication).

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60 Cf. also “Broadcasting Communication”, paragraph 29.
"Given the specific nature of the broadcasting sector, a 'wide' definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity" (cf. paragraph 33 of the Broadcasting Communication).

"The public service remit might include certain services that are not "programmes" in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question." (cf. paragraph 34 of the Broadcasting Communication).

Despite the freedom of Member States to define the public service remit, the Broadcasting Communication requires that Member State's definition must be sufficiently precise and clear. The definition "... should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not." A clear and precise definition is also important "...for non-public service operators, so that they can plan their activities." and "...that Member States' authorities can effectively monitor compliance..." (cf. paragraphs 37-39 of the Broadcasting Communication).

6.3.1.1. Public service definition for television broadcasting

In line with the preliminary views expressed in the Article 17 Letter, the Commission considers that, as regards RTÉ’s television programme activities (including the specific requirement for TG4 to broadcast in the Irish language), the current public service definition is sufficiently precise and clear, taking into account that the Commission accepts a "wide" definition comprising a varied and balanced program schedule. The overview of RTÉ’s programmes above (cf. paragraphs (19) et seq.) illustrates the varied character of the television offer in accordance with its public service remit as set out in the Broadcasting Act.

More specifically, as regards sports broadcasts, the Commission considers that sports can be part of the public service mission of providing a balanced and varied programme. The Commission further observes that RTÉs (and TG4’s) offer remained below 10% (see Figure 3 above). The Commission does not therefore consider that the inclusion of sports programmes into the remit of RTÉ and TG4 constitutes a manifest error.

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61 For instance, in the decision concerning Aid to the German public broadcasters, the Commission stated that "given the overall share of sports as part of the public service broadcasters' programme activities (i.e. not exceeding on average 10% of broadcast time), the Commission does not consider in the present case that the proportion of sports is manifestly excessive in the sense that it can no longer be regarded as part of a varied and balanced programme"; cf. paragraph 292.
6.3.1.2. Public service definition for activities other than broadcasting

(88) In the Article 17 letter, the Commission took the preliminary view that the public service remit for activities other than broadcasting was not sufficiently precise (in particular the possibility granted to RTÉ to may provide "any service other than a broadcasting service" and that the powers granted to RTÉ did not sufficiently differentiate between services/products of a public service or of a commercial nature.

(89) Despite the explanations of the Irish authorities as to the incidental character of "any service other than broadcasting", the Commission considers that such a general authorisation may lead to an extension of the public service remit needs therefore to be defined with sufficient precision (see also below on the need for a clear entrustment). In the absence of such further clarification as regards the exact scope of the public service remit, control of both the fulfilment of the public service remit and the use of the licence fee would not seem to be effective.

(90) Furthermore, based on the current legal provisions, it is not clear to what extent the exercise of powers (such as to publish books or audiovisual material) is part of the public service tasks or would have to be regarded as a purely commercial activities, with the consequence that it would have to be carried out under market conditions (i.e. charging market prices) and could not benefit from State funds.

(91) Consequently, the Commission takes the view that the current legal provisions do not allow to determine beforehand the scope and limits of public service activities other than broadcasting as opposed to purely commercial activities.

6.3.2. Entrustment and supervision

(92) Pursuant to paragraph 40 of the Broadcasting Communication, "...the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference)." Furthermore, the Broadcasting Communication requires that, "whenever the scope of the public service remit is extended to cover new services the definition and entrustment act should be modified accordingly, within the limits of Article 86(2)."^62

(93) Furthermore, paragraph 41 requires "...that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitor its application." In this respect, paragraph 42 of the Broadcasting Communication clarifies that it "...is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking." Finally, paragraph 43 states that "[i]n the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the

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^61 Cf. paragraph 35 of the Broadcasting Communication.
Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision."

6.3.2.1. Entrustment

(94) As stated above, it is not sufficiently clear what RTÉ is supposed to deliver as a public service as regards activities other than broadcasting. It would seem to remain mostly at the public service broadcasters' discretion to determine the scope of its activities in this respect, without there being a clear entrustment.

(95) Furthermore, and in line with established Commission practice, a mere authorisation granted to a public service broadcaster to perform activities which are described in a very broad way (such as the possibility to offer "any service...") cannot be regarded as sufficient for the act of entrustment. This general possibility would need to be further substantiated and the public service broadcaster be specifically entrusted with the provision of the thus specified services, in particular where the service in question looses its purely ancillary character and is of a certain significance.63 The Commission observes that there is currently no requirement for such an entrustment.

6.3.2.2. Supervision

(96) The Commission is not convinced that the existing legal provisions ensure an effective control of whether RTÉ has fulfilled its public service tasks.

(97) The RTÉ Authority's reporting obligations and the preceding responsibility of ensuring that RTÉ complies with its legal obligations would not, in the Commission's view, be sufficient to ensure effective supervision, since the RTÉ Authority is not a control body independent from the RTÉ but rather an integral part of it.

(98) As regards the reports transmitted to the Minister as well as reports submitted by the Minister to the Irish Parliament, the Commission considers that such reports may be an appropriate basis for a control of the fulfilment of the public service broadcasters' obligations.64 However, based on the current legal framework it is not clear how the fulfilment is assessed and what are the possible consequences of non-compliance. Also, the BCI does not seem to exercise the required control over public service broadcasters but only - and on different matters - over commercial operators.

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63 See for instance the decision concerning the RTP ad hoc financing, paragraph 171 and more recently the decision concerning the Aid to German public broadcaster paragraph 247; see also paragraph 92 of the TV2 decision where the Commission considered that for instance programme-related information on the internet would not require a separate entrustment.

64 The Commission takes note in this respect on the reviews which are carried out in the last years by an independent expert on behalf of the Ministry and which also look into the achievement of output commitments for RTÉ.
(99) Finally, the Commission would like to point out that effective supervision presupposes clear public service obligations against which the fulfilment can be measured. As pointed out above (see paragraphs (88) to (91)), this is not in all respects the case.

6.3.3. Proportionality

(100) Pursuant to paragraph 47 of the Broadcasting Communication, “the Commission has to verify, under Article 86 (2), that the derogation from the normal application of the competition rules for the performance of the service of general economic interest does not affect competition in the common market in a disproportionate manner. The test is of a "negative" nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the interests of the Community.”

(101) Furthermore, paragraph 49 of the Broadcasting Communication clarifies that the proportionality assessment “...requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities. ...Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86 (2) and the Protocol.” The requirements concerning the separation of accounts in line with the Transparency Directive are laid down in paragraphs 50-56.

(102) In accordance with paragraph 57 of the Broadcasting Communication, “…the Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However...it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid.”

(103) Finally, paragraph 58 of the Broadcasting Communication points out that “…there might be market distortions which are not necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors. Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster....”

(104) Against this background, the proportionality assessment to be carried out by the Commission comprises the following aspects: (1) separate accounting, (2) control of the limitation of State funding to the net public service costs and (3) examination of possible market distortions which are not inherent to the fulfilment of the public service remit.
(105) As consistently held by the Commission, when examining existing aid, the examination of the Commission is focussed on the existence of adequate safeguards in the relevant legal acts which would ensure the respect of the above requirements.\textsuperscript{65}

6.3.3.1. Transparent accounts

(106) The Commission notes that, according to Section 54 of the Broadcasting Act 2001, the accounts of the so-called "secondary broadcasting services" (i.e., commercial activities) shall be kept separate from any of RTÉ’s other activities. As referred to above (see paragraph (39)), RTÉ distinguishes in its annual accounts between public service costs and revenues as opposed to non public service costs.

(107) The Commission nevertheless observes that the provisions do not contain all the requirements as set out in the Transparency Directive (for instance as regards cost allocation rules). Furthermore, the Commission remains concerned about a correct separation of accounts since the delimitation between public service and other activities is not sufficiently clear (in particular to what extent the exercise of certain powers is part of the remit and may benefit from licence fee funds; see above in paragraph (90)).

6.3.3.2. Overcompensation

(108) As stated in paragraph (102) above, the Commission needs to examine whether the legal framework provides for the necessary safeguards which ensure that the financial compensation granted to public service broadcasters does not exceed the net public service costs linked to the fulfilment of the public service mission. The determination of the net public service costs requires a clear establishment of the public service costs based on separate accounts (see also paragraph (101) and (106) to (107) above) as well as the determination of the commercial revenues to be taken into account. The limitation of the compensation to the net public service costs needs to be subject to adequate ex post control.

(109) The Irish Government claimed that the funding of RTÉ is proportionate within the meaning of Broadcasting Communication. The cost associated with fulfilling RTÉ’s public service remit by far exceeded the funding it receives from the state.

(110) Even though the financial data for 2006 confirms that the public service costs for instance for the television business division (amounting to € 257 million) were indeed in excess of the public funds attributed to this division (amounting to € 125 million), the Commission nevertheless observes that the overall financial result of RTÉ in 2006 recorded a surplus of approximately € 10 million. This result is due to the positive contribution of commercial activities. In this respect, the Commission recalls that in order to be in line with the Broadcasting Communication, the public funding shall not exceed the net public service costs, i.e. the costs of delivering the public services after having deducted revenues from the commercial exploitation of the public service.

\textsuperscript{65} Cf. Commission decision concerning the licence fee financing of France 2 and France 3, paragraph 56 and Commission decision on the aid to German public service broadcasters E 3/2005, paragraph 264.
(111) Apart from the existence or absence of overcompensation in a particular year, the Commission considers that there is a need for structural safeguards such as ex-post controls of the use of public funding to exclude overcompensation and cross-subsidization of purely commercial activities.

(112) More particularly and in line with its previous decision making practice, the Commission considers that the legal framework should contain clear provisions limiting the available annual public funding to the net public service costs incurred in any given financial year as well as adequate control mechanisms which make sure that the public service broadcasters do not enjoy more financial means than necessary to cover the net public service costs.\textsuperscript{56} The control mechanisms need to make sure that excess money does not, in principle, remain at the free disposal of the public service broadcaster. Where the funding is determined and the compensation granted on an annual basis, excess money would normally need to be recovered or deducted from next year’s payment. Where the financing regime is based on contributions which are determined for a longer period, any excess money detected at the end of a given year would not automatically need to be withdrawn from the public service broadcaster immediately but could under certain conditions (and within the limits of 10\% of annual compensation payments) be carried over to the next year. In any case, at the end of a certain period of time, any remaining excess would need to be definitively withdrawn from the company in question.\textsuperscript{57}

(113) The Commission observes that the current legal framework does not provide for such safeguards since the amount to be allocated to RTÉ each year is determined based on the existing licence fee level without taking account of a possible surplus in the past.

6.3.3.3. Market distortions not inherent to the fulfilment of the public service remit: commercial activities should be carried out in line with market practices

(114) In general terms, the Commission considers that where public service broadcasters commercially exploit the public service and carry out commercial activities in competition with other operators, this should be done on purely market terms. Non-market behaviour would lead to distortions of competition which are not inherent to the fulfilment of the public service and could reduce commercial revenues. To the extent that these revenues are to be used to finance public service costs, non-market conform behaviour could eventually lead to State financing in excess of what is necessary for the fulfilment of the public service remit.

(115) For these reasons, the Commission has in its decision-making practice required Member States to adopt measures which ensure that public service broadcasters are required to respect market principles (i.e. the requirement for all commercial activities to be carried out on market terms, including the prohibition to undercut

\textsuperscript{56} Cf. France 2 and France 3 licence fee financing Decision, paragraphs 67 and 68 and Commission decision concerning German public broadcasters E 3/2005, paragraph 281.

prices on the advertising market, and the requirement to respect the arm’s length principle in all financial transactions between the public service broadcaster and commercial subsidiaries). The respect of these principles should be subject to control by an independent authority. 68

(116) To the extent that RTÉ carries out commercial activities through subsidiaries which do not receive any licence fee funding, it could be argued that these subsidiaries would not normally engage in non-market conform behaviour such as undercutting of prices. On the other hand, this organisational separation does not ensure that the financial relationship between RTÉ and its subsidiaries would be necessarily at arm’s length. In addition, several commercial activities are carried out within RTÉ with the inherent risk of non-market conform behaviour to the extent that losses may be covered by State funds 69. Furthermore, and as referred to above (see paragraph (22) et seq.), the current legislation also foresees the possibility of offering certain services or products without charge, without in being clearly established that they are part of the public service tasks. The Commission considers that in this context the offer of products “without charge” cannot be regarded as acting in line with market conditions. Failure to carry out commercial activities under market conditions may be an indication of overcompensation incompatible with the Common Market.

(117) Finally, the Commission observes that the Broadcasting Act does not contain clear obligations imposed on RTÉ to carry out commercial activities under market conditions. There is also no control that RTÉ respects the principles of market conform, behaviour.

6.3.4.  Conclusion on the compatibility of the aid under Article 86(2) of the EC Treaty

(118) In light of the above, the Commission considers that the current financing regime does not provide for a sufficiently clear and precise public service definition with regard to activities other than broadcasting and does not ensure that such activities are properly entrusted upon RTÉ and TG4. Furthermore, the scope of the public service remit may comprise purely commercial activities with the consequence that it cannot be excluded that such activities unduly benefit from state financing. There is also no satisfactory and independent control mechanism to verify that the public service tasks are carried out in line with the public service remit or that the public service broadcasters have not been overcompensated. Finally, the existing legal framework does not guarantee that commercial activities are carried out under market conditions.

68 Cf. BBC licence fee Decision, State aid N 631/2001, paragraph 51. See also more recent decisions: RAI licence fee financing Decision, paragraphs 60 and 61; RTVE general financing regime Decision, paragraph 71 and. France 2 and France 3 licence fee financing decision, paragraph 69; cf. also Commission decision concerning the compensation payments to the Portuguese public service broadcaster RTP, in particular paragraphs 98 and 101 and Commission decision in State aid E 3/2005 paragraph 285.

69 Even though several of the business divisions of RTÉ which carry out commercial activities would not seem to receive direct allocations of licence fee revenues, State funds may also stem from other commercial revenues where such revenues would normally have to be used to finance the public service tasks.
7. **Appropriate measures to ensure compatibility of the financing regime**

(119) Based on the conclusions regarding the compatibility of the existing aid as identified above, and after discussions with the Irish authorities on the changes necessary to remedy competition concerns, but also as regards their plans to extend the public service remit to new activities (as regards in particular electronic transmissions and an audiovisual archive), the Commission therefore considers that the following measures are appropriate to ensure compatibility:70

7.1. **The public service remit**

(120) Ireland should clarify the public service remit with regard to activities other than broadcasting. The legal framework needs to make sure that purely commercial activities are not part of the public service remit and do not benefit from state funding. The definition of the public service tasks should be sufficiently clear in order to determine ex ante under which circumstances a particular activity included in the powers of RTÉ is of a public service nature and when it constitutes a commercial service/product.

