27th May 2008

TV3 Programming response to Broadcasting Bill 2008

Part A: Overview of key arguments.
Part B: Proposed amendments.
2. RTÉ and TG4 must be required to conduct their commercial activities in line with market practices

In its discussions with the Commission, the Government undertook that the new Bill would "contain the necessary safeguards to ensure that [RTÉ and TG4 would] carry out their commercial activities (whether intra-group or with unrelated companies) on market terms" (emphasis added) (para 185, Commission Decision). The purpose of these safeguards is to ensure RTÉ’s and TG4’s requirements for subsidy will not be unnecessarily increased by activity in the commercial sphere which is not market oriented.

There is no reference in the Bill to RTÉ and TG4 being obliged to carry out their commercial activities on market terms. This market orientation principle must be included in the Bill.

TV3 suggests that, to capture fully the commitment given to the Commission Section 108(2) should be amended to read:

(2) All transactions or arrangements entered into by a corporation as between the activities arising from—

(a) its public service objects, and

(b) its exploitation of commercial opportunities object,

shall be made at arm’s length and carried out in line with market practices (amendment emphasised).

In addition, the following provision should be added at Section 108(3) to capture the commitment concerning unrelated companies.

(3) All transactions or arrangements entered into by a corporation with an unrelated party arising from its exploitation of commercial opportunities object shall be made at arm’s length and carried out in line with market practices.
3. Accounting Transparency

Full transparency in accounting is the key to ensuring that RTE and TG4 are not overcompensated through revenue from the TV licence fee. Overcompensation is not in the public interest because it means that RTE and TG4 are not providing value for taxpayers' money; it is also contrary to EC State aid law.

The Bill requires public broadcasters to keep separate accounts distinguishing between the revenues and cost of (a) public service activities and (b) commercial activities (Section 109(9)). However, there is no clear statement of the basis on which those separate accounts should be prepared. Section 109(10) seems to suggest that RTE and TG4 may choose the cost accounting principles and methods they use to report and assign revenues and costs, subject only to general non-binding "guidance" from the BAI (Section 109(11) and (12)). This is clearly not acceptable.

TV3 believes that the Bill must give either the BAI or the Minister the power, after public consultation (including consultation with independent broadcasters), to issue binding and detailed directions to RTE and TG4 on the cost accounting principles and methods they should use. When issuing those directions, the BAI or the Minister should also be required to take account of:

- International accounting standards (IFRS)
- Applicable EC law (including the Transparency Directive)

4. Benchmarking

TV3 also suggests that the BAI, in order to ensure that overcompensation is not occurring and that taxpayers are getting value for the licence fee, should be required to conduct a regular benchmarking exercise to compare the Irish funding arrangements with arrangements in similar EC member states, in particular in respect of:

- The amount of subsidy;
- The intensity of the subsidy in the context of the broadcasters overall revenues;
- The cost accounting principles and methods used to distinguish between revenue and costs associated with public service activities and commercial activities;
- The arrangements in place to ensure the maximisation of revenue to offset the requirement for subsidy; and
- The arrangements in place to ensure that the public broadcaster carries out its commercial activities in line with market practices.

5. Revenue Maximisation and Market Practice Orientation

The most effective safeguards against overcompensation and waste of taxpayers' money by public broadcasters are the requirements that their commercial activities are:

- Operated in an efficient manner so as to maximise revenues (c.f. Section 108(1)(a); and
- Carried out in line with market practices.
Revenue maximisation and market practice orientation are required by the European Commission (Commission Decision, para 185). TV3 suggests that, given the fundamental importance of those safeguards, compliance with them should be accorded priority in the Bill by, for example:

- In Section 87, adding a requirement that each member of the RTE and TG4 boards performs his or her functions in such a manner as to ensure that revenues are maximised and commercial activities are carried out in line with market practices;

- In Sections 99, 103 and 104, by adding a requirement that the Minister, when reviewing the Strategic Development Plans of RTE and TG4 or proposals for new services, variations in channels and the establishment of subsidiaries and joint ventures, should consider whether they sufficiently provide for the maximisation of revenues and the alignment of commercial activities with market practices;

- In Section 100, by requiring the BAI when conducting a sectoral impact assessment to consider whether the public service broadcaster’s proposal is formulated in a manner that is likely to maximise the broadcaster’s revenues and to align its commercial activities with market practices.
Daniel Carton

From: StateAid@dfa.ie
Sent: 12 December 2008 14:44
To: Des Hackett (DFA); Paul Mulqueen
Subject: Broadcasting Act

Des/Paul, I just got a call from Nora TOSICS in DG COMP who is now the case handler finalising the state financing of RTE and TG4 issue. She wanted to know when the Irish Authorities will notify the implementation measures as undertaken i.e. the Broadcasting Act. Her direct line in Brussels is 0032 2953795 - she was trying to get you Paul this afternoon and I told her that as far as I knew you were still the right person to contact - she may try you next week. I told her that you Des were tied up this afternoon but that you may contact her next week. She said it was not that urgent but was of the view that we should notify before the end of the year.
Pauline.

Pauline Mulligan,
Industry & Competitiveness Attaché,
Permanent Representation of Ireland to the EU.
Ph: + 32 2 2823242
Fax: + 32 2 2306384
GSM: + 32 496 597 796
Email: pauline.mulligan@dfa.ie
Email for State Aids: stateaid@dfa.ie
<table>
<thead>
<tr>
<th>Notice No</th>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>II 2009/C 257/01</td>
<td>Communication from the Commission on the application of State aid rules to public service broadcasting (1)</td>
<td>1</td>
</tr>
<tr>
<td>IV 2009/C 257/02</td>
<td>Euro exchange rates</td>
<td>15</td>
</tr>
<tr>
<td>2009/C 257/03</td>
<td>Special Report No 9/2009 'The efficiency and effectiveness of the personnel selection activities carried out by the European Personnel Selection Office'</td>
<td>16</td>
</tr>
</tbody>
</table>

(1) Text with EEA relevance
NOTICES FROM MEMBER STATES

2009/C 257/04 Information communicated by Member States regarding State aid granted under Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (*) 17

V Announcements

PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMPETITION POLICY

Commission

2009/C 257/05 Prior notification of a concentration (Case COMP/M.5631 — Symboled/Zumtobel/Ledon Oled JV) — Candidate case for simplified procedure (*) 22

2009/C 257/06 Prior notification of a concentration (Case COMP/M.5663 — AVIO/SECI-ETJV) — Candidate case for simplified procedure (*) 24

(*) Text with EEA relevance
II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission on the application of State aid rules to public service broadcasting

(Text with EEA relevance)

(2009/C 257/01)

1. INTRODUCTION AND SCOPE OF THE COMMUNICATION

1. Over the last three decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry.

2. In the 1970s, however, economic and technological developments made it increasingly possible for Member States to allow other operators to broadcast. Member States have therefore decided to introduce competition in the market. This has led to a wider choice for consumers, as many additional channels and new services became available; it has also favoured the emergence and growth of strong European operators, the development of new technologies, and a larger degree of pluralism in the sector, which means more than a simple availability of additional channels and services. Whilst opening the market to competition, Member States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs and public policy objectives that would otherwise not necessarily be fulfilled to the optimal extent. This was confirmed in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty (hereinafter referred to as the Amsterdam Protocol).

3. At the same time, the increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Commission's attention by private operators. The complaints allege infringements of Articles 86 and 87 of the EC Treaty in relation to public funding of public service broadcasters.

4. The 2001 Communication from the Commission on the application of State aid rules to public service broadcasting (1) has first set out the framework governing State funding of public service broadcasting. The 2001 Communication has served as a good basis for the Commission to develop significant decision-making practice in the field. Since 2001, more than 20 decisions have been adopted concerning the financing of public service broadcasters.

5. In the meantime, technological changes have fundamentally altered the broadcasting and audiovisual markets. There has been a multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand. This has led to an increase in competition with new players, such as network operators and Internet companies, entering the market. Technological developments have also allowed the emergence of new media services such as online information services and non-linear or on-demand services. The provision of audiovisual services is converging, with consumers being increasingly able to obtain multiple services on a single platform or device or to obtain any given service on multiple platforms or devices. The increasing variety of options for consumers to access media content has led to the multiplication of audiovisual services offered and the fragmentation of audiences. New technologies have enabled improved consumer participation. The traditional passive consumption model has been gradually turning into active participation and control over content by consumers. In order to keep up with the new challenges, both public and private broadcasters have been diversifying their activities, moving to new distribution platforms and expanding the range of their services.

(1) OJ C 320, 15.11.2001, p. 5.
Most recently, this diversification of the publicly funded activities of public service broadcasters (such as online content, special interest channels) prompted a number of complaints by other market players also including publishers.

6. Since 2001, important legal developments have also taken place, which have an impact on the broadcasting field. In the 2003 Altmark judgment (\(^1\)), the European Court of Justice defined the conditions under which public service compensation does not constitute State aid. In 2005, the Commission adopted a new decision (\(^2\)) and framework (\(^3\)) on State aid in the form of public service compensation. In 2007, the Commission adopted a Communication accompanying the Communication on 'A single market for 21st century Europe' — Services of general interest, including social services of general interest: a new European Commitment (\(^4\)). Furthermore, in December 2007, the Audiovisual Media Services Directive (\(^5\)) entered into force, extending the scope of the EU audiovisual regulation to emerging media services.

7. These changes in the market and in the legal environment have called for an update to the 2001 Communication on State aid for public broadcasting. The Commission's 2005 State Aid Action Plan (\(^6\)) announced that the Commission would 'revisit its Communication on the application of State aid rules to public service broadcasting. Notably, with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service activities'.

8. In the course of 2008 and 2009, the Commission held several public consultations on the review of the 2001 Broadcasting Communication. The present Communication consolidates the Commission's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultations. It clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the public funding of audiovisual services in the broadcasting sector (\(^6\)), taking into account recent market and legal developments. The present Communication is without prejudice to the application of the internal market rules and fundamental freedoms in the field of broadcasting.

2. THE ROLE OF PUBLIC SERVICE BROADCASTING

9. Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.

10. Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union (\(^3\)) and Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts (\(^7\)).

11. The role of the public service (\(^1\)) in general is recognised by the Treaty, in particular Articles 16 and 86(2). The interpretation of these provisions in the light of the particular nature of the broadcasting sector is outlined in the Amsterdam Protocol, which, after considering 'that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism', states that 'the provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting inssofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit

---


\(^2\) Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

\(^3\) Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).


\(^6\) For the purpose of the present communication, the notion 'audiovisual service(s)' refers to the linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services. This notion of 'audiovisual service(s)' must be distinguished from the narrower concept of 'audiovisual media service(s)', as defined in Article 1(a) of the Audiovisual Media Services Directive.


\(^4\) For the purpose of the present communication, and in accordance with Article 16 of the EC Treaty and the declaration (No 13) annexed to the final act of Amsterdam, the term 'public service' as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term 'service of general economic interest' used in Article 86(2).
as conferred, defined and organised by each Member State, 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, while the realisation of the remit of that public service shall be taken into account.'

12. The importance of public service broadcasting for social, democratic and cultural life in the Union was reaffirmed in the Council Resolution concerning public service broadcasting. As underlined by the Resolution ‘broadcast public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting’. Moreover, public service broadcasting needs to ‘benefit from technological progress’, bring ‘the public the benefits of the new audio-visual and information services and the new technologies’ and to undertake ‘the development and diversification of activities in the digital age’. Finally, ‘public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences’ (13).

13. The role of public service broadcasting in promoting cultural diversity was also recognised by the 2003 Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was approved by the Council on behalf of the Community and thus forms part of EC law (14). The Convention states that each party may adopt ‘measures aimed at protecting and promoting the diversity of cultural expressions within its territory’. Such measures may include, among others, ‘measures aimed at enhancing diversity of the media, including through public service broadcasting’ (14).

14. These values of public broadcasting are equally important in the rapidly changing new media environment. This has also been highlighted in the recommendations of the Council of Europe concerning media pluralism and diversity of media content (15), and the remit of public service media in the information society (16). The latter recommendation calls upon the members of the Council of Europe to ‘guarantee public service media (…) in a transparent and accountable manner’ and to ‘enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions’.

15. In its Resolution on concentration and pluralism in the media in the European Union, the European Parliament has recommended that regulations governing State aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment, while ensuring that public service media can carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expediency (17).

16. At the same time and notwithstanding the above, it must be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a significant role in achieving the objectives of the Amsterdam Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes. Moreover, newspaper publishers and other print media are also important guarantors of an objectively informed public and of democracy. Given that these operators are now competing with broadcasters on the Internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models. As recalled by the Audiovisual Media Services Directive (18), ‘the coexistence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.’ Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment.

(13) Recommendation CM/(Rec)(2007)2 of the Committee of the Ministers to Member States on media pluralism and diversity of media content, adopted on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.
(14) Recommendation CM/(Rec)(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.
(16) Cf. footnote 6 above.
3. THE LEGAL CONTEXT

17. The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The State aid assessment is based on Articles 87 and 88 of the Treaty on the application of the rules of the Treaty and the competition rules, in particular, to services of general economic interest. The Treaty of Maastricht introduced Article 151 concerning culture and Article 87(3)(d) on aid to promote culture. The Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and the Amsterdam Protocol on the system of public broadcasting in the Member States.

18. The regulatory framework concerning ‘audiovisual media services’ is coordinated at European level by the Audiovisual Media Services Directive. The financial transparency requirements concerning public undertakings are regulated by the Transparency Directive (19).

19. These rules are interpreted by the Court of Justice and the Court of First Instance. The Commission has also adopted several communications on the application of the State aid rules. In particular, in 2005, the Commission adopted the Services of General Economic Interest Framework (20) and Decision (21) clarifying the requirements of Article 86(2) of the EC Treaty. The latter is also applicable in the field of broadcasting, to the extent that the conditions provided in Article 2(1)(6) of the Decision are met (22).

4. APPLICABILITY OF ARTICLE 87(1)

4.1. The State aid character of State financing of public service broadcasters

20. In line with Article 87(1), the concept of State aid includes the following conditions: (a) there must be an intervention by the State or by means of State resources; (b) the intervention must be able to affect trade between Member States; (c) it must confer an advantage of the beneficiary; (d) it must distort or threaten to distort competition (23). The existence of State aid has to be assessed on an objective basis, taking into account the jurisprudence of the Community Courts.

21. The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). Public service broadcasters are normally financed out of the State budget or through a levy on broadcasting equipment holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources (24).

22. State financing of public service broadcasters can also be generally considered to affect trade between Member States. As the Court of Justice has observed, ‘when aid granted by the State or through State resources 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’ (25). This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public service broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State. Furthermore, services provided on the internet normally have a global reach.

23. Regarding the existence of an advantage, the Court of Justice clarified in the Almark case (26) that public service compensation does not constitute State aid provided that four cumulative conditions are met. 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. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, 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 bidder capable of providing those services at the least cost to the community, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well

(20) Cf. footnote 4 above.
(21) Cf. footnote 3 above.
(22) According to Article 2(1)(6) of the Decision, it applies to State aid in the form of ‘public service compensation granted to undertakings with an average annual turnover before 1 January 1994 of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million’.
(24) Regarding the qualification of license fee funding as State resources, see judgment in Joined Cases T-09/04, T-317/04, T-329/04 and T-336/04 ‘TV2’ at 158-159.
run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

24. To the extent that the funding fails to satisfy the above conditions, it would be considered as selectively favouring only certain broadcasters and thereby distorting or threatening to distort competition.

4.2. Nature of the aid: existing aid as opposed to new aid

25. The funding schemes currently in place in most of the Member States were introduced a long time ago. As a first step, therefore, the Commission must determine whether these schemes may be regarded as ‘existing aid’ within the meaning of Article 87(1). In line with this provision, the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

26. Pursuant to Article 1(b)(i) of the Procedural Regulation (2), existing aid includes ‘... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty’.

27. In the cases of Austria, Finland and Sweden, State aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 in these countries is regarded as existing aid. Regarding the 10 Member States which acceded in 2004 (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) and Bulgaria and Romania which acceded in 2007, measures put into effect before 10 December 1994, those included in the list annexed to the Treaty of Accession and those approved under the so-called 'interim procedure' are considered as existing aid.

28. Pursuant to Article 1(b)(v) of the Procedural Regulation, existing aid also includes ‘aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State’.

29. In accordance with the case law of the Court (3), the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission believes that a case by case approach is the most appropriate (4), taking into account all the elements related to the broadcasting system of a given Member State.

30. According to the case law in Gibraltar (5), not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Court of First Instance, '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 separable from the initial scheme.'

31. In light of the above considerations, in its decision-making practice the Commission has generally examined: (a) whether the original financing regime for public service broadcasting is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (b) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (c) in case subsequent modifications are substantial, whether they are separable from the original measure, in which case they can be assessed separately, or whether they are not separable from the original measure so that the original measure is as a whole transformed into a new aid.

5. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 87(3)

32. Although compensation for public service broadcasting is typically assessed under Article 86(2) of the Treaty, the derogations listed in Article 87(3) may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.


33. In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and promote the diversity of its cultures. Article 87(3)(d) of the Treaty allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

34. It is the Commission’s task to decide on the actual application of that provision in the same way as for the other exemption clauses in Article 87(3). It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Accordingly, the Commission considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable (11). Moreover, the Commission takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se (12). Furthermore, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture under Article 87(3)(d) (13).

35. State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, Article 87(3)(d) would generally not be relevant. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 86(2), on the basis of the criteria set out in the present Communication.

6. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 86(2)

36. In accordance with Article 86(2), undertakings entrusted with the operation of services of general economic interest or having the character of revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community: (14)

37. The Court has consistently held that Article 86 provides for a derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:

(i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition) (15);

(ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment) (16);

(iii) 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 (proportionality test) (17).

38. In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the ‘public service remit as conferred, defined and organised by each Member State’ (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting ‘insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (...) and (...) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account’ (proportionality).

39. It is for the Commission, as guardian of the Treaty, to assess, on the basis of evidence provided by the Member States, whether these criteria are satisfied. As regards the definition of the public service remit, the role of the Commission is to check for manifest errors (see Section 6.1). The Commission further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations (see Section 6.2).


(15) Judgment in the Case C-242/95 GT-Link; (1997) 4449.

(16) Judgment in the Case C-159/94 EDF and GDF; (1997) C-5815.
40. In carrying out the proportionality test, the Commission considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Commission assesses, in particular on the basis of the evidence that Member States are bound to provide whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities (see Section 6.3 and following).

41. The analysis of the compliance with the State aid requirements must be based on the specific characteristics of each national system. The Commission is aware of the differences in the national broadcasting systems and in the other characteristics of the Member States' media markets. Therefore, the assessment of the compatibility of State aid to public service broadcasters under Article 86(2) is made on a case-by-case basis, according to Commission practice (1), in line with the basic principles set out in the following sections.

42. The Commission will also take into account the difficulty some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, ceteris paribus, higher (2) while equally considering potential concerns of other media in these Member States.

6.1. Definition of public service remit

43. In order to meet the condition mentioned in point 37(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.

44. Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level, in accordance with their national legal order. Generally speaking, in exercising that competence, account must be taken of the Community concept of 'services of general economic interest'.

45. The definition of the public service mandate by the Member States should be as precise as possible. It 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. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

46. Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities. Moreover, the terms of the public service remit should be sufficiently precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapter.

47. At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2) (3). Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity. As expressed by the Court of First Instance, the legitimacy of such a widely defined public service remit rests upon the qualitative requirements for the services offered by a public service broadcaster (4). The definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms.

(1) See, for example, the recent decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNA

(2) Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.


(4) These qualitative criteria are according to the Court of First Instance 'the justification for the existence of broadcasting SGElS in the national audiovisual sector'. There is 'no reason for a widely defined broadcasting SGEl which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator'. T-442/03, SIC v Commission, paragraph 211.
48. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product. 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 Amsterdam Protocol — the ‘democratic, social and cultural needs of each society’. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games (44), sponsoring or merchandising, for example. Moreover, a manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.

49. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit (45).

6.2. Entrustment and supervision

50. In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference).

51. The entrustment act(s) shall specify the precise nature of the public service obligations in line with Section 6.1 above, and shall set out the conditions for providing the compensation, as well as the arrangements for avoiding and resaying any overcompensation.

52. Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment Act(s) should be modified accordingly, within the limits of Article 86(2). In the interest of allowing public service broadcasters to react swiftly to new technological developments, Member States may also foresee that the entrustment with a new service is provided following the assessment outlined in Part 6.7 below, before the original entrustment Act is formally consolidated.

53. It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary 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 monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. In accordance with the Commission communication on the principles and guidelines for the Community's audiovisual policy in the digital era (46), it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit (47).

54. In line with the Amsterdam Protocol, 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, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.

55. In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the 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. Choice of funding of public service broadcasting

56. Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.

(44) Regarding the qualification, under the Audiovisual Media Services Directive, of prize games including the dialling of a premium rate number as teleshopping or advertising, see the judgment of the Court in Case C-195/06 KommAmira v ORF of 18 October 2007.


(47) See judgment in the Case T-442/03 SIC/Commission (2008) at 212.
57. Funding schemes can be divided into two broad categories 'single-funding' and 'dual-funding'. The 'single-funding' category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. 'Dual-funding' systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial or public service activities, such as the sale of advertising space or programmes and the offering of services against payment.

58. As stated in the Amsterdam Protocol: 'The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting (...'). The Commission has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.

63. These general transparency requirements apply also to broadcasters, insofar as they are entrusted with the operation of a service of general economic interest, receive public compensation in relation to such service, and also carry out other, non-public-service activities.

64. In the broadcasting sector, separation of accounts poses no particular problem on the revenue side. For this reason, the Commission considers that, on the revenue side, broadcasting operators should give detailed account of the sources and amount of all income accruing from the performance of public and non-public service activities.

65. On the cost side, all the expenses incurred in the operation of the public service may be taken into consideration. Where the undertaking carries out activities falling outside the scope of the public service, only the costs associated with the public service may be taken into consideration. The Commission recognises that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side. This is because, in particular in the field of traditional broadcasting, Member States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.

66. Costs specific to non-public service activities (e.g. the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously should be allocated proportionately to public service and non-public service activities respectively, whenever it is possible in a meaningful way.

60. The State aid assessment by the Commission 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 including a clear separation of accounts.

61. Separation of accounts between public service activities and non-public service activities is normally already required at national level as it is essential to ensure transparency and accountability when using public funds. A separation of accounts provides a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. 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 Amsterdam Protocol.

62. Member States are required by Directive 2006/111/EC to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, i.e. public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established (\(^4\)).

\(^4\) Article 4 of Directive 2006/111/EC.
67. In other cases, whenever the same resources are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities (44). In such cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed in other utilities sectors is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to the public service activities have to be taken into account for the purpose of calculating the net public service costs and therefore to reduce the public service compensation level. This reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.

68. The main example for the situation described in the preceding paragraph would be the cost of producing programmes in the framework of the public service mission of the broadcaster. These programmes serve both to fulfil the public service remit and to generate audience for selling advertising space. However, it is virtually impossible to quantify with a sufficient degree of precision how much of the program viewing fulfills the public service remit and how much generates advertising revenue. For this reason, the distribution of the cost of programming between the two activities risks being arbitrary and not meaningful.

69. The Commission considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.

6.5. Net cost principle and overcompensation

70. As a matter of principle, since overcompensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State subject to the clarifications provided in the present chapter with regard to public service broadcasting.

71. The Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.

72. Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission (45). However, in other cases, for example where specific public service obligations are entrusted to commercially run undertakings which need to remunerate the capital invested in them, a profit element which represents the fair remuneration of capital taking into account risk may be considered reasonable, if duly justified and provided that it is necessary for the fulfilment of the public service obligations.

73. Public service broadcasters may retain yearly overcompensation above the net costs of the public service (as public service reserves) to the extent that this is necessary for securing the financing of their public service obligations. In general, the Commission considers that an amount of up to 10% of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay.

(44) This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

(45) Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.
74. By way of exception, public service broadcasters may be allowed to keep an amount in excess of 10% of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a non-recurring, major expense necessary for the fulfilment of the public service mission (\(^4\)). The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication.

75. In order to allow the Commission to exercise its duties, Member States shall lay down the conditions under which the above overcompensation may be used by the public service broadcasters.

76. The overcompensation mentioned above shall be used for the purpose of financing public service activities, only. Cross-subsidisation of commercial activities is not justified and constitutes incompatible State aid.