(121) The determination of whether in particular new media activities satisfy the same democratic, social and cultural needs of society should be based on a set of criteria suitable to assess the public service character of the service in question also in light of other already available offers on the market. The legal framework needs to provide for a sufficiently precise public service remit, allowing other business operators to plan their activities and control bodies to effectively monitor compliance.

7.2. **Entrustment and supervision**

(122) To the extent that the legal framework provides for the possibility of RTÉ to engage in vaguely defined activities or to establish new services or channels, the public service objectives and tasks should be stipulated in a formal act of entrustment. The scope of services for which such a formal act of entrustment is regarded as necessary should also be clarified in advance.

(123) Furthermore, supervision of the fulfilment of the public service tasks should be carried out by a body which is independent from RTÉ.

7.3. **Proportionality**

7.3.1. **Transparency**

(124) Ireland should adopt the necessary measures to ensure full respect of the requirements of the Transparency Directive. This includes not only the separation of accounts (based on a clear distinction between public service and other activities) but also objective and consistent cost allocation rules.

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70 References to RTÉ are to be understood as covering both RTÉ and TG4.
7.3.2. Overcompensation

(125) Ireland should adopt the necessary provisions which ensure that the public funding of public service broadcasters is limited to the net public service costs. This implies on the one hand that only costs related to the public service are taken into account (excluding costs/losses incurred by commercial activities). On the other hand, it needs to be ensured that all commercial revenues generated by the exploitation of the public service are deducted. This also implies that it needs to be ensured that the deductible commercial revenues are those that would be generated under market conditions (see also assessment concerning the respect of market principles below).

(126) In addition, there must be clear rules and control of any possible surplus at the end of a given financial year as well as at the end of a certain period. This means in particular that any accumulated surplus at the end of a licence fee period needs to be fully deducted from the compensation granted for the next licence fee period. This also means that possible surpluses recorded at the end of any given financial year shall not exceed what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e., 10% of the annual compensation). A higher annual reserve could be justified, for instance where the surplus is intended to be used for predetermined projects, the costs of which have been certified by an independent body and which are to be carried out at a later, provided that there are satisfactory control mechanisms ensuring that these reserves cannot be used for other purposes.

7.3.3. Commercial activities carried out in line with market practices

(127) Ireland needs to adopt measures obliging public service broadcasters to carry out commercial activities on market terms. The respect of market principles does not only comprise the market conform behaviour vis-à-vis third parties, but also an arm’s length relationship between public service broadcasters and their commercial subsidiaries, also including the respect of the MEIP as regards the public service broadcasters' investment decisions as regards their participations.

(128) The fulfilment of these measures should be subject to regular external control.

8. COMMITMENTS SUBMITTED BY THE IRISH GOVERNMENT IN JANUARY 2008

(129) Following discussions as to how to address to preliminary concerns addressed in the Article 17 letter, but also in relation to the draft Bill, the Irish Government submitted by letter of 30 January 2008 a summary of their commitments given in the context of the present investigation. These commitments are to some extent already reflected in the draft Bill. The commitments are stated below, including - where appropriate - references to the draft Bill for illustrative purposes.

8.1. The public service remit

(130) The Irish Authorities committed to determine the scope of the public service remits of RTÉ and TG4 by enumerating their respective objects and duties in broadcasting legislation and to limit the use of public funding by RTÉ and TG4 to
the achievement of such public service objects and duties (cf. point 1 of the letter).

(131) The draft Bill contains provisions laying down the exact scope of the public service broadcaster's remit by clearly setting out the "objects" (cf. in particular Heads 109 for RTÉ and 114 for TG4) and other duties (cf. for instance Head 77). Furthermore, Head 116 clearly stipulates that the receipts from the licence fee may only be used for clearly identified objects and duties.

(132) The stated objects relate to the following activities, e.g., the maintenance of orchestras, choirs, performing groups, maintenance of libraries and archives as well as new media activities (e.g., website and teletext services in connection with its public service broadcasting activities and so-called "non-broadcast non-linear audiovisual media services").

(133) In addition, the Irish Authorities commit to introduce a requirement for RTÉ and TG4 to prepare and publish a public service broadcasting charter and consequent annual statement of commitments which would elaborate on the principles to be observed and the activities to be undertaken by the public service broadcasters in fulfilling their statutory remits (cf. point 2 (a) of the letter).

(134) In particular Heads 103 and 104 of the draft Bill foresee the adoption of a Broadcasting Charter as well as annual statements of commitments which further implement and specify the public service remit. After having carried out a public consultation, RTÉ and TG4 are required to prepare public service broadcast charters every five years which outline the activities they will undertake over that five year period in order to meet their statutory remits. This Broadcasting Charter must be approved by the Minister, following consultation with the Broadcasting Authority of Ireland (hereafter "BAI") concerning the sector impact of such a charter, before being adopted by RTÉ and TG4. In addition, RTÉ and TG4 are required to prepare annual statements of commitments which outline the intended outputs of the broadcaster in the following twelve months. Before any such commitments are adopted, RTÉ and TG4 must consult with the Minister and the BAI on the sector impact of the commitments.

(135) As regards the distinction between public service and other activities (in particular in relation to the exercise of powers as currently foreseen in Heads 109 and 114 of the draft Bill), the Irish authorities assured the Commission that there is a distinction between the exercise of powers in pursuance of the public service objects on the one hand and the exploitation of commercial opportunities object on the other (cf. point 6 of the letter). If that object is the exploitation of a commercial opportunity that arises during the course of a public service function then the public service broadcaster can not use public funding in the exercise of this power.

(136) The oversight of the exercise of such powers has both ex ante and ex post dimensions: ex ante in the context of the proposed approval and review of public service broadcasting charters and annual statements of commitment (cf. Heads 103 and 104), and ex post in the context of the annual and five year reviews of public funding levels proposed under Head 117. The Irish Authorities also commit to require the public service broadcasters to indicate in their public
service broadcasting charters the proposed level of activity in respect of the publication of books and music for which public funding will be utilised.

(137) As regards the initial plan to allow RTÉ to offer services on a subscription or pay-per-view base, the Irish authorities proposed in the context of their commitments to preclude the use of public funding for public service broadcasting services which are of a special interest to only certain members of the community and which are made available on a subscription or pay-per-view basis. RTÉ and TG4 may continue to operate such a service solely on a commercial basis as is currently provided for in the Broadcasting Act 2001 (cf. point 4 of the letter).

(138) Finally, and as regards the archive service, the Irish authorities explained that Head 77 of the draft Bill mandates access by the public to the archived material held by the public service broadcasters as a consequence of their broadcasting activities (cf. point 5 of the letter).

(139) Public service broadcasters will be required to prepare two schemes for the reuse by third parties (e.g. educationalists, researchers, other broadcasters, other audio and audiovisual content providers— as opposed to the general public) of archived material held by the public service broadcasters: one scheme must relate to the non-commercial educational reuse of archived material and a second to the commercial reuse of archived material. Material intended for commercial reuse would be available on standard market terms.

(140) The promulgation of schemes which permit third parties (as opposed to the general public or the public service broadcaster itself) to reuse and exploit the material held in the archives requires Ministerial approval. Such approval will only be granted following consideration of the advice of the BAI as to the sectoral impacts. Whereas public access to view/listen to but not re-use the contents of the archive can be offered by RTÉ based on the legal provisions of the Broadcasting Act, the separate schemes for the re-use and exploitation of material held in the archives would be subject to sectoral impact assessments prior to any Ministerial approval. Re-use in this case which is subject to sectoral impact would, for instance, include downloading and storing permanently by individuals.

8.2. Entrustment and supervision

8.2.1. Entrustment

(141) The Irish Authorities give a commitment to separate entrustment for the new activities envisaged in the draft Bill (cf. point 8 of the letter). The Irish authorities also committed to foresee the requirement of a Ministerial Consent for a number of activities (see below). The Ministerial Consent is preceded by a public value and sectoral impact test (cf. point 2 (c) of the letter). In addition, the Irish authorities have committed to require Ministerial consent, following consultation with the BAI, in respect of alterations in the total time fixed for public service broadcasters to broadcast advertisements; the establishment of subsidiaries, investments and joint ventures by public service broadcasters, schemes for third party access to archives maintained by public service broadcasters and alteration in approved levels of borrowing by public service broadcasters (cf. point 2 (d) of the letter).
(142) The Irish Authorities commit to introduce public value and sectoral impact assessments in a number of circumstances, including alterations of the statutory public service remit of RTÉ or TG4 (see on this point Heads 110 and 115) or memorandum of association (cf. point 10 of the letter) as well as for the following services, falling within the ambit of the public service remit of RTÉ or TG4, and for which RTÉ or TG4 propose the use of public funds (cf. point 3 of the letter):

- the variation in the number of public service television or radio channels operated by RTÉ or TG4;

- the establishment and maintenance by RTÉ or TG4 of public service free-to-air community, local, or regional broadcasting services;

- the establishment and maintenance by RTÉ or TG4 of public service non-broadcast, non-linear, audio visual media services (this does not encompass the making available of material broadcast free-to-air by RTÉ or TG4 on non-traditional "broadcast" platforms e.g. mobile phones and websites); and

- the establishment and maintenance by RTÉ or TG4 of significant new public services not expressly stipulated by legislation.

(143) In this respect, it is noted that Head 109 (1) (or Head 114 (1) regarding TG4) provides for the possibility to establish new broadcasting services and for the possibility to establish non-broadcast non-linear audio-visual media services, subject to Ministerial consent and a public value and sector impact test. Head 75 specifies that where RTÉ and TG4 propose to: vary the number of television or radio channels, pursue certain public service objectives,71 and undertake supplementary services,72 a Ministerial consent is required. Before the Minister grants approval, he or she must publicly consult RTÉ and TG4, other appropriate third parties and in particular the BAI as to the public value and sector impact assessment of the proposed new activity/channel. Head 25 of the draft Broadcasting Act foresees that the BAI will be the principal expert body as far as conducting impact assessments and as such will be in a position to "advise" the Minister. However, whilst having an important contribution to make in the decision making process in relation to public value tests, the BAI will not be the "sole" expert voice on which the Minister will base his or her decisions.73

(144) While the draft Bill does not lay out the specifics of how a sector impact assessments would be conducted (and as such allows the BAI considerable flexibility and independence as to how it goes about fulfilling its obligations), the general intent is that the BAI should develop methodologies for the conduct of such assessments and that where possible the outcome of such assessments should be made public.74

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71 For instance local public service broadcasting or non-broadcast non-linear audio-visual media service.
72 Supplementary services (formerly termed ancillary services) are defined as an activity which is in accordance with the public service remits, incurs expenditure in excess of € 5, and is an activity which RTÉ and TG4 have not engaged in, in a significant manner in the previous five years.
73 See Ireland's 1 May 2007 submission.
74 Ibid.
(145) In their commitments, the Irish authorities included the following envisaged processes and criteria (cf. point 9 of the letter):

(146) As regards the procedures to be followed, the Irish authorities explained that on notification by the public service broadcaster that it is requesting the Minister's consent to engage in new activities (see paragraph (143) above), the Minister, the BAI and the public service broadcaster shall endeavour to agree a description of the activity proposed by the public service broadcaster. Following such agreement the Minister will consult with the BAI as to the modalities of the public value and sectoral impact assessments – in particular in respect of the timelines for the process and the nature of associated public consultation. The Minister will then conduct a public value assessment of the proposals as against the public value criteria outlined below, having consulted with the BAI, the public service broadcaster and such other persons as he or she considers appropriate.

(147) The BAI will conduct a sectoral impact assessment of the proposals as against the sectoral impact criteria outlined below, having consulted with the Minister, the public service broadcaster and such other persons as it deems appropriate – such an assessment is likely to take a five year perspective of the potential impact of the proposed services. The BAI will report the outcome of its sectoral impact assessment to the Minister and make such recommendations as it sees fit. The Minister will consider the BAI's sectoral impact assessment advices and the outcome of the public value assessment before coming to a final decision whether or not to grant the consent sought by the public service broadcaster.

(148) In granting his or her consent the Minister may attach such conditions or require such modifications to the proposals as he or she sees fit. In publishing his or her decision the Minister shall also publish a statement outlining the consultations that have been carried out and, subject to confidentiality requirements in respect of commercially sensitive material, make publicly available all documents furnished to the Minister during the course of the consultation.

(149) As regards the assessment of the public value, the Irish authorities have informed the Commission of the following indicative criteria:

- compliance of the proposed service with the public service remit as outlined in statute,
- compatibility with the goals of the Audio Visual Media Services Directive and Council of European recommendations in respect of public service broadcasting,
- cost of the proposed service and its impact on existing public service provision,
- extent to which the proposed service will contribute to meeting the democratic cultural, linguistic, educational, and social needs of Irish society, of individual groups within Irish society, and of Irish communities outside of the island of Ireland,
- extent to which the proposed service is accessible by the public,
- extent to which the proposed service will reach under-served audiences,
• contribution of the proposed service to individual’s or societal group’s interest in, and familiarity with, new forms of services and technology (e.g. in pursuit of the goals of the i2010 agenda and European digital switchover),

• contribution of the proposed service to media plurality

• as well as such other matters as the Minister adjudges relevant and appropriate.

(150) The criteria used for the sectoral impact assessment would cover:

• the extent to which the proposed service impacts on availability, choice, quality and accessibility of services for content viewers and listeners,

• the extent to which the proposed service complements or displaces existing service offerings,

• the impact of the proposed service on sectoral development, innovation and investment,

• the impact of the proposed service on related markets and

• such other matters as the BAI adjudges relevant and appropriate.

8.2.2. Supervision

(151) The Irish Authorities commit to the establishment of a new independent content regulator – the BAI - which will assist and advise the Minister in the monitoring of RTÉ and TG4’s performance as against their public service remits, and will in particular (1) on an annual basis carry out a review of, and report to the Minister on, the extent to which RTÉ and TG4 have, during the previous financial year, fulfilled the commitments outlined in their annual statement of commitments for that financial year; and (2) every five years, or such shorter period as directed by the Minister, carry out a review of, and report to the Minister on, the adequacy or otherwise of the level of public funding made available to RTÉ and TG4 in order to fulfil their public service objectives as enunciated in statute (point 11 of the letter).

(152) The draft Bill provides for the establishment of the BAI as an independent body which will ensure that broadcasting services (i.e., broadcasting services in general, not only public service broadcasting) meet the needs of the people of Ireland. Heads 5 to 39 of the draft Bill contain rules regarding the establishment of the BAI, its organization, staff, function, duties, powers and independence.