6.6. Financial control mechanisms

77. Member States shall provide for appropriate mechanisms to ensure that there is no overcompensation, subject to the provisions of paragraphs 72 to 76. They shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of 'public service reserves'. It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.

78. Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis. Member States shall make sure that effective measures can be put in place to recover overcompensation going beyond the provisions of the previous Chapter 6.5 and cross-subsidisation.

(\(^4\)) Such special reserves may be justified for major technological investments (such as digitisation) which are foreseen to occur at a certain point in time and are necessary for the fulfilment of the public service remit, or for major restructuring measures necessary to maintain the continuous operation of a public service broadcaster within a well-defined time period.

79. The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each financing period as provided for in the national broadcasting systems of the Member States, or in the absence thereof, a time period which normally should not exceed four years. Any 'public service reserves' existing at the end of the financing period, or of an equivalent period as provided above, shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period. In case of 'public service reserves' exceeding 10% of the annual public service costs on a recurring basis, Member States shall review whether the level of funding is adjusted to the public service broadcasters' actual financial needs.

6.7. Diversification of public broadcasting services

80. In recent years, audiovisual markets have undergone important changes, which have led to the ongoing development and diversification of the broadcasting offer. This has raised new questions concerning the application of the State aid rules to audiovisual services which go beyond broadcasting activities in the traditional sense.

81. In this respect, the Commission considers that public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society. In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

82. In parallel with the rapid evolution of the broadcasting markets, the business models of broadcasters are also undergoing changes. In fulfilling their public service remit, broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee).
83. Although public broadcasting services have traditionally been free-to-air, the Commission considers that a direct remuneration element in such services — while having an impact on access by viewers (49) — does not necessarily mean that these services are manifestly not part of the public service remit provided that the pay element does not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities (50). The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, Member States may entrust public service broadcasters with such a service as part of their public service remit.

84. As set out above, State aid to public service broadcasters may be used for distributing audiovisual services on all platforms provided that the material requirements of the Amsterdam Protocol are met. To this end, Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition.

85. It is up to the Member States to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as 'significant new service'. The 'new' nature of an activity may depend among others on its content as well as on the modalities of consumption (51). The 'significance' of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.

86. It is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material conditions of the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems, and the need to safeguard editorial independence of public service broadcasters.

87. In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the consultation, its assessment as well as the grounds for the decision shall be made publicly available.

88. In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in

(49) As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society, "(…) Member States may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, Member States may consider allowing public service media to collect remunerations (…) However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (…) When developing new funding systems, Member States should pay due attention to the nature of the remit provided in the interest of the public and in the common interest."

(50) For example, the Commission considers that requiring direct payment from users for the provision of a specialised premium content offer would normally qualify as commercial activity. On the other hand, the Commission, for example, considers that the charging of pure transmission fees for broadcasting a balanced and varied programming over new platforms such as mobile devices would not transform the offer into a commercial activity.
terms of serving the social, democratic and cultural needs of society (9), taking also into account the existing overall public service offer.

89. Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. Member States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster.

90. The considerations outlined above shall not prevent public service broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the feasibility of and the value added by the foreseen service, insofar as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service.

91. The Commission considers that the above assessment at the national level will contribute to ensuring compliance with the EC State aid rules. This is without prejudice to the competences of the Commission to verify that Member States respect the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative.

6.8. Proportionality and market behaviour

92. In accordance with the Amsterdam Protocol, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission. For example, the acquisition of premium content as part of the overall public service mission of public service broadcasters is generally considered legitimate. However, disproportionate market distortions would arise in the event that public service broadcasters were to maintain exclusive premium rights unused without offering to sublicense them in a transparent and timely manner. Therefore, the Commission invites Member States to ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters.

93. When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. Member States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.

94. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, insofar as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event 'affect trading conditions and competition in the Community to an extent which would be contrary to the common interest' and thus infringe the Amsterdam Protocol.

95. In view of the differences between the market situations, the respect of the market principles by public service broadcasters, in particular the questions whether public service broadcasters are undercutting prices in their commercial offer, or whether they are respecting the principle of proportionality with regard to the acquisition of premium rights (91), shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned.

96. The Commission considers that it is, in the first place, up to the national authorities to ensure that public service broadcasters respect market principles. To this end, Member States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.

97. Notwithstanding the preceding paragraph, where necessary, the Commission may take action on the basis of Articles 81, 82, 86 and 87 of the EC Treaty.

(91) See also at footnote 40 on the justification of a broadcasting SGEL
7. TEMPORAL APPLICATION

98. This Communication will be applied from the first day following its publication in the Official Journal of the European Union. It will replace the 2001 Communication from the Commission on the application of State aid rules to public service broadcasting.

99. The Commission will apply this Communication to all notified aid measures in respect of which it is called upon to take a decision after the Communication is published in the Official Journal, even where the projects were notified prior to that date.

100. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (*), the Commission will apply, in the case of non-notified aid,

(a) this Communication, if the aid was granted after its publication;

(b) the 2001 Communication in all other cases.

NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Euro exchange rates (1)
26 October 2009
(2009/C 257/02)

1 euro =

<table>
<thead>
<tr>
<th>Currency</th>
<th>Exchange rate</th>
<th>Currency</th>
<th>Exchange rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>USD US dollar</td>
<td>1.3019</td>
<td>AUD Australian dollar</td>
<td>1.6253</td>
</tr>
<tr>
<td>JPY Japanese yen</td>
<td>138.09</td>
<td>CAD Canadian dollar</td>
<td>1.5872</td>
</tr>
<tr>
<td>DKK Danish krone</td>
<td>7.4434</td>
<td>HKD Hong Kong dollar</td>
<td>11.6399</td>
</tr>
<tr>
<td>GBP Pound sterling</td>
<td>0.91940</td>
<td>NZD New Zealand dollar</td>
<td>1.9935</td>
</tr>
<tr>
<td>SEK Swedish krona</td>
<td>10.2000</td>
<td>SGD Singapore dollar</td>
<td>2.0928</td>
</tr>
<tr>
<td>CHF Swiss franc</td>
<td>1.5131</td>
<td>KRW South Korean won</td>
<td>1.767,38</td>
</tr>
<tr>
<td>ISK Iceland kroni</td>
<td></td>
<td>ZAR South African rand</td>
<td>11,2760</td>
</tr>
<tr>
<td>NOK Norwegian krone</td>
<td>8.3255</td>
<td>CNY Chinese yuan renminbi</td>
<td>10,2547</td>
</tr>
<tr>
<td>BGN Bulgarian lev</td>
<td>1.9558</td>
<td>HRK Croatian kuna</td>
<td>7,2200</td>
</tr>
<tr>
<td>CZK Czech koruna</td>
<td>25.895</td>
<td>IDR Indonesian rupiah</td>
<td>14 258,99</td>
</tr>
<tr>
<td>EIK Estonian kroon</td>
<td>15.6466</td>
<td>MYR Malaysian ringgit</td>
<td>5,0757</td>
</tr>
<tr>
<td>HUF Hungarian forint</td>
<td>267.45</td>
<td>PHP Philippine peso</td>
<td>70,575</td>
</tr>
<tr>
<td>LTL Lithuanian litas</td>
<td>3.4528</td>
<td>RUB Russian rouble</td>
<td>43,3850</td>
</tr>
<tr>
<td>LVL Latvian lats</td>
<td>0.7092</td>
<td>THB Thai baht</td>
<td>50,141</td>
</tr>
<tr>
<td>PLN Polish zloty</td>
<td>4.1745</td>
<td>BRL Brazilian real</td>
<td>2,5620</td>
</tr>
<tr>
<td>RON Romanian leu</td>
<td>4.2880</td>
<td>MXN Mexican peso</td>
<td>19,5758</td>
</tr>
<tr>
<td>TRY Turkish lira</td>
<td>2.2199</td>
<td>INR Indian rupee</td>
<td>70,0340</td>
</tr>
</tbody>
</table>

(1) Source: reference exchange rate published by the ECB.
COURT OF AUDITORS

Special Report No 9/2009 'The efficiency and effectiveness of the personnel selection activities carried out by the European Personnel Selection Office'
(2009/C 257/03)

The European Court of Auditors hereby informs you that Special Report No 9/2009 'The efficiency and effectiveness of the personnel selection activities carried out by the European Personnel Selection Office' has just been published.

The report can be accessed for consultation or downloading on the European Court of Auditors' website: http://www.eca.europa.eu

A hard copy and a CD-ROM version of the report may be obtained free of charge on request to the Court of Auditors:

European Court of Auditors
Communication and Reports Unit
12, rue Alcide De Gasperi
1615 Luxembourg
LUXEMBOURG

Tel. +352 4398-1
E-mail: euraud@eca.europa.eu

or by filling in an electronic order form on EU-Bookshop.
NOTICES FROM MEMBER STATES

Information communicated by Member States regarding State aid granted under Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)

(Text with EEA relevance)

(2009/C 257/04)

<table>
<thead>
<tr>
<th>Reference number of State Aid</th>
<th>X 71/08</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member State</td>
<td>Germany</td>
</tr>
<tr>
<td>Member State reference number</td>
<td>—</td>
</tr>
<tr>
<td>Name of the Region (NUTS)</td>
<td>Sachsen-Anhalt Article 87(3)(a)</td>
</tr>
<tr>
<td>Title of the aid measure</td>
<td>Richtlinie des Landes Sachsen-Anhalt über die Gewährung von Zuschüssen an kleine und mittlere Unternehmen zur einmaligen Beteiligung an Messen und Ausstellungen</td>
</tr>
<tr>
<td>National legal basis (Reference to the relevant national official publication)</td>
<td>§ 44 der Landeshaushaltsgesetzordnung des Landes Sachsen-Anhalt vom 30.4.1991 (GVBl. LSA S. 35 in der jeweils gültigen Fassung) sowie nach der Verwaltungsvorschriften zu § 44 der Landeshausaltsgesetzordnung des Landes Sachsen-Anhalt (VV-LHO, RdEr, des MF vom 1.2.2001, MBl. LSA S. 241, zuletzt geändert durch RdEr. vom 29.1.2008, MBl. LSA S. 116, in der jeweils geltenden Fassung) und des § 1 Abs. 1 Satz 1 des Verwaltungsverfahrensgesetz des Sachsen-Anhalt vom ... Vollständiger Wortlaut in der Anlage</td>
</tr>
<tr>
<td>Web link to the full text of the aid measure</td>
<td><a href="http://www.sachsen-anhalt.de/LPSA/index.php?id=136">http://www.sachsen-anhalt.de/LPSA/index.php?id=136</a></td>
</tr>
<tr>
<td>Type of measure</td>
<td>Scheme</td>
</tr>
<tr>
<td>Amendment of an existing aid measure</td>
<td>—</td>
</tr>
<tr>
<td>Economic sector(s) concerned</td>
<td>All economic sectors eligible to receive aid</td>
</tr>
<tr>
<td>Type of beneficiary</td>
<td>SME</td>
</tr>
<tr>
<td>Annual overall amount of the budget planned under the scheme</td>
<td>EUR 0.83 million</td>
</tr>
<tr>
<td>For guarantees</td>
<td>—</td>
</tr>
<tr>
<td>Aid Instrument (Article 5)</td>
<td>Grant</td>
</tr>
<tr>
<td>Reference to the Commission decision</td>
<td>—</td>
</tr>
<tr>
<td>Objectives</td>
<td>Maximum aid intensity in % or maximum aid amount in national currency</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>-----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Aid for SME participation in fairs (Article 27)</td>
<td>50 %</td>
</tr>
</tbody>
</table>

| Reference number of State Aid                   | X 72/08                                                               |
| Member State                                    | United Kingdom                                                        |
| Member State reference number                   | —                                                                    |
| Name of the Region (NUTS)                       | Scotland Non-assisted areas                                           |
| Granting authority                              | Scottish Executive, Innovations and Investment Grants Division         |
| Meridian Court                                  | 5 Cadogan Street                                                      |
| Glasgow                                        | G2 6AT                                                                |
| UNITED KINGDOM                                  | http://www.scotland.gov.uk/Home                                       |
| Title of the aid measure                        | Investment Support for SMEs                                           |
| National legal basis (Reference to the relevant national official publication) | Industrial Development Act 1982, Section 8 |
| Web link to the full text of the aid measure    | http://www.rsascotland.gov.uk/rsa/208.html                           |
| Type of measure                                 | Scheme                                                                |
| Amendment of an existing aid measure            | —                                                                    |
| Economic sector(s) concerned                   | All economic sectors eligible to receive aid                         |
| Type of beneficiary                             | SME                                                                  |
| Annual overall amount of the budget planned under the scheme | GBP 10.00 million                                                    |

For guarantees —

Aid Instrument (Article 5) Grant —

Reference to the Commission decision —

If co-financed by Community funds —

<table>
<thead>
<tr>
<th>Objectives</th>
<th>Maximum aid intensity in % or maximum aid amount in national currency</th>
<th>SME-bonuses in %</th>
</tr>
</thead>
<tbody>
<tr>
<td>SME investment and employment aid (Article 15)</td>
<td>20 %</td>
<td>—</td>
</tr>
<tr>
<td>Reference number of State Aid</td>
<td>X 76/08</td>
<td></td>
</tr>
<tr>
<td>-------------------------------</td>
<td>---------</td>
<td></td>
</tr>
<tr>
<td>Member State</td>
<td>Italy</td>
<td></td>
</tr>
<tr>
<td>Member State reference number</td>
<td>—</td>
<td></td>
</tr>
<tr>
<td>Name of the Region (NUTS)</td>
<td>Trento</td>
<td>Non-assisted areas</td>
</tr>
<tr>
<td>Title of the aid measure</td>
<td>Presentazione da parte delle aziende di proposte progettuali aventi contenuto formativo per l'aggiornamento e riqualificazione dei propri lavoratori cofinanziati dal Fondo sociale europeo — annualità 2008</td>
<td></td>
</tr>
<tr>
<td>National legal basis (Reference to the relevant national official publication)</td>
<td>Delibera della Giunta provinciale n. 2712 di data 24 ottobre 2008 — L'Avviso è pubblicato sul Bollettino della Regione Trentino Alto Adige n. 46 di data 11.11.2008</td>
<td></td>
</tr>
<tr>
<td>Web link to the full text of the aid measure</td>
<td><a href="http://www.fsc.provincia.tn.it/Trento_nuova_grafica/selezione.php?sezione=13&amp;invintro=">http://www.fsc.provincia.tn.it/Trento_nuova_grafica/selezione.php?sezione=13&amp;invintro=</a></td>
<td></td>
</tr>
<tr>
<td>Type of measure</td>
<td>Scheme</td>
<td></td>
</tr>
<tr>
<td>Amendment of an existing aid measure</td>
<td>—</td>
<td></td>
</tr>
<tr>
<td>Economic sector(s) concerned</td>
<td>All economic sectors eligible to receive aid</td>
<td></td>
</tr>
<tr>
<td>Type of beneficiary</td>
<td>SME large enterprise</td>
<td></td>
</tr>
<tr>
<td>Annual overall amount of the budget planned under the scheme</td>
<td>EUR 2,00 million</td>
<td></td>
</tr>
<tr>
<td>For guarantees</td>
<td>—</td>
<td></td>
</tr>
<tr>
<td>Aid Instrument (Article 5)</td>
<td>Grant</td>
<td></td>
</tr>
<tr>
<td>Reference to the Commission decision</td>
<td>—</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Objectives</th>
<th>Maximum aid intensity in % or maximum aid amount in national currency</th>
<th>SME-bonuses in %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific training (Article 38(1))</td>
<td>25 %</td>
<td>20 %</td>
</tr>
<tr>
<td>General training (Article 38(2))</td>
<td>60 %</td>
<td>20 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reference number of State Aid</th>
<th>X 77/08</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member State</td>
<td>Italy</td>
</tr>
<tr>
<td>Member State reference number</td>
<td>—</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>---</td>
</tr>
<tr>
<td>Name of the Region (NUTS)</td>
<td>Valle D'Aosta Mixed</td>
</tr>
</tbody>
</table>
| Granting authority          | Regione Valle d'Aosta  
Piazza Deffeyes 1  
11100 Aosta AO  
ITALIA  
http://www.regione.vda.it |
| Title of the aid measure    | Bando a favore di imprese per la realizzazione di progetti di innovazione |
| National legal basis (Reference to the relevant national official publication) | Deliberazione della Giunta regionale n. 2979 del 17 ottobre 2008 |
| Web link to the full text of the aid measure | http://www.regione.vda.it/attiprod/contributi_ricerca_qualita/innovazione_1.asp |
| Type of measure             | Scheme |
| Amendment of an existing aid measure | — |
| Economic sector(s) concerned | All economic sectors eligible to receive aid |
| Type of beneficiary         | SME |
| Annual overall amount of the budget planned under the scheme | EUR 1,40 million |
| For guarantees              | — |
| Aid Instrument (Article 5)  | Grant |
| Reference to the Commission decision | — |
| If co-financed by Community funds | FESR Programma Operativo Competitività Regionale 2007/2013 — Valle d'Aosta  
Codice CCI 2007TT162PO014 — 0,56 milioni di EUR |

<table>
<thead>
<tr>
<th>Objectives</th>
<th>Maximum aid intensity in % or maximum aid amount in national currency</th>
<th>SME-bonuses in %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aid for innovation advisory services and for innovation support services (Article 36)</td>
<td>EUR 150 000</td>
<td>—</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reference number of State Aid</th>
<th>X 78/08</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member State</td>
<td>Austria</td>
</tr>
<tr>
<td>Member State reference number</td>
<td>Österreich</td>
</tr>
<tr>
<td>Name of the Region (NUTS)</td>
<td>Kärnten Mixed</td>
</tr>
</tbody>
</table>
| Granting authority                                                                 | Amt der Kärntner Landesregierung, Abteilung 4, Finanzen, Wohnungs- und Steuergesetze
|                                                                                   | Arnulfplatz 1
|                                                                                   | 9020 Klagenfurt
|                                                                                   | ÖSTERREICH
|                                                                                   | http://www.km.gv.at
| Title of the aid measure                                                          | Richtlinie für die Übernahme von Ausfallsbürgschaften durch das Land Kärnten für Offensivmaßnahmen
| National legal basis (Reference to the relevant national official publication)    | § 1 des Kärntner Wirtschaftsförderungsgesetzes LGBl. Nr. 6/1993 i.d.F. 7/2008; Richtlinie für die Übernahme von Ausfallsbürgschaften durch das Land Kärnten für Offensivmaßnahmen; der Beschluss des Kärntner Landtages im Hinblick auf die Haftungsermächtigung ist noch zuholen
| Web link to the full text of the aid measure                                      | http://www.km.gv.at
| Type of measure                                                                   | Scheme
| Amendment of an existing aid measure                                              | Modification N 821/06
| Duration                                                                         | 1.10.2008-30.6.2014
| Economic sector(s) concerned                                                     | All economic sectors eligible to receive aid
| Type of beneficiary                                                              | SME
| Annual overall amount of the budget planned under the scheme                     | EUR 1.50 million
| For guarantees                                                                   | EUR 1.50 million
| Aid Instrument (Article 5)                                                       | Guarantee
| Reference to the Commission decision                                             | —
| If co-financed by Community funds                                                | —
| **Objectives**                                                                   | **Maximum aid intensity in % or maximum aid amount in national currency** | **SME-bonuses in %**
| Regional investment and employment aid (Article 13) Scheme                       | 40 % | —
| SME investment and employment aid (Article 13)                                   | 20 % | —
PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMPETITION POLICY

COMMISSION

Prior notification of a concentration
(Case COMP/M.5631 — Symboled/Zumtobel/Ledon Oled JV)
Candidate case for simplified procedure
(Text with EEA relevance)
(2009/C 257/05)

1. On 16 October 2009 the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 (1) by which the undertakings Zumtobel Holding GmbH (‘Zumtobel’, Germany) belonging to the Zumtobel Group and Symboled GmbH (‘Symboled’, Germany) controlled by the Fraunhofer Gesellschaft zur Förderung der angewandten Forschung e.V. (‘Fraunhofer Gesellschaft’) and four individuals acquire within the meaning of Article 3(1)(b) of the Regulation joint control of the undertaking Ledon Oled Lighting GmbH & Co. KG (‘Ledon Oled’, Germany) by way of purchase of shares in a newly created company constituting a joint venture.

2. The business activities of the undertakings concerned are:

— Zumtobel manufactures professional lighting systems and lighting components for indoor and outdoor use, LED modules and LED systems, and offers light management services,

— Symboled has been founded mid 2008 as a spin-off by the Fraunhofer Gesellschaft and four individuals for the development, manufacturing and sales of flat lighting- and signage systems based on organic light emitting diodes. Symboled, mainly supposed to hold the shares in Ledon Oled, has not been operational yet,

— Zumtobel and Symboled intend to establish the joint venture Ledon Oled which fulfils all the functions of an autonomous economic entity. Ledon Oled will develop, manufacture and sell organic light emitting diodes for professional lighting- and signage systems.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of Regulation (EC) No 139/2004. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2) it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

(2) OJ C 56, 5.3.2005, p. 32.
Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (+32 22964301 or 22967244) or by post, under reference number COMP/M.3631 — Symboled/Zumtobel/Ledon Oled JV, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Prior notification of a concentration
(Case COMP/M.5663 — AVIO/SECI-E/JV)

Candidate case for simplified procedure
(Text with EEA relevance)
(2009/C 257/06)

1. On 20 October 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (1) by which Avio S.p.A. ('Avio', Italy) indirectly controlled by Cinven Group Limited ('Cinven Group', UK), together with its subsidiary Se.Co.Sv. Im. S.r.l. ('Secovism', Italy) collectively 'Avio Group', and S.E.C.I. Energia S.p.A. ('Seci-E', Italy) belonging to Maccaferri Group (Italy) acquire within the meaning of Article 3(1)(b) of the Regulation joint control of Termica Colleverro S.p.A., a company constituting a joint venture, by way of purchase of shares.

2. The business activities of the undertakings concerned are:
   — for Avio: aero-engines components (both military and commercial), aero-derivative systems used in power generation, space propulsion, maintenance, repair and overhaul services,
   — for Cinven Group: private equity,
   — for Seci-E: development of industrial and commercial projects in the energy sector,
   — for Maccaferri Group: activities in different sectors such as (i) environmental engineering, (ii) real estate, (iii) construction and (iv) civil engineering,

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of Regulation (EC) No 139/2004. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2) it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (+32 22964301 or 22967244) or by post, under reference number COMP/M.5663 — AVIO/SECI-E/JV, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

---

(2) OJ C 59, 5.3.2009, p. 32.
2009 SUBSCRIPTION PRICES (excluding VAT, including normal transport charges)

<table>
<thead>
<tr>
<th>Publication</th>
<th>Languages</th>
<th>Prices</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU Official Journal, L + C series, paper edition only</td>
<td>22 official EU languages</td>
<td>EUR 1 000 per year (*)</td>
</tr>
<tr>
<td>EU Official Journal, L + C series, paper edition only</td>
<td>22 official EU languages</td>
<td>EUR 100 per month (*)</td>
</tr>
<tr>
<td>EU Official Journal, L + C series, paper + annual CD-ROM</td>
<td>22 official EU languages</td>
<td>EUR 1 200 per year</td>
</tr>
<tr>
<td>EU Official Journal, L series, paper edition only</td>
<td>22 official EU languages</td>
<td>EUR 700 per year</td>
</tr>
<tr>
<td>EU Official Journal, C series, paper edition only</td>
<td>22 official EU languages</td>
<td>EUR 70 per month</td>
</tr>
<tr>
<td>EU Official Journal, C series, paper edition only</td>
<td>22 official EU languages</td>
<td>EUR 400 per year</td>
</tr>
<tr>
<td>EU Official Journal, C series, paper edition only</td>
<td>22 official EU languages</td>
<td>EUR 40 per month</td>
</tr>
<tr>
<td>EU Official Journal, L + C series, monthly CD-ROM (cumulative)</td>
<td>22 official EU languages</td>
<td>EUR 500 per year</td>
</tr>
<tr>
<td>Supplement to the Official Journal (S series), tendering procedures for public contracts, CD-ROM, two editions per week</td>
<td>multilingual: 23 official EU languages</td>
<td>EUR 360 per year (= EUR 30 per month)</td>
</tr>
<tr>
<td>EU Official Journal, C series — recruitment competitions</td>
<td>Language(s) according to competition(s)</td>
<td>EUR 50 per year</td>
</tr>
</tbody>
</table>

(*) Sold in single issues: up to 32 pages: EUR 6
from 33 to 64 pages: EUR 12
over 64 pages: Priced individually.