(153) According to Head 25, the BAI will advise the Minister as to RTÉ and TG4’s strategic plans, the public service charter as well as the annual commitments. Furthermore, the BAI must undertake reviews of the extent to which RTÉ and TG4 have met their commitments.
8.3. Proportionality

8.3.1. Transparent accounts

(154) The Irish authorities commit to introduce a requirement for the public service broadcasters to distinguish in their accounts between transactions and arrangements entered into in pursuit of public service objects and the pursuit of the object to exploit such commercial opportunities in accordance with the requirements of the Transparency Directive as transposed into Irish law (cf. point 12 of the letter).

(155) Under Head 100, the BAI, having consulted with the Minister and with RTÉ and TG4, prepares and publishes guidance for RTÉ and TG4 as regards cost accounting principles and methods to be considered by RTÉ and TG4 in preparing revenue and cost statements. RTÉ and TG4 are required, following guidance from the BAI as regards cost accounting principles, to prepare a statement of revenues and costs distinguishing as between commercial and public service activities.

8.3.2. Overcompensation

(156) The Irish authorities commit to introduce a requirement for the public service broadcasters to report on an annual basis on the use they have made of the public funding they have received, based on separate accounts as outlined above.

(157) Furthermore, the Irish authorities commit to introduce a requirement for the BAI to undertake reviews and make recommendations to the Minister in respect of the level of public funding of RTÉ and TG4 (cf. points 2 (b) and 12 of the letter).

(158) The Irish Authorities commit to the establishment of the following mechanisms to safeguard against overcompensation of public service broadcasters RTÉ and TG4:

- The use of public funding limited by statute to the public service objects enunciated in statute.

- Statutory requirement that surpluses generated by activities in pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) shall be used to subsidise the attainment of the public service objects.

- Requirement on public service broadcasters to report on an annual basis on the use they have made of the public funding they have received.

- Statutorily mandated annual review by the BAI of the fulfilment or otherwise by the public service broadcaster of the commitments outlined in the public service broadcaster's annual statement of commitments, and an associated recommendation to the Minister as to the level of any necessary public funding adjustment. In considering whether there should be an adjustment to the level of public funding, the annual review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
• Statutorily mandated five year review of the adequacy or otherwise of the public funding made available to the public service broadcaster in order to meet its public service objectives as enunciated in statute, and an associated recommendation to the Minister as to any necessary adjustment as to the level of such public funding. In considering whether there should be an adjustment to the level of public funding, the five year review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.

• The Irish Authorities also commit to require the BAI, on the basis of the above mentioned reviews, to make a recommendation to the Minister as to the level of adjustment to the public funding of public service broadcasters, and to, on its establishment, communicate to the BAI the Commission’s policy in respect of the maintenance of surpluses by public service broadcasters\(^{75}\) (a mechanism for such a communication is provided for in paragraph (i) of Head 117(10) of the draft Bill).

(159) Head 117 lays down the rules and procedures for the reviews to be carried out by the BAI. While the annual review looks into the fulfilment of the statements of commitments as well as into the adequacy of the funding (but limited to the question of a possible increase, capped at CPI + 1%, or decrease), the five year review is a more in-depth assessment of the financial situation of the public service broadcasters. Head 117 foresees in this respect for instance that, in carrying out this review, the BAI shall take account of - inter alia - the existing resources available to the company, the current level of public funding available to the company, the outcome of any annual review, developments in public service broadcasting internationally, as well as such other matters which the Minister may consider relevant and has communicated to the Authority.

(160) In the course of the investigation, the Irish authorities also explained that the following scenarios are instances where a decrease in public funding might occur:

• The public service broadcaster fails to achieve its commitments under the annual statement of commitments or public service broadcasting charter and has been overcompensated;

• The cost base of the public service broadcaster reduces and it does not propose to increase the existing levels of its public service output; and

\(^{75}\) It is understood that under current published Commission policy (cf. in particular Commission decision of 24 April 2007, State aid E 3/2005 - Germany), a possible annual surplus (overcompensation) needs to be limited to what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of annual compensation payments). Exceptionally, a surplus exceeding the 10% threshold may remain with the public service broadcasters, provided that this amount is earmarked for a specific purpose, the costs of which are spelled out in advance and certified by an independent control body [the BAI] and that the use of these earmarked funds in accordance with its purpose is subject to ex post control. Furthermore, surpluses (overcompensation) accumulated at the end of a given period would need to be fully taken into account (i.e. deducted) when determining the financing needs of the public service broadcasters for the next period.
• The public service broadcaster gains considerable additional income from exploiting the commercial opportunities available to it and it does not propose to increase the existing levels of its public service output.\(^a\)

8.3.3. Commercial activities carried out in line with market practices

(161) The Irish Authorities commit to introduce a requirement for the BAI or its statutory committees to, at the request of the Minister, report on compliance by RTÉ and TG4 in respect of the following matters: (1) ensuring that transactions or arrangements entered into by public service broadcasters as between public service objectives and the exploitation of commercial opportunities (as may arise during the course of the public service broadcaster’s fulfilment of its public service objects) object are made at arm’s length and (2) any arrangement in respect of third party access to the archives of public service broadcasters (cf. point 11 of the letter).

(162) The Irish Authorities commit to the establishment of the following mechanisms to ensure arm’s length principles apply in respect of transactions as between public service objects and the exploitation of commercial opportunities object in relation to RTÉ and TG4 (cf. point 12 of the letter):

• Enunciation of an object for public service broadcasters to exploit such commercial opportunities as may arise during the course of the public service broadcaster’s fulfilment of its public service objects.

• Statutory requirement for transactions and arrangements entered into by public service broadcasters between, on the one hand the public service objects, and on the other hand, the pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster’s fulfilment of its public service objects) to be made at arm’s length.

• On foot of a request of the Minister the BAI must prepare and submit to the Minister a report on compliance by the public service broadcasters with the arm’s length requirement outlined above.

• Require public service broadcasters to report on, on an annual basis, on the use they have made of the public funding they have received, and to distinguish between transactions and arrangements entered into in pursuit of public service objects and the pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster’s fulfilment of its public service objects) in accordance with the requirements of the Transparency Directive as transposed into Irish law.

(163) Furthermore, the Irish authorities confirm that the arm’s length principle would apply to the making of investments in pursuit of the object to exploit such

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\(^a\) See Ireland’s 21 December 2006 submission, page 2.
commercial opportunities as may arise during the course of the public service broadcaster's fulfilment of its public service objectives (point 13 of the letter).

(164) In this respect, Head 101 foresees that commercial transactions shall be carried out at an arm's-length, that they are operated in an efficient manner so as to maximize revenues, and that any profits arising from such commercial activities shall be utilized to subsidize public service broadcasting activities. Head 47 foresees that RTÉ and TG4's compliance with requirements concerning commercial transactions is supervised by the so-called Compliance Committee of the BAI.

8.4. Final remarks

(165) The Irish Authorities confirmed that equivalent mechanisms to those proposed in respect of RTÉ with regard to entrustment, definition of public service remit, control of overcompensation and applicability of arms-length principles in respect non-public service commercial transactions will apply to TG4 (cf. point 7 of the letter).

(166) Finally, the Irish Authorities commit, subject to legal drafting and enactment by the Houses of the Oireachtas, to implement into national law by December 2008 the various outstanding commitments outlined above by means of the Broadcasting Bill 2008.

9. ASSESSMENT OF THE COMMITMENTS PROVIDED BY IRELAND

9.1. The public service remit

(167) The Commission considers that the commitments given by the Irish authorities are adequate to provide for a sufficiently precise and clear public service definition.

(168) Firstly, the Commission considers that the enunciation of objects and duties (covering broadcasting activities as well activities other than broadcasting) which read in conjunction constitute the public service mission further clarify the exact scope of the public service tasks and thus the activities which may benefit from State funds. In particular as regards the exercise of powers granted to RTÉ, the Commission is satisfied with the commitments and explanations provided by the Irish authorities which ensure that activities such as the publication of books or audiovisual material would be qualified ex ante (in the context of the Broadcasting Charter as well as the annual statements of commitments) and following consultation with the BAI as purely commercial activity or – where a public service need is shown - as a public service so that the scope of publicly funded activities would be known in advance and could be checked afterwards.
(169) Secondly, the Commission considers that the legal requirement for RTÉ and TG4 to adopt a Charter as well as annual statements of commitments help further clarifying the scope and limits of the public service remits. In this respect, the Commission notes that the Broadcasting Charter will need to be approved by the Minister following consultation with the BAI. It is also noted that RTÉ is supposed to consult with the BAI (and the Minister) on the statements of commitment and their impact on the market and that the BAI will also be responsible for checking compliance with the annual statements of commitments in its annual reviews.

(170) Thirdly, the Commission considers that the evaluation procedure (i.e. public value and sectoral impact test) which will be introduced by the Irish authorities is an adequate means to determine to what extent new services serve the democratic, social and cultural needs of society and thereby to establish the public service character of the services in question. The Commission notes in particular that the services which will be subject to such an evaluation (and separate entrustment; see on this aspect below) will be clearly identified. The services mentioned here include so-called supplementary (or ancillary) services so that the previously existing general authorisation for RTÉ to offer any new service will in the future be replaced by a Ministerial Consent, laying down in more specific terms the scope of additional public service activities.

(171) In this context, the Commission further considers that the criteria to be established (such as accessibility of the service, the extent to which the proposed service will reach under-served audiences, contribution to individual’s or societal group’s interest in new forms of services and technology as well as contribution to media plurality) allow for a transparent evaluation of the public service character and for determining whether such activities serve the democratic, social and cultural needs of society in line with the requirements of the Broadcasting Communication. The Commission also considers that the sectoral impact assessment to be carried out by the BAI, as well as the possibility for third parties to participate in public consultations or through other forms (decided by the Minister) is appropriate to address concerns about the potentially distortive effects of new activities.

(172) Overall, the evaluation procedure seems appropriate to strike a balance between the public service objectives of public service broadcasters and possible disproportionate effects on competition and trade, which could in the wording of the Amsterdam protocol run against the interest of the Community.

(173) Fourthly and as regards more specifically the archive service, the Commission is satisfied that the launching of RTÉ’s archive service would be – to the extent it would go beyond the possibility for the public to view/listen and involve in particular the possibility for downloading and storing permanently - subject to a sectoral impact assessment. Thereby, potentially distortive effects in competition caused by such an offer would be assessed and could be remedied in the context of the impact test carried out by the BAI.

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77 It is in this respect noted that following the implementation of the commitments, the Charter as well as the statements of commitments will – different to the current situation - have a statutory basis.
9.2. Entrustment and supervision

(174) The Commission considers that the commitments given by the Irish authorities ensure that new activities of RTÉ are formally entrusted upon the public service broadcasters.

(175) In this respect the Commission notes that for a number of clearly enumerated circumstances Ministerial Consent is required before RTÉ can engage in such new activities. These circumstances comprise in particular new activities which are not covered by the existing remit, such as new television channels, "non-broadcast, non-linear audiovisual media services" as well as any significant new public service not expressly stipulated by legislation. As also referred to above, the Commission is also satisfied that the granting of Ministerial Consent is preceded by a public value and market impact assessment.

(176) Furthermore, the Commission considers that the commitments given by Ireland as regards the establishment of the independent BAI to ensure effective supervision and compliance of the public service broadcasters' fulfillment of the public service obligations satisfy the requirement for adequate control.

(177) In this respect, the Commission also notes that, according to Head 25, the BAI must undertake reviews of the extent to which RTÉ and TG4 have met their commitments under their annual statement of commitments. In addition to these ex post control mechanisms, the Commission notes the ex ante advisory functions of the BAI, for instance its advise to the Minister on RTÉ and TG4's strategic plans, the public service charter and the annual commitments. Part of the BAI's duties comprise the ex ante assessment of the public value and sector impact of certain alterations and extensions to the public service remit as referred to above.

(178) The Commission also considers that the clearer public service remit will allow the BAI to carry out a more effective control, including a control to what extent public service broadcaster stayed within the limits of their mission.

9.3. Proportionality

9.3.1. Transparent accounts

(179) The commitments given by the Irish authorities to require RTÉ to respect the requirements of the Transparency Directive ensure that the RTÉ will keep separate accounts distinguishing between public service activities and based on clearly established, consistently applied and objectively justifiable principles within the meaning of Article 4 (1) of the Transparency Directive.

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78 These activities may have been included in the powers of RTÉ, but without necessarily giving RTÉ the right to use licence fee money.

79 Its independence as well as the objectives and different functions of the BAI (including the sectoral impact and public value test as well as the control of RTÉ's compliance with its obligations) are clearly stipulated in Heads 24, 25 and 28 of the draft Bill.
In this respect, the Commission notes that the draft Bill foresees that the BAI, after having consulted the Minister, prepares and publishes guidance to RTÉ as regards the cost accounting principles and methods to follow in its annual reporting. Finally, the Commission observes that following a further clarification of the scope of the public service remit and the use of licence fee money, the separate accounts would adequately reflect the net public service costs and thus allow the control of overcompensation as stipulated in paragraph 49 of the Broadcasting Communication.

9.3.2. Overcompensation

The Commission considers that the commitments given by the Irish authorities ensure that the compensation granted to public service broadcasters will not exceed what is necessary for the fulfilment of the public service tasks (i.e. limited to the net public service costs).

This is ensured through the commitment given by Ireland that the public funds can only be granted in relation to public service tasks, while deducting commercial revenues. In addition, the Commission is satisfied that the regular reviews carried out by the BAI ensure that there is a proper control of possible overcompensation.

In this respect, the Commission notes that in the context of the annual review as well as the five-year review, the BAI looks into the fulfilment of the statement of commitments and the possible need for adjusting the level of public funding for instance due to overcompensation. Such finding of overcompensation could lead to a recommendation by the BAI for a decrease in the level of public funding (see also the further explanations provided by the Irish authorities in this respect in paragraphs (156) to (160) above).

Based on the commitments given by the Irish authorities, the Commission is satisfied that the control of overcompensation, including the possibility for public service broadcasters to transfer a certain surplus to the following financial year (or period), is carried out by the BAI in line with Commission practice in this respect. In particular, the control should ensure that a possible annual surplus which may be carried over to the next year is limited to what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of annual compensation payments). Exceptionally, a surplus exceeding the 10% threshold may remain with the public service broadcasters, provided that this amount is earmarked for a specific purpose, the costs of which are spelled out in advance and certified by the BAI and that the use of these earmarked funds in accordance with its purpose is subject to ex post control. Furthermore, surpluses (overcompensation) accumulated at the end of a given period would be fully taken into account (i.e. deducted) when determining the financing needs of the public service broadcasters for the next period.
9.3.3. Commercial activities carried out in line with market practices

(185) The Commission considers that the commitments given by the Irish authorities (see paragraphs (161) et seq.) as currently reflected in the draft Bill contain the necessary safeguards to ensure that public service broadcasters carry out their commercial activities (whether intra-group or with non-related companies) on market terms and that the financial needs of public service broadcasters are not unnecessarily increased through any such non-market conform behaviour since the net public service costs will be determined after having deducted commercial revenues generated in full compliance with market principles. The Commission notes in particular that the arm’s length principle applies also to investments of public service broadcasters and that commercial activities shall be operated in an efficient manner so as to maximize revenues. The revenue maximisation maxim should be sufficient to ensure that RTÉ does not undercut prices for instance on the advertisement market. The Commission is satisfied that compliance with market principles is subject to control by the BAI. In this respect, the Commission notes in particular that the BAI must prepare and submit to the Minister a report on compliance.

10. CONCLUSIONS

(186) In accordance with Article 17 of the Procedural Regulation, the Commission informed Ireland about its preliminary views that the current broadcasting legislation was no longer compatible with the Common Market.

(187) Having assessed the information and arguments subsequently submitted by Ireland, the Commission, in accordance with Article 18 of the Procedural Regulation, concluded that the existing aid scheme is no longer compatible with the Common Market. Based on the discussions with the Irish authorities on ways of ensuring full compliance with Community law, the Commission also recommended appropriate measures to ensure future compatibility.

(188) With the submission of commitments, Ireland accepted to implement these appropriate measures. With the present decision, the Commission takes note of these commitments provided by Ireland, records acceptance in accordance with Article 19 of the Procedural Regulation and closes the procedure.

(189) The Commission reminds Ireland to notify the Commission of the entry into force of the Broadcasting Act 2008 and submit the final law to the Commission before December 2008.

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81 See on this aspect for instance the Commission decision concerning ad hoc financing of Dutch public service broadcasters, paragraph (174) where the Commission concluded its assessment of alleged undercutting of prices on the advertising market stating that "...there is currently no evidence that the Ster did not attempt to maximise its advertising revenues and that its behaviour would have led to an increased need for State funding." (underlined here)
The present letter is without prejudice to the possibility for the Commission to continuously assess existing aid schemes under Article 88 (1) of the EC Treaty, and to propose appropriate measures required by the progressive development or the functioning of the common market.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, Ireland will be deemed to have agreed to the disclosure to third parties and to the publication of the full text of this letter in the authentic language on the Internet site: http://ec.europa.eu/community_law/state_aids/index.htm.

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue de Spa 3
BE-1049 Brussels
Fax No: +32 2 296.12.42

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission
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10. CONCLUSIONS
Agreed minutes of DCENR and RTÉ management meeting.

Date: 6 March 2008

Time: 11am,

Venue: Secretary Generals Conference Room, Adelaide Road.

Attendance:
RTÉ - Bride Rosney, Noel Curran
DCMNR - Kevin O'Brien, Neasa Lehane, Diarmuid O'Connor (Peter O'Neill joined the meeting at the State Aid item).

Apologies:
Conor Hayes, RTÉ
Stephen O'Connor – DCENR
8. State Aid Update
The context of the State Aid complaint was outlined. The Department led the meeting through the letter of commitments of 30 January 2008. It is intended to reflect these commitments in the upcoming legislation.

Prepared by:

Diarmaid O'Connor,
Broadcasting Division.

12 March 2008.
Ref. No. B BILL 2008

Oifig an Aire Cumarsáide, Fuinnimh agus Acmhainní Nádúrtha

Draft Memorandum for the Government

Broadcasting Bill 2008

1. Decision Sought

Approval to be given to:

- The publication of the Broadcasting Bill as attached to the memorandum, subject to any further technical and drafting changes advised by parliamentary counsel and possible revision of broadcasting penalties.

- The provision of additional staffing resources to the proposed Broadcasting Authority of Ireland so that it may adequately carry out its functions; the level of such additional resources to be negotiated between the Minister for Communications, Energy and Natural Resources and the Minister for Finance.

2. Background-Reason for Memorandum

The rationale for the proposed Broadcasting Bill derives from-


- The Radio Licensing Review, carried out and completed by the Department of Communications, Marine and Natural Resources in 2004;

- Government Decision No. S180/20/10/0912 of 12 July 2006 which approved the drafting of the Bill along the lines of the general scheme of the Bill submitted under the eConsultation process to the Joint Oireachtas Committee on Communications, Marine and Natural Resources.

- The public discourse and the Tenth Report of the Joint Oireachtas Committee on Communications, Marine and Natural Resources of 18 April 2007, entitled “Considerations, recommendations and conclusions on the Joint Committee’s consultation on the draft General Scheme of the Broadcasting Bill”, arising from the eConsultation process.
• The objectives of the new Programme for Government as agreed in June 2007

• The recent agreement with the European Commission in the context of the Commission's closure of its investigation into complaints from commercial broadcasters alleging that public funding granted to RTÉ and Teitifis na Gaeilge infringed articles 92 to 94 of the EC Treaty.


• The need to update Irish broadcasting law generally, reflecting the changing environment for broadcasting and changing Government priorities.

• The need to consolidate and revise the significant corpus of broadcasting law put in place since and continuously amended and developed since the Broadcasting Authority Act 1960.

3. Forum on Broadcasting and Government decision of 10 December 2002

In August 2002, following on a public consultation process, the Forum on Broadcasting reported its recommendations to the Minister for Communications, Marine and Natural Resources. These recommendations informed Government decision No. S29312 of 10 December 2002 which-

• Approved the allocation of 5% of net television licence fee revenues for the establishment of a broadcasting fund designed to encourage additional innovative content by free-to-air Irish broadcasters (This measure has been effected with the enactment of the Broadcasting (Funding) Act 2003).

• Agreed, inter alia, the development of legislative proposals to
  
  o Establish a single content regulator (Broadcasting Authority of Ireland) for commercial and public service broadcasting;
  
  o Provide a statutory mechanism for future increases in the television licence fee; and
  
  o Bring forward proposals for the introduction of a commercial TV licence fee for licensed premises.
4. Radio Licensing Review

In late 2003 the Minister for Communications, Marine and Natural Resources initiated a review of the Broadcasting Commission of Ireland’s radio licensing (sound broadcasting contract) processes. This review culminated in the publication of a study by sectoral experts (the Ox Report) and a public seminar in Athlone in September 2004. The Bill as presented incorporates proposals to address some of the matters raised during the course of the review. These include:

- The need to move away from depending solely on ‘expressions of interest’ in radio licensing and thus allowing for more diversity in format setting;

- The use of scoring mechanisms to increase transparency in licensing contract award decisions;

- Improved enforcement procedures;

- ‘Fast-track’ application procedures; and

- The incorporation of an auction element in respect of the award of certain licences where the potential for supernormal profits might arise.

5. eConsultation process at the Joint Oireachtas Committee

The Government Decision of 12 July 2006 approved the drafting of the Broadcasting Bill based on the Heads of Bill submitted to Government in June 2006. The decision also required submission of the draft Heads of Bill to the inaugural eConsultation process undertaken by the Joint Oireachtas Committee on Communications, Marine and Natural Resources (JOC). The JOC held two days of webcast public hearings in January 2007, accepted submissions and reported on the eConsultation process in April 2007. Subsequent to receiving the report of the JOC the Department began finalising the Heads of Bill. A number of recommendations from the JOC Report are now reflected in the Bill.


The Programme for Government was agreed in June 2007. A range of commitments were made in respect of broadcasting. Of the commitments, the following will be delivered upon or facilitated through the draft Bill proposed.

Commitments

- Enact the Broadcasting Bill to ensure a comprehensive, modern framework of law for the sector.
• Establish the Broadcasting Authority of Ireland.

• Ensure a speedy right to reply to those who have been defamed in radio or television programmes.

• Work with the various broadcasting organisations and interested parties to review rules relating to the advertising of ‘junk food’ aimed at young people. This is with a view to phasing out such advertising.

• Place reviews of the licence fee on a statutory basis.

• Ensure RTÉ supports broadcasting to the Irish community abroad.

• Ensure a fair and competitive environment for the independent TV and radio sector.

• Work with the Houses of the Oireachtas and other local authorities to introduce programming carrying live feeds of Oireachtas business and Local Council meetings, where practicable.

7. European Commission investigation

In April 1999 Ireland received notification from the European Commission that it had received a complaint alleging aid granted to RTÉ and TG4 might infringe articles 92 to 94 of the EC Treaty. In March 2005 the Commission forwarded an "Article 17" letter to Ireland outlining the Commission's preliminary views on the funding of RTÉ and TG4 including recommendations which the Commission consider must be implemented before funding for RTÉ and TG4 can be considered as compatible with the relevant provisions of the EC Treaty. The subsequent negotiation between the Commission and the Ireland on this matter resulted in closure of the Commission investigation in February 2008, based on commitments from the Irish Authorities. These commitments, to be implemented by way of the Broadcasting Bill, relate to proposed changes in the supervisory framework for public service broadcasting, in particular:

• The provision of independent advice to the Minister on the funding of public service broadcasting on an annual and 5-year basis by the BAI;

• Sectoral impact and public value tests for certain new public service broadcasting activities;

• Clarity in Irish law around the remit (objects) and entrustment of public service broadcasters; and

• Various other oversight matters to be affected out by the BAI
Ireland also committed to endeavour to enact the Broadcasting Bill 2008 by the end of 2008.

8. European Directives

Two key sets of European Directives have a bearing on the proposed Bill. The first is the Television Without Frontiers Directive (since December 2007 the Audiovisual Media Services Directive). This Directive sets the basic framework for television services in Europe and sets a number of basic rules and standards in relation to television content and advertising. The Directive was amended in December 2007 after negotiations. While Ireland has until December 2009 to transpose the new Directive, some aspects, such as rules in relation to food advertising targeting children, are being transposed through the proposed Bill.

The second set of Directives of relevance are the 2002 Telecommunications Framework Directives. While these Directives are more largely concerned with telecommunications, certain rules and powers, such as ‘must carry’ rules in relation to cable systems, have a bearing for broadcasting policy. Sections of the Broadcasting Act 2001, which dealt with these matters, now need to be updated to reflect the 2002 Directives.

9. Consolidation and Revision

The proposed legislation, while seeking to implement the various policies and decisions outlined above, also presents a consolidation and revision of all broadcasting legislation since 1960. The reason for this is two-fold. Firstly, the range and scale of policy changes being made is to an extent that would entail major amendments to most parts of the key primary Acts. For this reason, the task is better effected through comprehensive revision. Secondly, the ease of use for all stakeholders will be significantly improved by the existence of a consolidated Act, rather than many layers of amendments on various primary acts.

A number of Acts are revised and consolidated here. These include:

- The Broadcasting Authority Act 1960, which established RTE and created the basis for public service broadcasting in Ireland.

- Various Broadcasting Authority Acts, including the Broadcasting Authority (Amendment) Act 1976, which established the Broadcasting Complaints Commission and allowed for the commencement of cable television provision in Ireland.

- The Radio and Television Act 1988, which established the Independent Radio and Television Commission (IRTC), allowed for the licensing of independent commercial and community radio and for independent television (TV3).

• The Broadcasting Act 2001, which allowed for Digital Terrestrial Television (DTT), the creation of the Broadcasting Commission of Ireland (BCI) which replaced the IRTC, the creation of various advertising and broadcasting codes and rules, the placing of Teilifís na Gaeilge (TG4) on an independent statutory basis and for various rules in relation to licensing of satellite, cable and MMD channels.

• The Broadcasting (Funding) Act 2003, which allocated 5% of licence fees to the Broadcasting Fund

• The Broadcasting (Amendment) Act 2007, which amended the DTT framework, allowed for digital radio licensing, and allowed for RTE to broadcast to Irish communities abroad.

The provisions of these various Acts are, in the proposed Bill, consolidated, revised or repealed as is appropriate.

10. Key aspects of the Bill

Apart from consolidating and revising existing legislation, the Bill seeks to-

• Establish a single broadcasting content regulator for commercial, community and public service broadcasters to be known as the Broadcasting Authority of Ireland (BAI) encompassing the existing regulatory and licensing functions of the Broadcasting Commission of Ireland and the Broadcasting Complaints Commission and with a range of new functions with regard to public service broadcasting;

• Provide for the funding of the BAI by a sectoral levy, applicable to public service as well as independent broadcasters;

• Ensure that adequate and proportionate enforcement instruments are available to the BAI, including administrative-type fines;

• Provide for an enhanced right of reply mechanism;

• Amend and strengthen certain aspects of broadcasting codes and rules, including stronger rules in relation to food advertising aimed at children;

• Prohibit the grant of sound broadcasting contracts to persons convicted of sound broadcasting without a licence or contract in the previous five years;
• Allow a 'fast-track' re-application procedure for existing independent radio licence holders;

• Allow for a procedure for existing independent radio licence holders to extend their licences by participating in digital sound broadcasting rollout;

• Provide that the BAI may, where appropriate, consider the amount of any cash bid proposed by a radio licence applicant, as one of the selection criteria for the award of a radio licences (auction type aspect to licensing);

• Provide greater transparency as regards the award of radio licences;

• Ensure that radio programming content produced by the independent sector is, where of value as a record of Irish culture, heritage and experience, preserved;

• Increase the fines on conviction for non-possession of a television licence and to provide for a limited 'on the spot' fines mechanism;

• Define 'television' for the purpose of the licence fee to future-proof its use in light of new technologies (ministerial orders under the Bill will ensure that the licence fee regime is not extended to currently inappropriate platforms such as mobile phones);

• Allow the Minister to continue to appoint An Post as the agent for the collection of the TV licence, but also to allow for the consideration of alternative agents;

• Amend and broaden the existing public service remit of RTÉ and Teilifís na Gaeilge in line with the agreement with the European Commission on state funding, including incorporation of the use of new web-based technologies in delivering on their mandates;

• Continuance of RTE and Teilifís na Gaeilge as statutory corporations, RTE to be no longer described as an Authority;

• Provide a statutory mechanism for the oversight of public funding to RTÉ and Teilifís na Gaeilge, in line with the agreement of the European Commission;

• Provide the regulatory framework to allow for the broadcasting of a Houses of the Oireachtas Television Channel, providing coverage of the Houses of the Oireachtas and other matters, on a free-to-air basis on DTT;

• Provide the regulatory framework to allow for the broadcasting of an Irish Film Channel by the Irish Film Board, showcasing Irish, European and World film, on a free-to-air basis on DTT.
11. Proposals in respect of various telecommunications matters.

As part of the Broadcasting Bill, the Minister proposes to bring forward proposals to place the regulation of premium rate telecommunications services on a stronger statutory footing. The changes necessary to implement this measure will be effected by way of committee stage amendment, and as a consequence the long title of the Bill has been amended.

This measure is as a consequence of advice received from the Office of the Attorney General that the current statutory framework for the oversight of these services needs to be reconsidered.

12. Main Provisions of the Bill

The main provisions of the Bill are set out in the attached Explanatory Memorandum.

13. Impacts

The Forum on Broadcasting, the Radio Licensing Review and the JOC eConsultation process, which informed the legislative proposals were each the subject of considerable public consultation, both written and oral. A Regulatory Impact Assessment was submitted with the Memorandum to Government of June 2006. An updated version of the Regulatory Impact Assessment is attached.