Subscriptions to the **Official Journal of the European Union**, which is published in the official languages of the European Union, are available for 22 language versions. The Official Journal comprises two series, L (Legislation) and C (Information and Notices).

A separate subscription must be taken out for each language version.

In accordance with Council Regulation (EC) No 920/2005, published in Official Journal L 156 of 18 June 2005, the Institutions of the European Union are temporarily not bound by the obligation to draft all acts in Irish and publish them in that language. Irish editions of the Official Journal are therefore sold separately.

Subscriptions to the Supplement to the Official Journal (S Series — tendering procedures for public contracts) cover all 23 official language versions on a single multilingual CD-ROM.

On request, subscribers to the **Official Journal of the European Union** can receive the various Annexes to the Official Journal. Subscribers are informed of the publication of Annexes by notices inserted in the **Official Journal of the European Union**.

**Sales and subscriptions**

Priced publications issued by the Publications Office are available from our commercial distributors. The list of commercial distributors is available at:


---

**EUR-Lex** (http://eur-lex.europa.eu) offers direct access to European Union legislation free of charge. The **Official Journal of the European Union** can be consulted on this website, as can the Treaties, legislation, case-law and preparatory acts.

For further information on the European Union, see: http://europa.eu
Public Service Broadcasting and the Press

Ensuring Fair Competition in the Digital Age

Submission to the Minister for Communications, Energy and Natural Resources

Prepared by National Newspapers of Ireland (NNI)

4 August 2010
1. Introduction

The National Newspapers of Ireland (NNI) represents 18 national daily, Sunday and weekly newspapers and 35 local and regional newspapers with a combined weekly circulation of almost 6.5m copies. This means that over 330m newspapers are sold annually in Ireland. Their production, distribution and sale accounts for thousands of jobs and millions of euro in direct and indirect tax revenue for the country. Additionally, our members operate websites including online news sites as well as other special interest sites like property and recruitment.

Some 4000 people are employed by the newspaper industry in Ireland with many more part-time and spin-off jobs in related sectors such as advertising, PR, distribution and printing. NNI newspapers alone account for 470m turnover and an annual payment to the exchequer of 800m in taxes.

Newspapers – national, regional and local - are a major contributor to the cultural, social, economic, intellectual and political life of Ireland. The free flow of information of all kinds is clearly critical to the functioning of Ireland as a modern democracy where freedom of expression is fully safeguarded. Newspapers provide the diverse and insightful news and analysis necessary to inform citizens and foster the democratic debate. They are, together with other media, guarantors of an objectively informed public and of democracy.

Newspapers have been, and remain, a vibrant part of Irish culture and a cornerstone of democracy. However, they face specific challenges as they enter into the Digital Age.

- **Newspapers in the digital world.** Newspapers have had to adapt to the digital world and address the thorny issue of generating revenue from electronic content, in particular in difficult economic times. In doing so, they compete for readers and advertising with other media, including broadcasters and aggregators.

- **Unfair competition from public-funded broadcasters.** A particular concern arises in relation to competition from RTÉ, which has gone far beyond the proper limits of its public service remit, by, for example, providing news on its website and on mobile screens free of charge, and by advertising in areas far removed from this remit. NNI maintains that this competition is manifestly unfair and that RTÉ should not be able to use public funding in a manner that adversely impacts on newspapers, and other non-publicly funded media. This requires, at the least, effective controls of RTÉ under the Broadcasting Act 2009 and a willingness of RTÉ to develop an effective policy to ensure fair trading vis-à-vis newspapers and other media.

In combating the present recession, all our members have had to implement wage cuts, redundancies and cost-cutting initiatives, but despite this we still face problems sustaining our business. Meanwhile, RTÉ enjoys a privileged position through its receipt of state funding.
NNI members would prefer not to receive government subsidies. However, if RTÉ is allowed to continue to provide news on its website and on mobile screens free of charge and to exploit this for increased advertising revenues, consideration should be given to providing a subsidy for newspapers to reflect the contributions that they make to the public good.

In this submission NNI first considers the place of newspapers in the digital world, and the importance of newspapers being able to obtain a fair remuneration for the costs of providing news, whether by subscription to web-sites or by advertising. It then describes how its efforts to compete in the new digital space are being frustrated by unfair competition by the main national public service broadcaster, RTÉ. NNI finally sets out a series of proposals for addressing such unfair competition.

NNI is aware of proposals by the Minister to appoint a Review Group to consider the public policy implications of changes in the media. NNI welcomes the commitment made by the Minister in Croke Park in April to have meaningful and effective consultation on the direction in which Ireland’s media is headed. NNI expects to take part in this consultation. However, it should not be forgotten that “in the here and now” Ireland’s newspapers are facing immediate challenges which can to a large extent be addressed by the proper and effective implementation of the existing legislation and competition (including State aid) rules.

2. Newspapers in the Digital World

There have been huge developments and changes in the media industry in the past ten years. This has clearly been the case for the accessing of news. In addition to the “traditional” media of printed paper newspapers, television and radio, a consumer can get a quick overview of a story through mobile communications or view the story on-line (and even share comments with other readers).

Seen from the perspective of newspaper publishers, the novel means of accessing news has opened up a whole new realm of competition. The traditional physical newspaper is no longer the only option. There are now numerous online news sites of various newspaper titles (including the news sites of NNI titles) as well as websites that provide a news service with information taken from the news sites (such as those operated by Google and eircom). Broadcasters have entered the on-line market as well, providing written news content, as well as video. RTÉ and TV3 each have a website, as does the BBC. All these news providers compete for readers/viewers and advertising in this digital space. This is, as the Minister has rightly noted, driven by the consumer, availing of new (including mobile) and increasingly interactive technologies.

Google is currently being investigated by the Italian Competition Authority and the European Commission in respect of its alleged manipulation of search results, with newspaper publishers arguing that their advertising revenues have been adversely affected.
The rapidly growing importance of this sector is shown in a recent PWC Report on online advertising spending, commissioned by IAB Ireland, the trade association for the Irish online advertising industry. Last year, the value of the online advertising market in the State amounted to nearly 1,000 million, representing 10% of the total advertising spend, and this is projected to grow by 10% this year.

This is indeed a fast-moving world. In Ireland, the Irish Independent launched its app for the iPhone in October 2009 and the Irish Times launched its apps earlier this year. In contrast to these apps, which are or are to be paid for, RTÉ has a number of free apps which it introduced in January. Competition in the market will become more intense, and more unfairly skewed in favour of RTÉ, with the recent decision by Vodafone to make the iPhone available to its customers.

Newspaper publishers have made significant investments to keep pace with the huge developments and changes in the media industry in the past ten years. Irish publishers have invested in staff development and training to provide the reader with the highest quality editorial and journalism. Investment in production methods and delivery allows the reader access to a better quality print and digital product.

The Irish publishers have, of course, responded in different ways to these challenges. Overall, however, they have been concerned to ensure that the diverse and insightful news and analysis that they provide in their printed newspapers at considerable cost is reflected in their news websites and in their mobile offering. To maintain this depth of analysis and insight is seen as key to the success of newspapers in the digital space.

The ability to generate reader and advertising revenue is critical to success in this market. Newspapers can do, and have done, much to improve their competitive offering. However, they face huge difficulties in asking readers to pay for content where a State-funded competitor is able to provide free on-line and mobile content. Their ability to attract advertising revenue is also diminished where that State-funded competitor is able unfairly to attract advertising spend.

These problems are not limited to Ireland. Concerns about unfair competition from State-funded broadcasters have emerged in a number of other EU Member States. In the UK, for example, the Newspaper Publishers Association last year urged the BBC Trust to block the BBC from launching iPhone apps and the BBC Trust asked for the launch to be delayed pending its review. Regrettably the BBC Trust has recently decided to approve these plans for BBC news, sport and iPlayer without the need for a public value analysis, but at least concerns by the print media were given an airing. In any case, the UK Culture Secretary has recently called for “clearer red lines” around the BBC’s website to allow competitors that depend on public revenue to survive.

---

In Belgium, the JBF (Belgian French-language newspapers) has asked the public broadcaster RTBF to desist from written press activities on-line and the placing of related advertising which the JPF argues are not part of the RTBF remit. Both of these complaints, and others, raise important competition and State aid issues which are all relevant to the position in Ireland.

**Competition from Publicly-Funded Broadcasters**

News has to be paid for. If Irish newspaper publishers are to succeed in the new digital markets, they need to be able to charge the reader for news and generate a large readership base in order to be able to attract advertising. Their chances of successfully doing so have been considerably damaged by the activities of RTÉ as a State-funded broadcaster.

NNI does not in principle challenge RTÉ’s public service mission. However, RTÉ’s public service activities must be limited to what is inherent in its mission and it must not be able to leverage its privileged position in the competitive arena, in particular the “on-line” space which is occupied by broadcasters, newspaper publishers and others.

NNI has a number of concerns, covering advertising, charging for content and the need to secure a level playing-field.

**Advertising**

RTÉ’s news content, gathered as part of the public service remit and thus funded by the State, is utilised on its many platforms to generate further revenues from the sale of advertising.

RTÉ.ie includes specialised sections devoted to advertising, including RTÉ Property, RTÉ Classifieds and RTÉ Motors. These are areas which are far removed from its public service remit. Nevertheless, RTÉ is enabling users of its news website to link to these areas, and hence makes itself more attractive to advertisers.

There is also a concern about RTÉ’s ability to offer multi-media advertising solutions, enabling advertisers to use television, radio, on-line and print media. RTÉ offers companies a very effective multi-media service – Cross Media Solutions. This was described by one media agency director, in an interview in Medieweek magazine: “RTÉ is unique in that it has such strong presence in TV, radio, online and press.” Speaking about a specific deal, he said: “To draw on all four of those mediums meant the deal delivered value far in excess of the investment.” In the words of its Manager, commenting on a recent deal agreed with Airtricity: “RTÉ is Ireland’s cross-media leader. With 2 national television channels, 11 radio stations,
Ireland's number one media website and the country's largest selling magazine, RTÉ can work with brands on integrated properties more effectively than any other broadcaster. I'm delighted to see Airtricity using RTÉ's platforms so proactively and so effectively.” No other operator, whether independent broadcaster or newspaper publisher, is able to offer such a package to advertisers.

RTÉ also “plugs” its on-line offerings in its mainstream public service broadcasting. It is not clear to NNI whether this is being paid for, and in particular how the public service and commercial elements are distinguished for accounting purposes.

At a more general level, NNI would question the ability of RTÉ to engage in advertising in connection with its public service remit. It seems in principle wrong that a publicly funded body should be able to advertise, at least to the extent that occurs with RTÉ. In addition to ordinary “break” advertising, RTÉ generates further advertising revenue by selling sponsorship packages, advertising around the programme and viewer competitions. The concept of “one for everyone in the audience” is commonplace but it is almost impossible in this context to distinguish the public service elements from those which are commercial.

This unfairness will only increase if RTÉ daily and hourly limits are increased above the already generous limits. The BAI has recently increased the limits for commercial broadcasters, in a manner which inexplicably failed to take into account the impact on other sectors of Irish media, including newspapers. Were RTÉ to seek parity, and the Minister give approval, this would have catastrophic effects on these other sectors.

All this creates an unlevel playing field favouring RTÉ, especially in the on-line news market where RTÉ directly competes with other media. Irish newspapers seeking to enter the digital domain, and fully develop their presence there, are confronted by unfair competition from the State broadcaster.

**Charging for Content**

In light of the high levels of actual and future investment needed to create a sustainable digital offering, NNI publishers would like to be able to consider moving towards charging for certain levels of online content. This revenue stream is increasingly important given the decline in advertising revenues, of 40% in the Irish case.

Charging for content is thus a natural progression for newspaper publishers. In the absence of a just return, there is a risk that quality journalism for the benefit of society as a whole will be devalued in the emerging information society. Publishers who have invested huge sums in committing to standards and codes of practice, developing editorial systems, as well as training and retaining their journalistic staff, honing their skills and expanding their knowledge, are keen to ensure that journalism and the great tradition of writing in Ireland retains its value, whether the product is in print or digital. This all needs to be paid for.
However, this is not an opportunity that Irish publishers can properly exploit because RTÉ can offer consumers free access to comparable news content on www.rte.ie. Even where publishers feel they can charge – as may be the case for e-versions of an entire newspaper or for iPhone apps – their freedom to charge for news in general is unfairly constrained by the fact that RTÉ is able to offer its on-line news and apps for free.