Cost to Exchequer of Proposal

It is expected that the legislative proposals would lead to a net saving to the Exchequer as a result of the sector bearing the cost of its own regulation. It is estimated that this will be a saving to the Exchequer of approximately €8m per annum in 2008 terms. Before this saving accrues, the legislation must be enacted, the BAI established and the appropriate procedures established by the BAI to calculate, apply and collect the levy. It is proposed that the BAI should be fully funded by the levy from one year after its establishment.

It should be noted that the proposals include a provision that, apart from the costs of initial year of operation BAI, and any exceptional costs of (i) the Compliance Committee (in particular exceptional legal costs) and (ii) ensuring the continued operation of a broadcasting service over which the Minister has assumed control in the event of an emergency, may result in additional costs to the Exchequer at some future date.

It should be noted that the BAI will require significant additional staff in respect of the fulfilment of the additional functions envisaged for the BAI under this Bill and that such cost will be met by means of the proposed levy on the sector.
Industry Costs

The introduction of a levy on broadcasters to fund the regulatory activities of the BAI and its statutory committees will increase costs for the sector generally. The manner in which the BAI implements such a levy will determine the specific cost impact on the different categories of broadcaster.

If the assumption is made that the BAI imposes a levy based on sectoral turnover (inclusive of television licence fee income and other forms of Exchequer grant to public service broadcasters) it is estimated that the likely financial impact on broadcasters would be of the order of 1.5% of their broadcasting related revenues, with commercial and community broadcasters contributing approximately a quarter, and public service broadcasters three-quarters of the levy raised. However the actual proportions borne will depend on the manner in which the BAI implements any levy.

Quality Regulation

Account has been taken of the quality regulation checklist in considering the proposed legislation. The provisions in the Bill will enable the regulation of the broadcasting sector to be better focussed on areas where it is justified.

Many of the new regulatory functions proposed in the Bill are functions required to meet the requirements of the European Commission for independent oversight of public service broadcasting.

North-South

The Broadcasting Bill provides that the objects of RTÉ and Teitifís na Gaeilge (TG4) will include a requirement to make a free-to-air service available "in so far as it is reasonably practicable, to the whole community on the island of Ireland." The Bill also provides a mechanism whereby the Minister may direct, if appropriate, that services available in Northern Ireland may be carried on free-to-air networks in Ireland.

East-West

The Bill continues the provisions of the Broadcasting (Amendment) Act 2007 in respect of broadcasting to Irish communities abroad.

There are no impacts for the following: Employment, Gender Balance, Poverty Proofing, Rural Communities
Ref. No.

Oifig an Aire Cumarsáide, Fuinneamh agus Acmhainní Nádúrtha

Draft Memorandum for the Government

Broadcasting Bill

1. Decision Sought

Approval to be given to the publishing of the Broadcasting Bill as attached to the memorandum, subject to any further technical changes or drafting changes that the Parliamentary Counsel may suggest.

2. Background/Reason for Memorandum

The rationale for the proposed Broadcasting Bill derives from-


- The Radio Licensing Review, carried out and completed by the Department in 2004;

- Government Decision No. S180/20/10/0912 of 12 July 2006 which approved the drafting of the Bill along the lines of the general scheme of the Bill as then submitted, and which submitted the general scheme to the eConsultation process at the Joint Oireachtas Committee.

- The public discourse and the Tenth Report of the Joint Oireachtas Committee on Communications, Marine and Natural Resources of 18 April 2007, entitled “Considerations, recommendations and conclusions on the Joint Committee’s consultation on the draft General Scheme of the Broadcasting Bill”, arising from the eConsultation process.

- The objectives of the new Programme for Government agreed in July 2007

- The recent agreement with the European Commission in the context of the Commission’s investigation into complaints alleging public funding granted to RTÉ and Teilifís na Gaeilge might infringe articles 92 to 94 of the EC Treaty.

• The need to update Irish broadcasting law generally, reflecting the changing environment for broadcasting and changing Government priorities.

• The need to consolidate and revise the significant corpus of broadcasting law put in place since and continuously amended and developed since the Broadcasting Authority Act 1960.

3. Forum on Broadcasting and Government decision of 10 December 2002

In August 2002, following on a public consultation process, the Forum reported its recommendations to the then Minister for Communications, Marine and Natural Resources. These recommendations informed the Government decision No. S29312 of 10 December 2002, which

• Approved the allocation of 5% of net television licence fee revenues for the establishment of a broadcasting fund designed to encourage additional innovative content by free-to-air Irish broadcasters (This measure has been effected with the enactment of the Broadcasting (Funding) Act 2003).

• Agreed, inter alia, the development of legislative proposals to

  o Establish a single content regulator (Broadcasting Authority of Ireland) for commercial and public service broadcasting;

  o Provide a mechanism for future increases in the television licence fee.

  o Bring forward proposals for the introduction of a commercial TV licence fee for licensed premises; and

• Agreed that the operation of the Broadcasting Authority of Ireland would be fully funded from the broadcasting sector.

4. Radio Licensing Review

In late 2003 the then Minister for Communications, Marine and Natural Resources initiated a review of the radio licensing process in Ireland. This review culminated in the publication of a study by sectoral experts (the Ox Report) and a public seminar in Athlone in September 2004. The Bill as presented incorporates proposals to address some of the matters raised during the course of the review. There include:

• The need to move away from depending solely on ‘expressions of interest’ in radio licensing
• The use of scoring in licensing decisions
• Greater involvement of executives in decision-making
• Improved enforcement procedures
5. eConsultation process at the Joint Oireachtas Committee

A Government Decision of 12 July 2006 approved the drafting of the Broadcasting Bill based on the Heads of Bill submitted to Government in June 2006. That Decision also submitted the draft Heads of Bill to the eConsultation process at the Joint Oireachtas Committee. The JOC held two days of webcast public hearings in January 2007, accepted submissions and reported on the eConsultation process in April 2007. Subsequent to receiving the report of the JOC the Department began finalising the Heads of Bill. A number of recommendations from the JOC Report are now reflected in draft Bill, compared with the draft Heads of Bill considered by the Committee. These include:

- A reduction in Ministerial appointments overall
- Support for independent radio producers
- A review of the proposed Television Licence section
- Additional support for the promotion of the Irish language
- Review of the Minister's powers in relation to the remit of public service broadcasters.


The Programme for Government was agreed on 12 June 2007. A range of commitments were made in respect of broadcasting. Of the commitments, the following will be delivered upon or facilitated through the draft Bill proposed:

- Enact the Broadcasting Bill to ensure a comprehensive, modern framework of law for the sector.
- Establish the Broadcasting Authority of Ireland.
- Ensure a speedy right to reply to those who have been defamed in radio or television programmes.
- Work with the various broadcasting organisations and interested parties to review rules relating to the advertising of 'junk food' aimed at young people. This is with a view to phasing out such advertising.
- Place reviews of the licence fee on a statutory basis.
- Ensure RTÉ supports broadcasting to the Irish community abroad.
- Ensure a fair and competitive environment for the independent TV and radio sector.
- Work with the Houses of the Oireachtas and other local authorities to introduce programming carrying live feeds of Oireachtas business and Local Council meetings, where possible.
7. European Commission investigation

In April 1999 Ireland received notification from the European Commission that it had received a complaint alleging aid granted to RTÉ and TG4 might infringe articles 92 to 94 of the EC Treaty. In March 2005 the Commission forwarded an "Article 17" letter to Ireland outlining the Commission's preliminary views on the funding of RTÉ and TG4 including recommendations which the Commission consider must be implemented before funding for RTÉ and TG4 can be considered as compatible with the relevant provisions of the EC Treaty. The subsequent negotiation between the Commission and the Ireland on this matter resulted in closure of the Commission investigation in February 2008, based on commitments from the Irish Authorities. Those commitments related to proposed changes in the Irish legislative framework for public service broadcasting, to be put in place through the Broadcasting Bill, and which focussed primarily new duties to be assigned to the proposed Broadcasting Authority of Ireland. Key among these commitments and provided for in the proposed legislation are:

- Independent advice to the Minister on the funding of public service broadcasting on an annual and 5-year basis by the BAI
- Sectoral impact and public value tests of certain new public service broadcasting activities
- Clarity in Irish law around remit and entrustment of public service broadcasters
- Various other oversight matters to be carried out by the BAI

Ireland also committed to endeavour to bring the new legislation into law by the end of 2008.

8. European Directives

Two key sets of Directives have a bearing on the proposed Bill. The first is the Television Without Frontiers Directive (since December 2007 the Audiovisual Media Services Directive). This Directive sets the basic framework for television services in Europe and sets a number of basic rules and standards in relation to television content and advertising. The Directive was amended in December 2007 after negotiations. While Ireland has until December 2009 to transpose the new Directive, some aspects, such as rules in relation to food advertising targeting children, are being transposed through the proposed Bill.

The second set of Directives of relevance are the 2002 Telecommunications Framework Directives. While these Directives are more largely concerned with telecommunications, certain rules and powers, such as 'must carry' rules in relation to cable systems, have a bearing for broadcasting policy. Sections of the Broadcasting Act 2001, which dealt with these matters, now need to be updated to take care of the 2002 Directives.
9. Consolidation and Revision

The proposed legislation, while seeking to implement the various policies and decisions outlined above, also presents a consolidation and revision of all broadcasting legislation since 1960. The reason for this is two-fold. Firstly, the range and scale of policy changes being made is to an extent that would entail major amendments to most parts of the key primary Acts. For this reason, the task is better done through comprehensive revision. Secondly, the ease of use for all stakeholders will be significantly improved by the existence of a consolidated Act, rather than many layers of amendments on various primary acts.

A number of Acts are revised and consolidated here. These include:

- The Broadcasting Authority Act 1960, which set up RTE and created the basis for public service broadcasting in Ireland.
- Various Broadcasting Authority Acts, including the Broadcasting Authority (Amendment) Act 1976, which set up the Broadcasting Complaints Commission and allowed for the commencement of cable TV.
- The Radio and Television Act 1988, which set up the IRTC, allowed for the licensing of independent commercial and community radio and for independent television (TV3).
- The Broadcasting Act 2001, which allowed for Digital Terrestrial Television (DTT), the creation of the Broadcasting Commission of Ireland (BCI) in place of the IRTC, the creation of various advertising and broadcasting codes and rules, the creation of the Broadcasting Complaints Commission, the placing of Teilifís na Gaeilge (TG4) on an independent statutory basis and for various rules in relation to licensing of satellite, cable and MMD channels.
- The Broadcasting (Funding) Act 2003, which allocated 5% of licence fees to the Broadcasting Fund.
- The Broadcasting (Amendment) Act 2007, which amended the DTT framework, allowed for digital radio licensing, and allowed for RTE broadcasting to the Irish abroad.

The provisions of these various Acts are, in the proposed Bill, consolidated, revised or repealed as is appropriate.

10. Key aspects of the Bill

Apart from consolidating and revising existing legislation, the Bill seeks to:

- Establish a single broadcasting content regulator for commercial, community and public service broadcasters to be known as the Broadcasting Authority of Ireland (BAI) and encompassing the existing regulatory and licensing functions of the Broadcasting Commission of
Ireland and the Broadcasting Complaints Commission and with a range of new functions with regard to public service broadcasting

• Provide for the funding of the BAI by a sectoral levy, applicable to public service as well as independent broadcasters.

• Ensure that adequate and proportionate enforcement instruments are available to the single content regulator, including administrative-type fines;

• Provide an enhanced right of reply mechanism;

• Amend and strengthen certain aspects of broadcasting codes and rules, including stronger rules in relation to food advertising aimed at children

• Prohibit the grant of broadcasting contracts to persons convicted of illegal broadcasting in the previous five years;

• Allow a ‘fast-track’ re-application procedure for existing independent radio licence holders

• Allow a procedure for existing independent radio licence holders to extend their licences by participating in digital radio rollout

• Provide that the BAI may, where appropriate, consider the amount of any cash bid proposed by a radio licence applicant, as one of the selection criteria for the award of a radio licences (auction type aspect to licensing);

• Provide greater transparency as regards the award of radio licences

• Increase the fines on conviction for non-possession of a television licence;

• Define ‘television’ for the purpose of the licence fee to future-proof its use in light of new technologies

• Allow the Minister to continue to appoint An Post as the agent for the collection of the TV licence, but also to allow for the consideration of alternative agents.

• Amend and broaden the existing public service remit of RTÉ and Teilifis na Gaeilge in line with the European Commission decision including to incorporate the use of new web-based technologies in delivering on their mandates;

• Provide a statutory mechanism for the oversight of public funding to RTÉ and Teilifis na Gaeilge, in line with the European Decision.

• Provide the regulatory framework to allow for the broadcasting of an Oireachtas Television Channel, providing coverage of the Houses of the Oireachtas and other matters, on a free-to-air basis on DTT.
• Provide the regulatory framework to allow for the broadcasting of an Irish Film Channel by the Irish Film Board, showcasing Irish, European and World film, on a free-to-air basis on DTT.

11. Regulation of Premium Telephone Services

12. Main Provisions of the Bill

PART I - Preliminary and general matters

Heads 1, 3 and 4 are standard provisions.

Head 2 provides definitions for a number of terms used throughout the general scheme, in particular the head provides for the definition of commercial, community and public service broadcasters.

PART II - Broadcasting Authority of Ireland (BAI)

• Heads 5 and 6 provide ....................... 

13. Impacts

The Forum on Broadcasting, the Radio Licensing Review and the JOC eConsultation process, which informed the legislative proposals were the subject of considerable public consultation. A Regulatory Impact Assessment was provided with the Memorandum to Government of June 2006.

Cost to Exchequer of Proposal

It is expected that the legislative proposals would lead to a net saving to the Exchequer as a result of the sector bearing the cost of its own regulation. It is estimated that this will be a saving to the Exchequer of approximately €8m per annum in 2008 terms. Before this saving will commence, the legislation must be enacted, the BAI put in place and the appropriate procedures established by the BAI to calculate, apply and collect the levy. It is proposed that the BAI should be fully funded by the levy from one year after its establishment.

It should be noted that the proposals include a provision that the costs of initial year of operation BAI, and any exceptional costs of (i) the Compliance Committee (in particular exceptional legal costs) and (ii) ensuring the continued operation of a broadcasting service over which the Minister has assumed control in the event of an emergency, may result in additional costs to the Exchequer at some future date.

It should be noted that the BAI will require 25 additional staff to fulfil its functions.
Industry Costs

The introduction of a levy on broadcasters to fund the regulatory activities of the BAI and its statutory committees will increase costs for the sector generally. The manner in which the BAI implements such a levy will determine the specific cost impact on the different categories of broadcaster.

If the assumption is made that the BAI imposes a levy based on sectoral turnover (inclusive of television licence fee income and other forms of Exchequer grant) it is estimated that the likely financial impact on broadcasters would be of the order of 1.5% of their broadcasting related revenues, with commercial and community broadcasters contributing approximately a quarter, and public service broadcasters three-quarters of the levy raised. However the actual proportions borne will depend on manner in which the BAI implements any levy.

Quality Regulation

Account has been taken of the quality regulation checklist in considering the proposed legislation. The provisions in the Bill will enable the regulation of the broadcasting sector to be better focussed on areas where it is justified.

North-South

The Broadcasting Bill provides that the objects of the new RTÉ and Teilifís na Gaeilge (TG4) companies will include a requirement to make a free-to-air service available "in so far as it is reasonably practicable, to the whole community on the island of Ireland." The Bill also provides a mechanism whereby the Minister may direct, if appropriate, that Northern Ireland services are carried on free-to-air networks in Ireland.

East-West

The Bill continues with the Broadcasting (Amendment) Act 2007 powers which give RTE the duty of broadcasting to the Irish abroad.

There are no impacts for the following: Employment, Gender Balance, Poverty Proofing, Rural Communities

14. Views of other Ministers..........

15. Response of the Minister for Communications, Marine and Natural Resources to the views of other Ministers...........
Broadcasting Bill 2008

Screening Regulatory Impact Analysis

April 2008

Department of Communications, Energy and Natural Resources
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PART A – Broadcasting Authority of Ireland

Policy Context
At present regulation of the broadcasting sector is primarily undertaken by the Broadcasting Commission of Ireland (BCI), the Broadcasting Complaints Commission (BCC), the RTÉ Authority, the board of TG4, the Commission for Communications Regulation and the Minister for Communications, Energy and Natural Resources.

In summary:-

➤ The BCI (i) awards and enforces broadcasting contracts with commercial and community broadcasters; (ii) develops statutorily specified broadcasting codes and rules applicable to commercial, community and public service broadcasters; and (iii) administers and conducts reviews of the Broadcasting Fund.

➤ The RTÉ Authority functions as a board of directors as regards the operation of RTÉ. It also self-regulates as regards content rules not addressed by an existing BCI broadcasting code or rule. The board of TG4 carries out the same functions in relation to TG4.

➤ The BCC investigates and decides upon complaints made against commercial, community and public service broadcasters.

➤ The Commission for Communications Regulation in summary (i) licenses frequency usage by RTÉ and TG4; (ii) licenses the BCI to allocate frequencies to commercial and community broadcasters and multiplex operators (the BCI assigns such frequencies by way of contracts); and (iii) prosecutes unlicensed broadcasters.

➤ The Minister exercises a general supervisory role as regards public service broadcasters including the level and use of public funding, maximum limits on broadcast advertising, the level of borrowings and the fulfillment of reporting obligations by public service broadcasters.

The Forum on Broadcasting was established in March 2002 by the Minister for Arts, Heritage, Gaeltacht and the Islands with a remit to consider the future of public service broadcasting in Ireland. In August 2002, following a public consultation process, the Forum reported its recommendations to the Minister for Communications, Marine and Natural Resources.

The Forum recommended that “The Minister … should establish…a new single regulator for broadcasting in Ireland to be called the Broadcasting Authority of Ireland (BAI). It would be established, under legislation, to assume the existing functions of the BCI (Broadcasting Commission of Ireland) and the regulatory functions of the RTÉ Authority. The Office of the Director of Telecommunications Regulation (ODTR) [now the Commission for Communications Regulation] should continue to regulate distribution platforms. There should, however, be formal liaison between the ODTR and the BAI.”
These recommendations informed Government decision No. S29312 of 10 December 2002, which -

- Agreed to establish a single content regulator (BAI) for commercial and public service broadcasting.
- Agreed that the operation of the BAI would be fully funded from the broadcasting sector.

Objectives
In the light of the Government decision the objective is to establish a single content regulator, to be known as the Broadcasting Authority of Ireland (BAI), incorporating the regulatory functions of the Broadcasting Commission Ireland (BCI), the Broadcasting Complaints Commission (BCC) and the RTÉ Authority.

The organisational structure proposed for the BAI is for an Authority with two quasi-independent statutory committees, the Contract Awards Committee and the Compliance Committee. The membership of the BAI and its statutory committees is to be appointed by Government (on the nomination of either the Minister or the Joint Oireachtas Committee, as set out).

The BAI would assume the following functions:

- Liaison with the Commission for Communications Regulation in the preparation of the allocation plan for the frequency range dedicated to radio and television broadcasting;
- Development of a general contract award strategy;
- Directing the Contract Awards Committee to hold a competition for the award of broadcasting contracts and multiplexing contracts;
- Preparing and making broadcasting codes and rules;
- Preparing and implementing schemes in relation to the disbursement of funds under the Broadcasting Funding Scheme;
- Preparing a scheme for the exercise of the right of reply;
- Advising the Minister as to the sectoral impact of proposals made by public service broadcasters which require Ministerial approval;
- Providing guidance to public service broadcasters as to the preparation of financial statements (e.g. separation of commercial, non-commercial activities), and the code of fair trading practice
- Reviewing (a) the extent to which a public service broadcaster has fulfilled commitments made under a proposed annual statement of commitments, and (b) the adequacy or otherwise of public funding to support the public service activities required of public service broadcasters;
- Recommending to the Minister for Communications, Energy and Natural Resources modifications to the level of public funding of public service broadcasters;
- Promotion of media literacy;
- Identification of skill shortages that impede the development of the broadcasting sector;

1 The BCI and BCC would be dissolved.
➢ Collation and dissemination of information on the sector and co-operation with other regulatory bodies.

The Contract Awards Committee would assume the role of the BCI as regards the award of broadcasting contracts to commercial and community broadcasters.

The Compliance Committee would assume the following functions:

➢ Investigation and deciding upon complaints made against broadcasters (currently functions of the BCC);
➢ Monitoring and enforcing the term and conditions of broadcasting and other contracts;
➢ Monitoring and enforcing compliance by broadcasters with broadcasting duties, codes and rules;
➢ Deciding on requests for the right of reply, and
➢ Reporting to the Minister on compliance by public service broadcasters with (a) the requirement that transactions between the public service and commercial activities of the public service broadcasters should be undertaken at arm’s length and (b) the proposed code of fair trading practice.

In summary the BAI would address strategic issues, whilst the statutory committees would focus on operational issues.

The legislative proposals provide that the powers of BAI and its statutory committees would mirror the existing powers of the BCI, with the addition of a power to undertake, sponsor or commission research into matters affecting the sector.

It is also proposed that the Minister for Communications, Energy and Natural Resources would have the power to issue policy communications to the BAI and that the BAI in performing its functions would take cognisance of such directives. However, the functions of the two statutory committees would be excluded from the ambit of ministerial policy communications.

Policy options

Within the context of the Government Decision of 10 December 2002 the policy options considered include-

1. Establish the BAI as a single body encompassing the regulatory functions of the RTÉ Authority, the BCI and the BCC:

2. Establish the BAI as a single body encompassing the regulatory functions of the RTÉ Authority, the BCI, the BCC and the Commission for Communications Regulation i.e. a single regulator covering the telecommunications and broadcasting sectors:

3. Establish the BAI as a single body encompassing the regulatory functions of the RTÉ Authority and the BCI, with the BCC remaining as a stand alone body: and
4. Establish the BAI as a single body encompassing the regulatory functions of the RTÉ Authority, the BCI and the BCC but with organisational separation in the execution of its functions as between public service and commercial and community broadcasters.

Costs and benefits

Option 1: Establish the BAI as a single body encompassing the regulatory functions of the RTÉ Authority, the BCI and the BCC [Option proposed]

Benefits-arguments for
➢ It would permit the development of a holistic approach to the enforcement of content standards e.g. unification of monitoring, contract enforcement etc.
➢ It would enable administrative efficiency, i.e. a reduction in the number of content regulatory bodies
➢ A precedent can be found in Ofcom’s statutory committees, e.g. the Contents Board, Contents Sanction Committee and Fairness Committee.

Costs-arguments against
➢ The lack of a stand-alone complaints body may be seen as a reduction of commitment to addressing viewer and listener complaints.
➢ In addition, if the contract award and complaint functions rest in the same unitary organisation, this may give rise to concerns that the organisation will seek to justify past contract award decisions rather then uphold justifiable complaints.

Option 2: Establish a single body regulating the telecommunications and broadcasting sector

Benefits-arguments for
➢ Regulatory structure would reflect converging telecommunications, broadcasting and computer technologies environment
➢ Potential administrative efficiencies
Costs-arguments against

- The regulation of the broadcasting and telecommunications sectors requires separate knowledge sets - in essence the Commission for Communications Regulation is a network regulator whilst the RTÉ Authority, BCI and BCC are content regulators.
- Separate legal systems - telecommunications regulation derives from EU law, broadcasting regulation derives primarily from national legislation.
- In a single organisation there is a danger that the natural focus would be telecommunications rather than broadcasting given the sheer size of telecommunications sector e.g. the turnover of telecommunications sector is approximately seven times that of the broadcasting sector.
- Whilst both Ofcom (UK) and the Australian Communications and Media Authority are unitary organisations as regards the regulation of broadcasting and telecommunications, both have distinct internal operational structures which effectively separate the regulation of broadcasting and telecommunications.

Option 3: Establish the BAI as a single body encompassing the regulatory functions of the RTÉ Authority and the BCI, with the BCC remaining as a stand alone body.

Benefits-arguments for

- The lack of a stand-alone complaints body may be seen as a reduction of commitment to addressing viewer and listener complaints.
- Separation as between the complaint function and the contract award function is perceived as heightening the independence of action of the former.

Costs-arguments against

- It would hinder the development of a holistic approach to the enforcement of content standards e.g. unification of monitoring, contract enforcement etc.
- Administrative inefficiencies i.e. the costs associated with maintaining a separate body.

Option 4: Establish the BAI as a single body encompassing the regulatory functions of the RTÉ Authority, the BCI and the BCC but with organisational separation in the execution of its functions as between public service and commercial and community broadcasters.

Benefits-arguments for

- Public service, commercial and community broadcasters have differing objectives, are subject to differing regulatory requirements, and would therefore benefit from being regulated by differing sets of people.
- Would address fears expressed by public service broadcasters that the BAI will have a purely commercial focus.
Costs-arguments against

➢ Additional complexity with the potential for unnecessary additional costs
➢ The proposed objectives for the BAI explicitly recognise three distinct categories of broadcaster - public service, commercial and community i.e. the BAI has a stated objective to ensure diversity in content and format, and high quality and innovation in output, from public service broadcasters (as is applicable to commercial and community broadcasters).
➢ Under the existing regulatory structure BCI codes and rules apply to all broadcasters, and the BCC hears complaints made against all broadcasters.
➢ Similar arguments for internal organisational separation could be made in relation to the differential as between commercial and community broadcasters: as between radio and television broadcasters: and as between incumbents and new entrants to the sector.
➢ Under the regulatory framework envisaged by the legislative proposals, many key decisions in relation to public service broadcasting (e.g. changes to remit, additional channels, advertising minutage, level of funding etc.) will remain with the Minister, with the BAI assuming an expert advisory role.
Part B – Sectoral levy

Policy context
The Government Decision of December 2002 agreed that “the operation of the BAI would be fully funded from the broadcasting sector.”

There are a number of precedents in Irish legislation for a sectoral levy. The Commissions for Aviation Regulation, Energy Regulation and Communications Regulation all impose levies on their respective sectors in order to meet the expenses incurred in the exercise of their functions.

precedents for a levy on the broadcasting sector to fund the sectoral regulator exist in a number of European countries, e.g. Austria, Cyprus, Denmark, Italy, Lithuania, Malta, the Netherlands and the UK. Some of these countries fund the sectoral regulator through a combination of sectoral levy and state grant.

Section 14(4)(b) of the Radio and Television Act 1988 originally empowered the Independent Radio and Television Commission (now the BCI) to impose a 3% levy on the advertising sales of local radio stations in order to fund its regulatory operations. Section 14(4)(b) was subsequently repealed by the Broadcasting Act 2001 which provided that the cost of the BCI would be met directly from the Exchequer.

Objective
To implement the Government Decision of December 2002 requiring that the operation of the BAI be fully funded from the broadcasting sector.

Policy Options
The options available in implementing the Government Decision are-

1. That the operational form of the levy be detailed in the legislative provisions.

2. That the legislative provisions permit the BAI to decide on the final operational form of the levy. [Option proposed]

Costs, benefits

Option 1

Benefits-arguments for
- Certainty as to how a levy is to operate would permit the sector to plan accordingly. and might serve to reduce the likelihood of disputes as to its operation

Costs-arguments against
- Inflexible approach – allows the BAI no discretion as to the operation of the levy
Option 2

**Benefits-arguments for**
- Allows the BAI some flexibility as to the operation of the levy e.g. permits the BAI to adopt an approach that (a) prevents the levy becoming a barrier to new entrants to the sector and (b) takes account of the impact of new technologies on the sector.

**Costs-arguments against**
- Sector less certain as to how levy will be operated by the BAI and therefore reduces the capacity of the sector to plan accordingly.
Part C – Contract Award

Policy context
In late 2003 the Minister for Communications, Marine and Natural Resources initiated a review of the radio licensing process (the award of sound broadcasting contracts). This review culminated in the publication of a study by sectoral experts (the Ox Report) and a in a public seminar (held in Athlone in September 2004). The draft general scheme as developed incorporates proposals to address some of the following issues in relation to the radio licensing process which arose during the course of the review:

1. *Unlicensed broadcasting*
   With the passing of the Radio and Television Act 1988, persons interested in providing a commercial or community broadcasting service were afforded the opportunity to do so without having to resort to unlicensed broadcasting. The issue has subsequently arisen as to whether or not a person with a recent conviction for unlicensed broadcasting should be permitted to apply for a sound broadcasting contract (radio licence).

2. *Demand assessment*
   What demand side analysis, if any, should the BAI be required to undertake prior to directing the Contract Awards Committee to invite expressions of interest for further broadcasting contract applications? At present the BCI is required by statute to invite expressions of interest for the supply of a sound broadcasting service. It is argued that this approach results in a supply-side focus with insufficient account being taken of listener needs and demands.

3. *Role of the BAI executive as regards the sound broadcasting contract award process*
   At present on a non-statutory basis the BCI executive prepares a summary analysis of the information received for each broadcasting contract application. Since February 2004 this summary contains an evaluation of the non-programming elements of applications, but not the programming elements. The BCI Board makes its decision based on its assessment of the applications and having considered the analysis presented to it by the executive. The question has arisen as to whether or not the BAI executive should play a greater role in the context of decisions made by the proposed BAI Contracts Awards Committee.