Free content means more traffic to the site, more traffic means the opportunity to sell more advertising and generate more income. It is a vicious circle that is greatly distorting the market and damaging non-State supported competitors.

Further, the extensive content written specifically for RTE.ie and published on its site should not be part of RTÉ's public service remit and is another example of RTÉ's expansion into areas - like publishing - that compete directly with other media who do not enjoy a state subsidy.

**Securing a Level Playing Field**

The Amsterdam Protocol recognises the competence of Member States to fund public service broadcasters in order to satisfy a number of clear objectives. However, State aid rules require that the public service remit of such broadcasters be properly defined and that there be fair competition with other players in the market place. This is clear from the 2008 Commission Decision on the state financing of RTÉ and TG4,¹ and, more recently in the Commission's 2009 Communication on the application of State aid rules to public broadcasting.

The need to ensure that newspapers and other print media are not unfairly disadvantaged in competing in the new digital environment has been made clear in the Commission's 2009 Communication on the application of State aid rules to public broadcasting which states:

"Newspaper publishers and other print media are also important guarantors of an objectively informed public and of democracy. Given that these operators are now competing with broadcasters on the internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models...Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment."

The Communication also makes it clear that a public service broadcaster carrying out commercial activities must respect market principles. In terms:

"Member States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market.

economy principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding”.

Indeed, in the recent Commission Decision in relation to the annual financing of Dutch public service broadcasters, the Commission stated:

"An uncontrolled expansion of the public service broadcasters’ offer to all kinds of media activities in disregard of the Amsterdam Protocol would seriously harm media pluralism in the Netherlands and elsewhere. This would be in conflict with the common interest of Europe to maintain a pluralistic media landscape in the fast developing media environment.

The regime set up under the Broadcasting Act 2009 is intended to reflect commitments made by the Government to the European Commission in early 2008 when the latter closed its investigation of the RTÉ funding arrangements.

It is essential that the provisions of the Act in relation to the scope of the public service remit and the conduct of RTÉ’s commercial activities are properly applied and that there is full transparency in this regard. In this respect, NNI calls for a clear divide to be made between public service and commercial activities. There is a continued lack of transparency between RTÉ’s public service remit and its commercial activity. Full regard must be had to the 2009 Guidelines and to the evolving practice of the European Commission in this area.

3. The Way Forward

As seen above, NNI has a number of concerns about the unfair competition it faces from RTÉ. Some of these concerns can be addressed only by more or less radical changes in broadcasting policy, perhaps necessitating amendment of the Broadcasting Act 2009.

Other concerns can in NNI’s view be immediately addressed by a rigorous application of the Act to RTÉ consistent with the letter and spirit of the EU competition rules. This will require the Minister, the BAI and, not least, RTÉ itself to engage fully in defining the proper scope of the public service remit, to ensure that public funding is only used to support the public service remit and to secure fair competition. There must also be full transparency.

NNI does not, of course, seek anything that would prejudice the independence of RTÉ in the pursuance of its objects (see Section 98 of the Act), and in particular its editorial freedom. However, quite apart from the specific provisions of the Act, EU State aid rules require that State-funded broadcasters be subject to proper and effective supervision to ensure that their publically-funded status does not allow them to compete unfairly with their competitors. RTÉ does not have a licence to compete unrestrainedly with its competitors in the digital space.

1 State aid E 4/2005 - Ireland (C2008) 745 final
Doubtless some of these issues will be addressed in the forthcoming review. However, these issues need to be addressed within a short time span and cannot be "kicked into the long grass". NNI therefore calls upon the Minister to address the following as a matter of urgency.

**Advertising**

NNI strongly believes that RTÉ should not, as a publicly-funded broadcaster, be able to operate unhindered in the advertising market, whether in connection with its public service remit or in exploiting commercial opportunities in pursuit of its public service objects. The Minister needs to make it clear that the freedom that RTÉ seems to have arrogated to itself is not inherent in its public service remit or implied in the dual funding regime. This applies not only to the time-limits for advertising in its public service broadcasts, but also to the widespread in-programme advertising. It should not be able to offer multi-media advertising solutions which allow it to offer an advertising package straddling its public service media offerings (television and radio) and its commercial media offerings (on-line and print media). The public service arm of RTÉ must not be allowed to subsidise the commercial arm. It is, in this respect, crucial that the commercial "value added" is taken into account in ensuring that public service and commercial elements deal with each other at arms’ length.

NNI believes that there is an urgent need to amend Section 106 of the Act to clarify the limits of RTÉ’s freedom in the area of advertising. Given its privileged position as a public service broadcaster, it should not be able to offer advertising at will in carrying out its public service remit, where this has a clear impact on other media. The "Late Late Show", for example, should not be used as a vehicle for the profligate advertising ("one for everybody in the audience") that has developed.

NNI requests that the Minister makes it clear that he will not give approval to raising any daily or hourly limits in the provision of broadcast services.

It is also necessary to examine practices such as advertising RTÉ’s website and print activities during public service programming in order to ensure that these services are being provided at arms’ length and on commercial terms (see Section 108(2) of the Act).

NNI believes that other practices are incapable of being remedied by effective arms’ length mechanisms and that they are by their nature inimical to fair competition. This is the case, for example, for cross-media packages (which by their nature can only be offered by RTÉ) and competitions launched in public service programming requiring entrants to refer to the RTÉ Guide for information.

Even leaving aside the question of fair competition, NNI believes that RTÉ’s advertising in pursuing its commercial exploitation object goes beyond what is permitted under the Act. Section 114(1)(j) of the Act makes it clear that this object is limited to commercial
opportunities as may arise “in pursuit” of its various “public service” objects. Specialised sections in RTÉ’s website such as RTÉ Property, RTÉ Classifieds and RTÉ Motors do not arise in pursuit of its public service objects. The Minister must ensure that RTÉ does not act outside its statutory objects.

**Defining the Limits of RTÉ’s Public Service Remit and Commercial Activities**

The statutory definition of RTÉ’s public service remit is not very clear and the borderline between its public service remit and its commercial activities is likewise not clear. It is questionable whether the public service remit should cover on-line activity. In any case, RTÉ’s object of establishing a website in connection with its other public service activities should be strictly limited to those activities and it should not be part of its public service remit to provide an on-line written news service.

NNI believes to extend RTÉ’s public service remit to establishing and maintaining a website is not tenable in light of the competitive nature of the on-line news market. To enable RTÉ to receive funding for a news website means that all non-funded publishers of on-line news sites are facing unfair competition. The public service remit needs to be more clearly defined to make it clear that it does not cover on-line or mobile news provision. At the most, RTÉ’s public service on-line activities should be limited to TV and radio programming.

Even as matters stand, RTÉ’s object of establishing a website and teletext services in connection with its other public service activities should be tightly defined in accordance with the Act.

Section 114(1)(f) makes it clear that RTÉ is to exploit “such commercial opportunities as may arise in pursuit of” its public service objectives. NNI believes that this should be defined to exclude commercial activities which are not driven by its public service objectives.

The express (and implied) powers of RTÉ are limited to the objects stated in the Act. The onus is on RTÉ to show in an open and transparent manner:

- that website activity as part of its public service remit is appropriately connected with other elements of that remit; and
- that its current and proposed commercial activities are “in pursuit” of its public service remit.

NNI submits that the Minister has the overall responsibility to supervise RTÉ to secure compliance. It cannot be left to RTÉ to offer new services in the digital space without proper scrutiny. In this context, it is difficult to see how RTÉ has the power to provide mobile communications services (including “apps”), as it has since January 2010, under the current statutory provisions.

1 Emphasis supplied.
The Public Service Statement

RTÉ’s forthcoming public service statement should include a list of current and prospective activities covered by its public service remit. The Minister should not grant his consent unless he is satisfied that this list conforms to the Act.

RTÉ is required to prepare, not later than 12 months after passing of the Act, and every five years thereafter, a public service statement setting out the principles to be observed, and activities to be undertaken, in order to fulfil its public service objects.

The Minister must, after consulting the BAI and reviewing RTÉ’s public service statement against its public service objects, decide whether or not to grant consent to the statement. NNI submits that the Minister must, in deciding whether or not to grant consent, consider whether RTÉ has properly delimitated the scope of activities covered by its public service objects.

Transactions between RTÉ’s Public Service and Commercial Activities

More active and effective supervision is needed to ensure that RTÉ respects market principles, including the requirement that transactions between the public service and commercial elements of RTÉ are conducted at arms’ length.

One year after the Broadcasting Act’s entry into force – and well over two years after the settlement of the State aid investigation – the factual position as regards transactions between RTÉ’s public service and commercial activities remains opaque.

NNI believes that Section 108(2) of the Act can operate only if RTÉ precisely defines what falls within its public service remit, on the one hand, and its commercial activities, on the other.

It is important that any structure enabling RTÉ’s public service and commercial elements to behave vis-à-vis each other at arm’s length and commercial terms should be clearly and transparently defined.

In order to secure maximum transparency and promote confidence that RTÉ is complying with the requirement to keep transactions and arrangements at arm’s length, NNI calls upon the Minister to direct the BAI Compliance Committee to report on compliance by RTÉ with the requirements of Section 108(2), with such report made public.

Combating Other Anti-Competitive Practices

The 2009 Commission Guidelines require not only that Member States ensure that public service broadcasters respect the arms’ length principle, but also that they undertake their commercial investments in line with the market economy principle
and do not engage in anti-competitive practices with regard to their competitors. The latter two concerns need to be fully addressed by the Minister and, where applicable, the Competition Authority or European Commission.

Although Section 104 of the Act does contain provisions relating to the establishment of subsidiaries and joint ventures by RTÉ, it does not cover all commercial investments and does not require compliance with the market economy investor principle. NNI believes that the Act may need to be amended in this regard. In the meantime, it asks the Minister to make it clear that he will expect RTÉ to conform this requirement.

The Act does not appear to cover the question of anti-competitive practices falling outside the framework of “transactions or arrangements” as between public service and commercial activities. NNI is aware that the Competition Authority and the European Commission each has powers to investigate alleged breaches of competition rules, that the latter may impose sanctions for breach, and that the Irish courts may adjudicate on alleged breaches. The NNI naturally reserves its right to complain to the relevant competition authority where it considers that RTÉ is in breach of the competition rules. However, NNI believes that the proper application of the State aid rules cannot be made dependent on complaints being made and taken up by competition authorities. The Minister also has a duty to ensure that RTÉ does not engage in anti-competitive practices. If the Minister considers that he lacks such powers, consideration could be given to amending the Act to specify the Minister’s powers. In this regard, Section 112 could be amended to extend the scope of the Code of fair trading practice beyond the commissioning of programming material from independent producers to cover fair trading generally.

The Section 109(9) Statement

RTÉ must make it crystal clear what is received and spent in exploiting its commercial opportunities as distinct from its public service objects. The Minister should issue directions on the format of RTÉ’s annual statement and the BAI asked to prepare general guidance.

Section 109(9) requires RTÉ to make an annual statement to the Minister in respect of total revenue and costs and to distinguish between monies received/spent in pursuance of its public service objects, on the one hand, and in pursuance of its exploitation of commercial opportunities object, on the other. To ensure transparency, the Minister should issue directions on the format of a Section 109(9) statement.

The Minister should also exercise his powers to direct the BAI to prepare and publish general guidance on the cost accounting principles and methods by which costs and revenues have been assigned to the various activities. In due course, the Minister should also direct the BAI to review and report on the extent to which a Section 109(9) statement complies with any guidance issued by the BAI.
Ministerial Consent for New Services

RTÉ should not be permitted to offer additional or ancillary services without a full public value test being undertaken. There should be open public consultation and the strict limits of the Amsterdam Protocol must be observed.

RTÉ is required to obtain the consent of the Minister in order to pursue the objects in Section 114(g) and (h), or to undertake ancillary services.

NNI is not sure that, as it is currently worded, Section 103 of the Act provides an adequate guarantee that the new services will satisfy the requirements of the Amsterdam Protocol. There is no requirement that the Minister should consult openly and publicly. Although the Minister is undoubtedly required to consider the requirements of the Amsterdam Protocol amongst a number of matters (see Section 103(8) (d), he is not required to refuse consent where these requirements are not satisfied.