4. *“Monopoly oligopoly profits”*
   This issue has arisen in the context of what have been perceived as the large capital gains reported as accruing on the sale of a number of companies holding broadcasting contracts in recent years. The radio licensing review raised the issue of whether the BCI or its successor the BAI should have powers where appropriate, to limit the ability of sound broadcasting contractors to extract “monopoly/oligopoly profits” from the sector.
5. **Transparency of the sound broadcasting contract award process**
   The OX Report observed that "the current decision making process is insufficiently transparent" and recommended that the BCI should publish the relevant considerations that shape a decision. It also suggested the introduction of some form of scoring mechanism.

6. **Fast-track process**
   The issue of automatic renewal/roll-over of broadcasting contracts was a matter of considerable debate during the course of the radio licensing review. A number of existing sound broadcasting contract holders argued that the current system of re-advertising sound broadcasting contracts is expensive and wasteful, and that there should be a certain level of automatic roll-over of sound broadcasting contracts where the existing contract holder has met their contractual commitments. The BCI has commented that re-advertisement of licences allows the BCI to re-evaluate and build on existing commitments in the public interest.

**Objectives**

1. **Unlicensed broadcasting**
   To dissuade persons from engaging in unlicensed sound broadcasting and to support the position of law abiding persons wishing to offer a sound broadcasting service.

2. **Demand assessment**
   To ensure that the interests and needs of the listening public receive active consideration in the early stages of the sound broadcasting award process.

3. **Role of the BAI executive as regards the sound broadcasting contract award process**
   To ensure that the expertise and experience of the BAI executive is fully utilized in the sound broadcasting contract award process.

4. **"Monopoly-oligopoly profits"**
   To provide the BAI and the Contract Awards Committee with the necessary instruments to ensure that where appropriate they can address the issue of the possible earning of "monopoly/oligopoly" profits by sound broadcasting contract holders.

5. **Transparency of the sound broadcasting contract award process**
   To provide a level of transparency in the sound broadcasting award process that will ensure public confidence in the award process.

6. **Fast-track process**
   To provide a mechanism that allows for the rollover of a sound broadcasting contract in instances where the incumbent is the only substantive interested party in the award of the contract and has met its contractual commitments to date.
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Costs and benefits

1. **Unlicensed broadcasting**

Option 1: *No policy change*

**Benefits-arguments for:**
- There is no evidence to suggest that the current regime fails to deter unlicensed broadcasting activities or permits individuals engaged in such activity to benefit from such activity in the context of the award of a sound broadcasting contract.

**Costs-arguments against**
- No clear legislative position as to whether persons convicted of unlicensed sound broadcasting are fit to hold sound broadcasting contracts.

Option 2: *Disqualification from applying for a sound broadcasting contract*
[Option proposed]

**Benefits-arguments for:**
- Gives a clear legislative position on the fitness or otherwise of persons convicted of unlicensed sound broadcasting to hold sound broadcasting contracts.
- Strengthens the position of law-abiding applicants.

**Costs-arguments against:**
- May act to close off the possibilities for the transition of unlicensed broadcasters from unlicensed activity to licensed activity.

Option 3: *Increased penalties for unlicensed broadcasting*

**Benefits-arguments for:**
- Would deter individuals from engaging in unlicensed sound broadcasting

**Costs-arguments against:**
- Disproportionate

2. **Demand assessment**

*Risks*

The current supply-led approach may lead to inadequate consideration of listeners needs.
Option 1: No policy change

Benefits-arguments for:
➤ The current legislative position does not explicitly preclude “assessment of listener demand” studies by BCI.

Costs-arguments against:
➤ Public consultation occurs at a late stage in the contract award process (oral hearings of applications made) – limiting the opportunities for change.

Option 2: Listener demand survey [Option proposed]

Benefits-arguments for:
➤ Provides for the collection of data needed to inform the development of the BAI’s general contract award strategy.
➤ Data collected will reflect interests and concerns of the general listening public.
➤ The publication of the results of such a study will enhance the overall transparency of the contract awards process i.e. why a particular approach was adopted by the BAI in relation to the direction it gives to the Contract Awards Committee, and why a particular approach was adopted by the Contracts Awards Committee in relation to the expression of interest, applications and contract award phases of the process.
➤ Public consultation would occur at an earlier stage in the contract awards process and hence, increase opportunities to affect change.

Costs-arguments against:
➤ Additional cost incurred in carrying out “assessment of listener demand” studies.

3. Role of BAI executive in contract award process

Option 1: BAI executive evaluates applications and makes recommendations to the Contract Awards Committee

Benefits-arguments for:
➤ The BAI executive’s expertise and operational experience would add considerable value to the Contract Awards Committee’s decision-making process

Costs-arguments against:
➤ May not fully utilise executive’s experience but also permits advice to be given but without ownership of decision by the executive.
Option 2: Two members of BAI executive appointed on an ex officio basis to the Contract Awards Committee [Option proposed]

Benefits-arguments for:
➢ Fully utilizes the expertise of the BAI executive (in the case of the two members appointed) but membership of Contract Awards Committee remains predominantly independent of executive.

Costs-arguments against:
➢ Risk of dominance of decision making by BAI executives.

4. “Monopoly/oligopoly profits”

Option 1: No policy change

Benefits-arguments for:
➢ Decision making focus in the contract awards process remains on the capacity and programme offerings of applicants.
➢ An auction process may result in a successful bidder being less willing to assume the financial risks associated with programming innovation.

Costs-arguments against:
➢ Does not address public concerns regarding the perceived supernormal profits accruing on the change of ownership of sound broadcasting contractors.

Option 2: Auction, share of profits or royalties [Option proposed]

Benefits-arguments for:
➢ Provides a relatively non-subjective contract award selection mechanism.
➢ Provides the BAI with an instrument to address at an early stage the possibility of unwarranted supernormal profits accruing on the change of ownership of a sound broadcasting contractor.
➢ Option to be utilised only at the BAI’s discretion.

Costs-arguments against:
➢ An auction process may result in a successful bidder have less resources to devote to programming.
➢ May militate against applicants who have the potential to produce high quality engaging programming but who lack financial resources.
5. Transparency – award and publication of scores

Assumptions/Risks:
➢ The subjectivity of contract award criteria may render it difficult to award scores.
➢ The publication of a high level summation of the scoring scheme may add to the level of transparency.

Option 1: No policy change

Benefits-arguments for:
➢ A scoring mechanism may operate to fetter the discretion of the Contract Awards Committee

Costs-arguments against
➢ Lack of transparency may reduce public confidence in the contract award process.

Option 2: The Contract Award evaluation process incorporates a scoring mechanism [Option proposed]

Benefits-arguments for:
➢ Potentially greater transparency as regards the award of broadcasting contracts.
➢ Requires the members of the Contract Awards Committee to structure their decision making process.
➢ Provides greater feedback to unsuccessful applicants.

Costs-arguments against:
➢ A scoring mechanism might add an additional level of complexity to the decision making process – the Contract Awards Committee would be required to reach agreement as to the exact scores as well as to which applicant should gain the contract i.e. the Committee may agree as to which applicant has been successful but disagree as to the margin of that success.
➢ May fetter the discretion of the Contract Awards Committee.

6. Fast-tracking process

Option 1: No policy change

Benefits-arguments for:
➢ The element of competition introduced by the automatic re-advertising of contracts ensures that the best possible offerings are proposed and ultimately made available to the listener.
➢ The automatic re-advertising of contracts affords the BCI the opportunity to review the current service offerings and spectrum usage.
➢ In a number of instances, parties who did not respond to the BCI’s expression of interest were subsequently successful at application stage.
Cost-arguments against:

➤ In the instances where the incumbent is the likely to be the only substantive applicant, the requirement to prepare a new contract application may lead to unnecessary expense for both the incumbent and the BAI Contract Awards Committee.

Option 2: Fast-tracking [Option proposed]

Benefits-arguments for:

➤ In instances where the incumbent is the likely to be the only substantive applicant, the fast-tracking process may serve to eliminate unnecessary expense for both the incumbent and the BAI Contract Awards Committee.

Costs-arguments against:

➤ The process would provide little incentive for an incumbent to improve service offered.

Option 3: Automatic renewal of sound broadcasting contracts

Benefits-arguments for:

➤ Rewards broadcasting contractors who comply with the terms of their contracts and broadcasting standards generally.
➤ Continuity of service for listeners.
➤ Level of additional certainty may result in additional sectoral investment.

Costs-arguments against:

➤ Would act as a barrier to entry to the sector
➤ Would discourage innovation in the sector.
➤ The presumption of automatic roll-over may create a property right
Part D – Public service broadcasting

General policy context

The Forum on Broadcasting was established in March 2002 by the Minister for Arts, Heritage, Gaeltacht and the Islands with a remit to consider the future of public service broadcasting in Ireland. In August 2002, following on a public consultation process, the Forum reported its recommendations to the Minister for Communications, Marine and Natural Resources.

These recommendations informed the Government decision to -

- Remove remaining regulatory functions from the RTÉ Authority.
- Provide that the television licence fee and funding of RTÉ be fully reviewed every five years by the BAI.
- Provide a statutory mechanism for future increases in the television licence fee. Any increase in the licence fee to be conditional on delivery on broadcast commitments by RTÉ, specified on an annual basis. Licence fee adjustments, after review by the single content regulator (Broadcasting Authority of Ireland), to be submitted with a recommendation to the Minister for the approval with or without amendment by the Minister.

European Commission investigation

In April 1999 Ireland received notification from the European Commission that it had received a complaint alleging aid granted to RTÉ and Te lé lís na Gaeilge (TG4) might infringe articles 92 to 94 of the EC Treaty. In March 2005 the Commission forwarded an "Article 17" letter to Ireland outlining the Commission's preliminary views on the funding of RTÉ and TG4. The subsequent dialogue between the Commission and the Ireland on this matter led to agreement in early 2008 and this agreement has informed the development of the proposals contained within the Broadcasting Bill.

Objectives

Objective 1 Alteration of the objects (remit) of RTÉ and Te lé lís na Gaeilge to reflect the evolving role of public service broadcasting

Objective 2 Supervision of the use of public funding by RTÉ and Te lé lís na Gaeilge

Policy context - objective 1

The draft general scheme proposes a number of additions to the remits of RTÉ and TG4 as currently specified in legislation. The proposed additions derive from the general debate as to the focus and purpose of Irish public service broadcasting and the evolving impact of information and communications technologies on public service broadcasting generally.
The proposed additions have been grouped into two main categories.

The first category includes (a) the maintenance of websites by RTÉ and Teitifís na Gaeilge and (b) the provision of assistance by RTÉ and Teitifís na Gaeilge to relevant public bodies with regard to disseminating information in the event of an emergency.

The second category includes objects that may not be pursued by RTÉ and Teitifís na Gaeilge without ministerial consent, the Minister having first consulted with the BAI on and sectoral impact of such a proposal and the Minister having considered the public value. This category includes (a) involvement in local, regional and community broadcasting, and (b) the making of non-broadcast content available on the Internet.

The principal issue in relation to such additions is the extent to which RTÉ and Teitifís na Gaeilge may utilise public funding in the pursuance of such objects.

Maintenance of websites by RTÉ and Teitifís na Gaeilge

Section 28(8)(c) of the Broadcasting Act 2001 prohibits the use of licence fee revenues for the purpose of the maintenance of a website by RTÉ. Since 2001, many European public service broadcasters have increasingly integrated websites into the fulfilment of their public service remit, e.g. www.bbc.co.uk.

Benefits-arguments for
- Would assist RTÉ and TG4 in providing audiences with an increased array of content formats and choices around accessing public service broadcasting related content.
- Would allow RTÉ and TG4 to support and develop their existing websites with a view to affording Irish communities abroad and foreign audiences an increased opportunity to access and interact with RTÉ’s and Teitifís na Gaeilge’s public service broadcasting related content.

Costs-arguments against
- Diversion of public funding and management time from other public service activities.
- Displacement of private sector investment in media related websites.

Assisting in the dissemination of emergency information

Benefits-arguments for
- Public service broadcasters have a key role to play in the preparation for the dissemination of public information in the event of an emergency.

Costs-arguments against
- Diversion of public funding and management time from other public service activities
- May be perceived as impacting negatively on the independence of the broadcaster.
Involvement in local, regional and community broadcasting

Section 16(1) of the Broadcasting Act 1960 (as amended by Section 3 of the Broadcasting Authority (Amendment) Act 1979 and Section 29 of the Broadcasting Act 2001) provides that the RTÉ Authority may establish and maintain broadcasting services of a local, community or regional character. The legislative proposals restate this provision but subject its exercise to the consent of the Minister, the Minister having consulted with the BAI.

Benefits-arguments for
Oversight of RTÉ and TG4 participation in the provision of broadcasting services of a local, community or regional character would serve to address possible concerns regarding:

- Displacement of private investment in local, community or regional independent broadcasting services.
- Diversion of public funding and management time from other public service activities

Costs-arguments against
- May be perceived as reducing the independence of the public service broadcaster.

Delivery of non-broadcast content via the Internet

Benefits-arguments for
- Consumers would benefit from an increased array of content formats and choices around accessing content from the national broadcasting service.
- Since 2001, many European public service broadcasters have increasingly integrated websites and broadband Internet services into the fulfilment of their public service remit, e.g. BBC and Channel 4 websites.
- Would allow RTÉ and TG4 to keep up with the changing role of a public service broadcaster from a provider of content over an exclusive broadcast channel to the broadcast of content over several channels and distribution paths.

Costs-arguments against
- Displacement of private investment in online media.
- Diversion of management time from other public service activities.

Policy context - objective 2

The Government Decision of December 2002 sought a mechanism for (i) annual increases in the television licence fee and (ii) for a full review of the adequacy or otherwise of the television licence fee every 5 years by the BAI.
At present the Minister for Communications, Energy and Natural Resources under Section 6 of the Wireless Telegraphy Act 1926 as amended, makes regulations setting the amount of the fees to be paid on grant of renewal of a television licence and thus the level of public funding available to RTÉ. In addition section 51 of the Broadcasting Act 2001 provides that the Minister with the consent of the Minister for Finance decides the level of funding to be made available to TG4.

In December 2002 a non-statutory Public Service Broadcasting Charter was agreed between the Minister for Communications, Marine and Natural Resources and RTÉ. The purpose of the Charter is to explain the obligations placed on RTÉ by national and EU legislation and to set out what RTÉ commits to, in terms of provision of services and accountability.

Arising from the Public Service Broadcasting Charter RTÉ also produces a non-statutory Annual Statement of Commitments, which specifies the actions that RTÉ intends to take in order to fulfill its obligations under the Public Service Broadcasting Charter. These actions are required to be capable of measurement and independent verification.