NNI ask that the Minister consider proposing an amendment to the Act to bring Section 103 into line with the requirements under EU State aid rules. In the absence of such an amendment, it would ask that the Minister make a statement committing himself to consult openly and publicly (in acting under Section 103(4)(a)) and that there will be no consent if there is a failure to meet the requirements of the Amsterdam Protocol.
State financing of RadioTeilifís Éireann (RTÉ) and Teilifís na Gaeilge (TG4)

Dear Madam/Sir,

On 27 February 2008, the Commission adopted the above mentioned decision and closed the investigation under EU state aid rules into the financing regime of the Irish public service broadcasters RTÉ and TG4 following commitments from Ireland to amend the regime.

According to paragraph 189 of the mentioned decision, Ireland should submit the final law to the Commission. In these proceedings, however, it appears that Ireland has so far not submitted the final law to the Commission, and thus your authorities are reminded to do so within 20 working days.

Yours faithfully,

Wouter PIEKÉ
Head of Unit

Contact person: Cecilia Nilsson Bottka, Email: Cecilia.Nilsson@ec.europa.eu
Telephone numbers: +32 2 298 76 49

Please specify the name of the case and the case number in all correspondence.
Des

Not sure about this. The law in question would appear to be the Broadcasting Act 2009 and I find it hard to think that we would not have submitted it to the Commission once it was enacted. As a start, I'll ask Kevin and Bill if they recall doing that.

Regards

Éanna

From: Des.Hackett@dfa.ie [mailto:Des.Hackett@dfa.ie]
Sent: 28 October 2010 15:59
To: Eanna O'Conghaile; Paul Mulqueen

Are we in trouble here or was there just a failure to notify CION?

Regards

Des

From: #BRUSSELS PR State Aid
Sent: 28 October 2010 15:53
To: Hackett Des BRUSSELS PR

Des

please see attached document. CION have seek a response within 20 working days from the date of the letter.

Regards

Fionnuala

From: Stateaidgreffe@ec.europa.eu [mailto:Stateaidgreffe@ec.europa.eu]
Sent: 28 October 2010 16:29
To: #BRUSSELS PR State Aid
Subject: MS - D/9843 - E4/2005*IE*REM - State aid financing of RTE and TNAG (TG4)

Dear Sir, Dear Madam,

Please find enclosed doc. D/9843

Kind regards,
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.

----------------------------------------

Tabhair aire:

Tá an r-phost seo faoi phribhléid agus faoi rún.
Mura tusa an duine a bhí beartaithe leis an teachtaireacht seo a fháil, scríos é le do thoil agus cuir an seoltóir ar an solas.
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 víoras leis an bpatrúnchomhbad atá in Ósáid faoi láthair.
Ní féidir a ráthú leis seo áfach nach bhfuil ábhar mailíseach ann.

----------------------------------------
Hi Pauline – can you send on this response to a recent letter from CION through the SANI system?

Thanks

Des
4th November, 2010

Mr Wouter Pieke,
Head of Unit
Markets and Cases II: Information, Communication and Media
DG Competition
European Commission
B-1049 Brussels
Belgium

State financing of Raidió Teilifís Eireann (RTÉ) and Teilifís na Gaeilge (TG4)

Dear Mr. Pieke,

Thank you for your letter dated October 28th, 2010 regarding the state financing of Raidió Teilifís Eireann (RTÉ) and Teilifís na Gaeilge (TG4).

I enclose for your attention a copy of the Broadcasting Act, 2009 (Number 18 of 2009). The Broadcasting Act 2009 sets the regulatory framework for broadcasting services in Ireland. It consolidates all Irish broadcasting content related legislation in a single Act and also transposed the traditional broadcasting aspects of the Audiovisual Media Services Directive.

I also enclose for your attention a copy of our letter to the Commission dated 30 January 2008 which set out further information regarding the regulatory framework in Ireland in respect of public service broadcasting.

I trust that the above will assist in providing the clarification which you require. If we can be of any further help please do not hesitate to contact me.

Yours sincerely

Des Hackett
Communications Attaché
Tel: +32-2-282-3234
GSM: +32-496-59 77 89
des.hackett@dfa.ie
Joe,

Please expedite.

Relevant attachments appended.

Paul

---

From: Eanna O'Conghaille
Sent: 03 November 2010 17:45
To: Paul Mulqueen; Joe Meeady
Subject: RE: Wouter Pieke .doc

Paul

That's perfect. Send it on.

Éanna

---

From: Paul Mulqueen
Sent: 02 November 2010 17:30
To: Joe Meeady
Cc: Eanna O'Conghaile
Subject: Wouter Pieke .doc
Importance: High

Joe,

Some minor changes. Can you confirm that you have checked the files and that the Department has not sent this already. Once Eanna has cleared we can forward to Des for onward transmission to the Commission. I believe it would be appropriate for the Perm Rep to sign.

Paul
Brief on
NNI Submission to the Minister for Communications, Energy and Natural Resources

Public Service Broadcasting and the Press
Ensuring Fair Competition in the Digital Age

1. Introduction

The National newspapers of Ireland wrote to the Minister on the 4th August 2010 enclosing a submission “Public Service Broadcasting and the Press - Ensuring Fair Competition in the Digital Age” and requesting a meeting.

The NNI submission indicated that it “deals with the immediate challenges facing the Irish newspaper industry”, vis-à-vis public service broadcasting, and indicated that these can be “addressed by the proper implementation of the existing legislation and competition (including State Aid) rules which is largely a question of compliance rather than policy”.

The covering letter indicated that the submission was also being submitted to other relevant Departments and agencies. NNI circulated the submission to Members of Dáil Éireann and Seanad Éireann on 15th September, 2010.

Chapter 2 summarises the NNI’s submission, and Chapter 3 addresses the issues raised in the submission.

2. Summary of NNI Submission

The NNI submission is structured on three main headings; “Introduction”, “Newspapers in the Digital World” and “The Way Forward”.

In summarising the submission this structure and its subheadings have been retained.

2.1. Introduction

NNI represents 18 national daily, Sunday and weekly newspapers and 35 local and regional newspapers. Some 4000 people are employed directly in the newspapers industry in Ireland. They have a combined turnover of €700m with an annual exchequer tax payment of €100m. Newspapers are a major contributor to the cultural, social, economic, intellectual and political life of Ireland.

Newspapers face specific challenges as they face the Digital Age including; generating revenue from electronic content and competing for readers and advertisers with other media including broadcasters and aggregators.
NNI maintain that they face unfair competition from public-funded broadcasters. Specifically NNI maintain that RTÉ goes beyond the limits of its public service remit by providing news on its website and on mobile screens free of charge. NNI calls for effective control of RTÉ under the Broadcasting Act 2009 and a willingness by RTÉ to develop an effective policy to ensure fair trading vis-à-vis newspapers and other media.

NNI indicate that they would prefer not to receive government subsidies but that consideration should be given to providing a subsidy for newspapers to reflect the contribution that newspapers make to the public good.

2.2. Newspapers in the Digital World

2.2.1. Introduction

NNI point out that there have been huge developments and changes in the media industry in the last ten years. Mobile communications and on-line have opened up a whole new means of accessing news. A recent PWC report indicated that the value of that sector in advertising spend is €100m or 10% of the total advertising spend.

Newspapers face huge difficulties is asking users to pay for content where RTÉ is able to provide free on-line and mobile content. iPhone apps highlight the fast pace and issues, vis-à-vis RTÉ offering free apps. NNI point out that this is not solely an Irish problem.

2.2.2. Competition from Publicly-Funded Broadcasters

NNI claim that RTÉ’s on-line activities have damaged their chances of successfully charging for on-line content. NNI do not challenge RTÉ’s public service mission but insist that its activities on-line must be limited to its mission. NNI’s concerns cover advertising, charging for content and the need to secure a level playing field.

2.2.3. Advertising

NNI maintain that RTÉ’s news content is used to generate further revenues on-line. Examples include RTÉ property, RTÉ Motors, and RTÉ classifieds.

NNI also have concerns about RTÉ’s ability to use multi-media advertising solutions - Cross Media Solutions - utilising TV, radio, on-line, and press. NNI also has issues with RTÉ plugging its on-line offerings in mainstream public service broadcasting. NNI asks for clarification as to how this is distinguished for accounting purposes.

NNI specifically objects to:

- any increase in the daily and hourly limits of advertising minutage given to RTÉ.

- sponsorship packages and “one for everyone in the audience” advertising.
• the recent BAI sanctioned increase on advertising limits for commercial broadcasters.

NNI claims that RTÉ's offering in the on-line market amounts to unfair competition.

2.2.4. Charging for content

NNI indicates that it would like to like to be able to consider moving towards charging for certain levels of on-line content. However, NNI maintain that this is not an opportunity that NNI can exploit as RTÉ offer consumers free access to comparable news content on-line and via apps including material specifically written for their on-line offerings.

2.2.5. Securing a level playing field

NNI outline the European framework for Public Service Broadcasters namely, the "Amsterdam Protocol" and the "Communication from the Commission on the application of State Aid rules to public service broadcasting". NNI outline the implementation of these rules and the resolution of the Irish PSB State Aid case via the Broadcasting Act 2009.

NNI seek the proper application of the Broadcasting Act 2009 and a clear divide between commercial and public service activities by RTÉ and ongoing regard to European practice in this area.
2.3. NNI - The Way Forward

NNI calls for action in a number of areas including rigorous application of the Broadcasting Act 2009, consistent with EU competition rules, and also amendment to the Act.

Specifically NNI calls for, a clear definition of RTÉ’s remit, greater transparency, fair competition and supervision, and for the Minister to address the following as a matter of urgency.

2.3.1. Advertising

NNI believes that RTÉ should not be allowed to operate unhindered in the advertising market and that is should be regulated in relation to time, but also its in-programming advertising, its website and print activities, and cross-media advertising straddling various platforms (the latter NNI maintains is inimical to fair competition). NNI maintain that these activities should be operated in compliance with S 108(2) of the Act. NNI maintain that the public arm of RTÉ should not be allowed to subsidise the commercial arm of RTÉ.

NNI specifically request that the Minister not give approval to an extension of RTÉ’s daily or hourly advertising limits.

NNI maintain that specific activities like RTÉ property, RTÉ Motors, and RTÉ classifieds, go beyond what is permissible under the Act S.114(1)(j)² and that the Minister must ensure that RTÉ does not operate outside its statutory objects.

---

¹ S. 108.—(1) The commercial activities undertaken by a corporation in pursuance of its exploitation of commercial opportunities object shall—

(a) be operated in an efficient manner so as to maximise revenues, and
(b) be used to subsidise its public service objects.

(2) All transactions or arrangements entered into by a corporation as between the activities arising from—

(a) its public service objects, and
(b) its exploitation of commercial opportunities object, shall be made at arm’s length and on commercial terms.

(3) On the direction of the Minister, the Compliance Committee shall prepare and submit to the Minister a report on compliance by the corporation with the requirements of subsection (2).

² S. 114.—(1) The objects of RTÉ are—

(a) to establish, maintain and operate a national television and sound broadcasting service which shall have the character of a public service, 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,
(b) to establish and maintain a website and teletext services in connection with the services of RTÉ under paragraphs (a), (c), (d), (e), (f), (g), (h) and (i),
(c) to establish and maintain orchestras, choirs and other cultural performing groups in connection with the services of RTÉ under paragraphs (a), (f), (g) and (h),
(d) to assist and co-operate with the relevant public bodies in preparation for, and execution of, the dissemination of relevant information to the public in the event of a major emergency,
2.3.2. Defining the Limits of RTÉ’s Public Service Remit and Commercial Activities

NNI maintain that the statutory definition of RTÉ remit is not clearly defined and that the line between its public service remit and commercial activities is also unclear. NNI maintain that RTÉ’s object of establishing a website in connection with its other public service activities should be strictly limited and that it should not be part of its remit to provide an online written news service and that teletext services should be tightly defined.

NNI submits that the Minister has overall responsibility to supervise RTÉ to ensure compliance.

2.3.3. The Public Service Statement

NNI maintain that the forthcoming public service statement should include a list of current and prospective activities covered by RTÉ’s public service remit and that the Minister should not grant consent unless the activities are covered by the Act.

2.3.4. Transactions between RTÉ’s Public Service and Commercial Activities

NNI maintain that more active supervision of RTÉ is required to ensure that RTÉ respect market principles including the requirement that transactions between the public service and commercial elements of RTÉ are conducted at arm’s length.