EU concerns
In April 1999 Ireland received notification from the European Commission that it had received a complaint alleging aid granted to RTÉ and TG4 might infringe articles 92 to 94 of the EC Treaty. Agreement between the Commission and Ireland results in the following inclusions in the Bill:

Public Service Broadcasting Charter

The legislative proposals contain a provision placing the Public Service Broadcasting Charter on a statutory footing, along the following lines:

(i) Following consultation, RTÉ and TG4 draft their charters, addressing their understanding of their respective public service remits.
(ii) RTÉ and TG4 submits their draft charters to the Minister.
(iii) The Minister, following consultation with the BAI, approves the charters, which are then laid before the Houses of the Oireachtas:
(iv) The charters are renewed and reviewed every five years:
(v) The five yearly review of public funding undertaken by the BAI shall, amongst other matters, take into account RTÉ and TG4’s performance to date against their charter commitments.

Annual Statement of Commitments

The legislative proposals contain a provision placing the Annual Statement of Commitments on a statutory footing along the following lines:
(i) On an annual basis, RTÉ and TG4 prepare their respective statement of commitments which specify the output that they intend to deliver during the year under their respective public service broadcasting charters:

(ii) RTÉ and TG4 are required to consult the BAI and the Minister prior to the publication of each statement of commitments:

(iii) In their annual reports RTÉ and TG4 are required to report on the fulfillment of their commitments as outlined under their statement of commitments.

Setting the level of public funding

The legislative proposals provide that the BAI would review annually the extent to which RTÉ and TG4 have met their commitments under their respective annual statement of commitments. On foot of this review the BAI would make a recommendation to the Minister as to how much the licence fee or public funding to TG4 should increase or decrease, the maximum increase being CPI +1%, Consumer Price Index +1%, the 1% being intended to accommodate differences as between goods and services level inflation. The Minister would consider such recommendation and make a final decision. The legislative proposals also provide that every five years (or at the request of the Minister) the BAI will review the fundamental basis of the television licence fee with regard to its adequacy to sustain and strengthen high quality public service broadcasting in Ireland against a number of set criteria. The BAI will make a recommendation to the Minister as to alterations in the licence fee or as to the level of public funding to TG4, and the Minister would take this to Government for decision.

Variation in the number of channels

The legislative proposals contain a provision permitting RTÉ and TG4 to increase or decrease the number of channels required to deliver on their public service broadcasting remits. It is also proposed that this power would be subject to Ministerial approval following consultation with the BAI.

Supplementary public services

The legislative proposals provide that development of new public services by RTÉ or TG4 ancillary to their public service objectives with a cost in excess of €5 million per annum would require the approval of the Minister. The Minister having consulted with the BAI.

Establishment of subsidiaries, joint ventures or partnerships

The legislative proposals provide that RTÉ and TG4 may establish subsidiaries, joint ventures or partnerships and make investments, but that this power would be subject to the consent of the Minister and the Minister for Finance, the former having consulted with the BAI.
Advertising

The legislative proposals provide that the total daily and hourly limits for broadcasting advertisements and teleshopping by RTÉ and TG4 be subject to the approval of the Minister following consultation with the BAI.

Borrowings

The legislative proposals provide that RTÉ and TG4 may borrow above a specified limit with the consent of the Minister and the Minister for Finance, the Minister having consulted with the BAI.

Transparency

The legislative proposals provide:

(i) That RTÉ and TG4 prepare annual statements outlining the revenues and costs associated with their (a) public service activities and (b) non-public service activities.
(ii) Require that RTÉ and TG4 include as part of a statement under (i) a statement of the cost accounting principles and methods by which costs and revenues have been assigned to such activities.
(iii) Empowers the Minister to require RTÉ and TG4 to prepare a statement under (i) in a particular format.

The legislative proposals also provide that all transactions as between the public service and non-public service activities of RTÉ and TG4 be carried out on market and arms-length terms.

It should be noted that the proposed provisions are additional to the requirements of Commission Directive 80/723/EEC, as amended, on the transparency of financial relations between public undertakings and other undertakings, which places an obligation on RTÉ and TG4 to prepare accounts, which distinguish between its public service and non-public service activities - this Directive was transposed into Irish law as S.I. 693 of 2004.

Policy options - objective 2

The policy options associated with objective 2 principally relate to the balance of responsibilities as between the BAI and the Minister for Communications, Energy and Natural Resources in relation to public service broadcasters.
The general approach adopted is for the Minister to retain political accountability as regards the level funding (public funding and advertising minutage) to be made available to public service broadcasters (RTE and TG4). However, the legislative proposals envisage a specific role for the BAI in providing expert advice to the Minister in relation to this issue.
Part E - Right of Reply

Policy context

The Government Decision of December 2002 requested that the Minister develop legislative proposals to establish a statutory provision to provide for the Right of Reply.

The Television without Frontiers Directive (Article 89/552/EEC. Section 23. as amended by 97/36/EC. Article 30) requires that member states provide that a right of reply or equivalent remedy be available to persons whose reputation and good name had been damaged by an assertion of incorrect facts in a television or radio programme. This requirement was transposed into Irish law by section 24 of the Broadcasting Act 2001 which provides that persons who believe that their good name has been damaged by an assertion of incorrect facts in a television or radio programme may make a complaint to the BCC who may investigate and make a finding on the matter including requiring a broadcaster to broadcast such a finding.

Objective

The objective of the legislative proposals as drafted is to provide a developed right of reply as mandated by the Government decision.

The legislative proposals provide that the BAI would, after public consultation, and in accordance with the parameters outlined in the draft legislation, develop a right of reply scheme. Requests for a right of reply would be submitted to broadcasters. In the event that a broadcaster refuses to grant a right of reply, the complainant could appeal to the Compliance Committee of the BAI. Where the Compliance Committee were to find in favour of the complainant but the broadcaster continued to refuse to grant a right of reply in accordance with the scheme, the Compliance Committee could apply through the BAI to the High Court for confirmation of its decision.

It is also proposed that where a broadcaster grants the right of reply this fact shall not be taken as an admission of liability but may be given as evidence in mitigation of damage in any defamation proceedings against the broadcaster in respect of the matter complained of.
Costs - arguments against:
➢ The cost of establishing and implementing a right of reply scheme
➢ May impact on the independence of broadcasters and act to discourage robust debate.
Consultation

The Forum on Broadcasting and the Radio Licensing Review, which have informed the legislative proposals, were the subject of considerable public consultation. In July 2006 the Government decided to submit the draft general scheme of the Bill to public consultation under the Houses of the Oireachtas eConsultation initiative. Under this initiative the Joint Oireachtas Committee for Communications, Marine and Natural Resources sought submissions on the proposals in the draft Bill from the public and interested stakeholders and held public sessions over two days in January 2007. The Joint Oireachtas Committee published a report on its considerations under the eConsultation process in April 2007. The eConsultation process has informed the preparation of the final form of the Bill.
Policy Options

Option 1: Self regulatory measures

- Broadcasters develop a self-regulatory measures, e.g. ombudsman mechanism or voluntary right of reply

Option 2: The BAI develops right of reply scheme [Option proposed]

- The BAI develops a scheme for the exercise of the right of reply.
- Broadcasters would be granted the opportunity to use right of reply in mitigation in defamation actions where they facilitated a right of reply without admitting liability.
- Where a broadcaster refuses a right of reply, the BAI may decide to apply to the courts for a court-ordered right of reply.

Costs, Benefits

Risks and Assumptions
One of the main perceived risks from the perspective of broadcasters is that the granting of a right of reply will be regarded as an admission of liability in any action for defamation. Other possible risks include the possibility that a right of reply scheme might impact adversely on the independence of broadcasters and act to discourage robust debate.

Option 1: Self regulatory measures

Benefits- arguments for:
- Low cost for both broadcasters and complainants.
- Would not impact on the independence of broadcasters.

Costs-arguments against:
- Broadcasters are likely to refuse to grant a right of reply for fear of further defamation proceedings.
- A complainant cannot pursue a refusal by a broadcaster to grant a right of reply.

Option 2: The BAI develops a developed right of reply scheme

Benefits- arguments for:
- Low cost remedy for complainant and broadcaster
- Speedy remedy
- A complainant can pursue a refusal by a broadcaster to grant a right of reply.
Enforcement

The following enforcement instruments are currently available to the BCI and the BCC:

1. Financial bonds² (commercial and community broadcasters)
2. Suspension or revocation of contracts for serious or repeated breaches of contract (commercial and community broadcasters)
3. Injunction (all broadcasters)
4. Requiring a broadcaster to broadcast the BCC's decision “including any correction of inaccurate facts” where the latter has found in favour of the complainant (all broadcasters).

However these enforcement instruments suffer from a number of deficiencies:

Financial bonds

1. Only applicable to commercial and community broadcasters.
2. The provision of a cash deposit by a broadcaster reduces the cashflow available for investment in programming
3. The premium paid by a broadcaster to obtain a financial bond from a financial institution can represent a significant expense.

Suspension or revocation of a contract

1. Can only be used in the event of serious or repeated breaches and is an instrument of last resort (interference with the constitutional right to earn a livelihood)
2. Only applicable in practice to commercial and community broadcasters
3. Rarely used both in Ireland and internationally

Injunctions

Can only be used in restricted circumstances – i.e. where other remedies are not available.

The 2004 OX Auction experts review of radio licensing in Ireland concluded that:

1. The BCI lacks proportionate enforcement instruments (i.e. at present there are only two options: (a) to issue warnings, or (b) to suspend or revoke a contract
2. The imposition of fines by the BCI would be ultra vires its statutory powers.

² The BCI has never utilised the power to require a broadcaster to produce a financial bond.
In addition a study commission by the Australian Communications and Media Authority into the enforcement powers of broadcasting regulators, published November 2005, concluded that the most effective broadcasting regulatory enforcement system required enforcement instruments that "escalate in severity in response to more serious contraventions of the law" i.e. a proportionate and graded system of sanctions.

In developing the legislative proposals the objective has been to provide the Compliance Committee of the BAI with a range of appropriate and proportionate enforcement instruments, wider than is currently available to the BCI.

The legislative proposals envisage that the BAI (Compliance Committee) would be empowered to seek court approval for financial sanctions of up to €250,000 for breaches of statutory duties, broadcasting codes and rules.

In developing the legislative proposals in this area the following considerations were to the fore-

- Proportionality
- The relative complexity of broadcasting duties, codes and rules and the need for a flexible approach
- Equivalence of treatment as between commercial, community and public service broadcasters
- Precedent in other jurisdictions

During the course of the review of enforcement mechanisms the following options were considered but discounted:

- Fines on summary conviction for a criminal offence.
- Fines on conviction on indictment for a criminal offence.
- Penalty points leading to revocation or suspension in the term of a contract.
- Imposition of advertising free periods.
- Reports to the Oireachtas.
Review

The draft general scheme of the Broadcasting Bill incorporates the following review mechanisms:

BAI

It is proposed that the annual report of the BAI would encompass separate reports from the BAI, the Compliance Committee and the Contract Awards Committee on the achievement of their functions during the course of the year. In addition the Minister for Communications, Energy and Natural Resources would be empowered to require the BAI and its statutory committees to supply him or her with such information regarding the performance of their functions as he or she may require.

The proposals require that the BAI must, every four years, review and report on the effect of any broadcasting code or rule prepared by it. This report must be furnished to the Minister and laid before the Houses of the Oireachtas.

Right of Reply

The draft legislative proposals provide that BAI must, every five years or as requested by the Minister, review and make a written report on the operation, effectiveness and impact of any ‘right of reply’ scheme prepared by it. This report must be furnished to the Minister and laid before the Houses of the Oireachtas.

Public Service Broadcasters

Public funding of RTÉ and TG4

The legislative proposals provide:

- that RTÉ and TG4 prepare and publish an annual statement of commitments specifying the outputs to which they will commit in the forthcoming year;
- that RTÉ and TG4 make an annual report on the performance of their functions and activities during the previous year. This report is to be furnished to the Minister for Communications, Energy and Natural Resources and laid before the Houses of the Oireachtas;
- that BAI must review and report on the extent to which RTÉ and TG4 have fulfilled the undertakings given by them in their annual statement of commitments. The review feeds into the BAI’s recommendation to the Minister as to annual modifications to the licence fee and public funding to RTÉ and TG4.
- the BAI, every 5 years, review and report on the adequacy of public funding to enable RTÉ and TG4 to meet their objectives. The report must be furnished to the Minister along with a recommendation by the BAI for any consequent modifications to the licence fee or payments to RTÉ and TG4.
- That the Compliance Committee, on the direction of the Minister, submit a report on compliance by RTÉ and TG4 with the requirement that transactions by RTÉ or TG4 as between their commercial and public service aspects must be made at arms length.
➢ That RTÉ must report to the Minister concerning the commissioning by it of any independent television programming and the operation of the independent television programme account. Copies of any report must be laid before the Houses of the Oireachtas.

➢ that RTÉ and TG4 forward to the Minister a copy of the accounts submitted for audit, the auditor’s report and a statement of the total revenue and costs derived by RTF and TG4 in pursuance of their objectives.

➢ that RTÉ and TG4 must report annually to the Minister on their use of public funding in pursuance of their statutory remits. Copies of reports to be laid before the Houses of the Oireachtas

Other matters

The legislative proposals provide that the BAI, at the direction of the Minister, report on compliance by RTÉ and TG4 as regards third party access and reuse of programme archive material owned by the public service broadcasters.

The legislative proposals provide that the BAI submit, every four years, a report to the Minister concerning the compliance by RTÉ or TG4 with any code of fair trading practice prepared by the public service broadcasters.

The legislative proposals require that the audience councils of RTÉ and TG4 make an annual report of their proceedings during the previous financial year to the Minister, the board of the public service broadcaster and the BAI.
Consolidation and Revision

The Broadcasting Bill now consolidates and revises all key broadcasting legislation into one single piece of legislation. Acts consolidated and revised include the Broadcasting Authority Act 1960, the Radio and Television Act 1988, the Broadcasting Act 2001 and the Broadcasting Act 2007. In consolidating and revising broadcasting legislation, provisions have been appropriately updated, often reflecting changes in broadcasting and telecommunications law at a European level. Providing a revised and consolidated Act will result in a significant improvement in ease of use for all interested stakeholders.
Dear Mr Mulqueen,

My former colleague Alexandra Antoniadis gave me your contact details as I am following up the recent decision concerning the State financing of RTÉ and TG4 in Ireland together with my colleague Pedro Dias.

At the end of the decision letter, the Commission has asked Ireland to indicate if there are any confidential issues in the decision which should not be published or disclosed to third parties. So far, we have not received a reply from your authorities in this respect.

In order to make sure that no confidential information is disclosed, may I please ask you to confirm that the decision contains no such confidential information and can be published / disclosed to third parties?

Please, don't hesitate to contact me if you have any question in this respect.

Thank you in advance,

Kind regards,

Nóra Tosics

Case handler
DG Competition
State aid: Information, Communication and Media
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