NNI submits that the Minister request the BAI compliance committee to report on compliance by RTÉ with the requirement of Section 108(2) of the Act.

(e) to establish and maintain archives and libraries containing materials relevant to the objects of RTÉ under this subsection,
(f) to establish, maintain and operate a television broadcasting service and a sound broadcasting service which shall have the character of a public service, which services shall be made available, in so far as RTÉ considers reasonably practicable, to Irish communities outside the island of Ireland,
(g) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish, maintain and operate, in so far as it is reasonably practicable, community, local, or regional broadcasting services, which shall have the character of a public service, and be available free-to-air,
(h) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish and maintain non-broadcast non-linear audio-visual media services, in so far as it is reasonably practicable, which shall have the character of a public broadcasting service (such consent not being required in respect of such services which are ancillary to a broadcasting service provided under paragraphs (a), (d), (f) and (g)),
(i) to establish, maintain, and operate one or more national multiplexes,
(j) so far as it is reasonably practicable, to exploit such commercial opportunities as may arise in pursuit of the objects outlined in paragraphs (a) to (i).
2.3.5. Combating other Anti-competitive practices

NNI maintains that the “Communication from the Commission on the application of State Aid rules to public service broadcasting” requires, not only that public service broadcasters respect the arm’s length principle, but also that they undertake their commercial investments in line with the market economy principle and do not engage in anti-competitive practices with regard to their competitors. NNI maintain that the latter needs to be fully addressed by the Minister and where applicable the Competition Authority or the European Commission.

NNI maintains that while the Act does not require compliance with the market economy investor principle, they believe that the Act may need to be amended in this regard.

NNI maintain that the Minister has a duty to ensure that RTÉ does not engage in anti-competitive practices.

2.3.6. The Section 109(9) statement - Accounts

NNI maintains that RTÉ must make it crystal clear what is received and spent in exploiting its commercial opportunities as distinct from its public service objects.

NNI maintain that the Minister should issue directions on the format of RTÉ’s annual statement and the BAI asked to prepare a general guidance in line with Section 109(9) of the Broadcasting Act 2009.

2.3.7. Ministerial consent for new services

NNI maintain that RTÉ should not be permitted to offer additional ancillary services without a full public value test being undertaken. S. 114(g) and (h) and S. 103(8)(c).

---

3 Communication from the Commission on the application of State aid rules to public service broadcasting. C 257/1. 27/10/2009.
4 S. 69. “The Commission considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm’s length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.”
5 S. 93. “When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm’s length relations with these subsidiaries. Member States shall ensure that public service broadcasters respect the arm’s length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.”
6 S. 109. (9) Without prejudice to subsection (3) and section 110, a corporation shall as soon as may be after the end of each financial year, send to the Minister—
(a) a statement of the use it has made, of the monies paid to it under section 123 in that financial year, in pursuance of its public service objects, and
(b) a statement in respect of the total revenue and costs derived by the corporation in that financial year distinguishing between monies received or expended on—
(i) activities in pursuance of its public service objects, and
(ii) activities in pursuance of its exploitation of commercial opportunities object.
3. **Addressing NNI’s submission**

3.1. **General Overview**

The analysis of the submission made by NNI indicates that majority of the issues raised are similar to those raised during the RTE State Aid case resolved in 2008. These are itemised below.

NNI’s covering submission states that their concerns can be “addressed by the proper implementation of the existing legislation and competition (including State Aid) rules which is largely a question of compliance rather than policy”.

The specific issues raised have been itemised below with a note detailing the Sections of the Broadcasting Act 2009 where they are implemented and details of the up to date position.

RTÉ has separately confirmed in writing to the Department that its online activities are in compliance with the regulatory framework.

Further macro issues on media policy raised are suitable for consideration in the Minister’s proposed digital media review details of which are outlined below. The NII have indicated a willingness to participate in this review.

3.1.1. **Media Review**

The Minister has indicated that he intends to establish a deliberative forum that will examine how Ireland can best embrace the advent of the digital era.

The motivation for such a forum is to try to expand the digital capabilities of Irish people in order to develop a global market in the trade of digital services and harness the wider economic, social and cultural benefits of ICT.

Action it is anticipated will be needed in six critical areas to meet this objective, namely;

1. Development of our digital skills
2. Improvement in our broadband infrastructure
3. Ensuring security and privacy in the use of digital information

---

7 **114.**—(1) The objects of RTE’ are— (g) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish, maintain and operate, in so far as it is reasonably practicable, community, local, or regional broadcasting services, which shall have the character of a public service, and be available free-to-air, 

(h) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish and maintain non-broadcast non-linear audio-visual media services, in so far as it is reasonably practicable, which shall have the character of a public broadcasting service (such consent not being required in respect of such services which are ancillary to a broadcasting service provided under paragraphs (a), (d), (f) and (g)),

8 **103.**— (8) The Minister, in deciding on the public value of a proposal under this section shall consider the following matters— (c) the costs and revenues associated with the proposal and any impact on existing public service provision
(4) Increasing the use of digital technologies on the public service
(5) The creation of a single European digital market
(6) Ensuring the right public policy, regulatory and market conditions to encourage the development of the internet in Ireland.

The Minister envisages that a small group would set the agenda for the subsequent forum and highlight issues for priority and immediate consideration including:

(1) The potential for new media platforms and their effect on traditional media outlets, and the values we want to protect and promote in this changing media environment
(2) How to encourage the active and wide participation of a digitally-enabled citizenry in the online revolution as well as how to promote the production of local digital content using new technologies
(3) The role of Comreg, BAI and government businesses and civic society in the regulation and development of converging digital industries

The Minister hopes that the forum will adopt a flexible, innovative and open approach as the questions that prioritise the questions that need to be asked about the regulation and development of new digital technologies.

3.2. The Broadcasting Act 2009

The majority of the issues raised by NNI reflect issues where agreement was reached with the EU Commission in the settlement of the RTÉ State Aid case in 1999. The implementation of this agreement is reflected in the provisions of the Broadcasting Act 2009.

The Broadcasting Act 2009 sets out, inter alia, the principal objects and associated powers and obligations of the public service broadcasting corporations, RTÉ and TG4. The Act also imposes extensive reporting requirements on the two corporations in regard to the pursuit of their objects and compliance with relevant obligations. These reporting requirements are supplemented by ex-ante and ex-post Ministerial and regulatory oversight mechanisms that are being used, when and as appropriate, in accordance with the provisions of the Act.

Of the items raised by NNI the following fall into this category and the commitment given to the EU Commission is outlined, the Section of the broadcasting Act where this is implemented and a general outline on the current position;

- Advertising
  o The Irish Authorities committed to introduce a requirement for Ministerial consent, following consultation with the BAI, in respect of alterations in the total fixed time for Public Service Broadcasters to broadcast advertisements. This commitment is implemented under Section 106(3)9 of the Broadcasting Act 2009. The total daily time for broadcasting advertisements and the maximum period given to

---

9 106.— (3) Subject to the requirements of section 41(2), a corporation providing a broadcasting service under this Part shall, subject to the approval of the Minister following consultation with the Authority, fix—
(a) the total daily time for broadcasting advertisements, and (b) the maximum period given to advertisements in any hour.
advertisements in any one day for RTÉ and Téirlís na Gáilge is a matter for the Minister following consultation with the BAI.

RTÉ have written to the Minister requesting an increase in their advertising minutage, Section 106(3) of the Broadcasting Act, 2009 requires that the Minister following consultation with the authority approve or otherwise of such requests, the matter is currently with the BAI.

• Public Service Remit of RTÉ
  o The Irish authorities committed to determine the Public service remit of RTÉ and Téirlís na Gáilge by enumerating their respective objects and duties in broadcasting legislation and to limit the use of public funding by RTÉ and Téirlís na Gáilge to the achievement of such public service objects and duties. This commitment is implemented under Sections 114 and 118 of the Broadcasting Act 2009.

• Public Service Broadcasting Statement
  o The Irish authorities committed to introduce a requirement for RTÉ and Téirlís na Gáilge to prepare and publish a public service broadcasting statements 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.

This commitment is implemented under Section 101 of the Broadcasting Act 2009. Section 101(1) of the Broadcasting Act, 2009 provides that RTÉ, following a public consultation, shall prepare not later than 12 July 2010 (12 months after the passing of the Act) a public service statement setting out the principles to be observed and activities to be undertaken by it. RTÉ submitted their public service statement on July 12, 2010 in line with the requirements of the Act.

Section 101(3) of the Broadcasting Act, 2009 requires The Minister to consult with the Broadcasting Authority of Ireland (BAI) prior to my granting of consent to the public service statement. A submission from the BAI in respect of this consultation is expected shortly.

• Exploitation of Commercial opportunities
  o The Irish authorities committed to introduce a requirement for RTÉ and Téirlís na Gáilge to ensure 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 fulfillment of its public service objects) object are made at arm’s length. This commitment is implemented under Sections 108 and 114 of the Broadcasting Act 2009.
One of the principal objects of RTÉ under Section 114(1) (b) of the Broadcasting Act 2009 is to establish and maintain a website in connection with its services and the allocation of public funding, vis-à-vis the licence fee, in pursuing this public service object is fully in line with the provisions of the legislation.

Section 108 (1) of the Broadcasting Act 2009 clearly envisages that the commercial activities undertaken by RTÉ in the exploitation of its commercial opportunities, for example on-line, shall be used to subsidise its public service mandate.

- Ministerial Consent for new Services (ancillary services)
  o The Irish authorities committed to introduce a requirement for RTÉ and Teilifís na Gaeilge in respect of the establishment of subsidiaries, investments and joint ventures.

This commitment is implemented under Sections 103 and 104 of the Broadcasting Act 2009. Ancillary services are defined in the Broadcasting Act 2009.

Section 103 of the Broadcasting Act 2009 provides for both RTÉ and TG4 to vary the number of channels it operates subject to the consent of the Minister. This section also sets out the procedure that the Minister must adopt in making a decision on whether to consent to any new or additional channels. These procedures provide for the Minister to, inter alia, consult with RTÉ and other interested parties, consider the sectoral impact of the new services, following an assessment by the Broadcasting Authority of Ireland, and to consider the public value of these channels.

In relation to the development of additional channels, RTÉ has recently clarified that it wishes to develop a number of new TV service channels for carriage on the public service Digital Terrestrial Television multiplex. In accordance with section 103, the required consultations with RTÉ and the Authority have commenced on the proposals and it is intended to complete consideration of this issue as soon as possible.

- Funding
  o The BAI to undertake review and make recommendations to the Minister in respect of the level of public funding of RTÉ and Teilifís na Gaeilge. This commitment is implemented under Section 124 of the Broadcasting Act 2009.

As well as reviewing corporations annually on the extent to which they have fulfilled their annual statement of performance commitments, Section 124(2) of the Broadcasting Act, 2009 also provides that the BAI, as part of this annual review, report on the adequacy or otherwise of the public funding to enable the corporation to meet its public service objects. Upon completing their review, the BAI shall make a recommendation in their report to the Minister an annual television license fee modification, if any. Section 124(8) of the Broadcasting Act, 2009 provides that the
BAI shall carry out a review solely on the basis of the adequacy of a corporation’s public funding not later than July 12, 2012.

- Accounts and Audit – Section 109(9) Statement

Section 109(11) of the Broadcasting Act, 2009 provides that the BAI, at the direction of the Minister, shall prepare guidance for corporations as regards the cost accounting principles and methods to be considered by corporations in preparing a Financial Statement under Section 109(9). Section 109(9) requires a corporation as soon as may be after the end of each financial year to send to the Minister a financial statement i) of the use it makes of television license fee monies it receives and ii) in respect of total revenue and costs derived by the corporation distinguishing between monies received an expended on public service activities and non-public service/commercial activities. RTÉ included these Financial Statements upon submission of their 2009 Group Annual Report in April 2010 and this material is now on the public record.

3.2.1. State Aid case

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 license fee revenue and direct grants to RTÉ.

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.

Negotiations with the European Commission and the Department of Communications, Energy and Natural Resources 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.

3.2.2. The Amsterdam Protocol

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.
Broadcasting Act 2009

- Act reflects commitments made by the Irish authorities in January 2008 to remedy State aid concerns raised by the European Commission. Key features include:
  - Definition of public service remit and requirement for RTÉ to produce Public Service Statement;
  - RTÉ is permitted to exploit commercial opportunities but there must always be a link to its public service objects;
  - Transactions between public service and commercial elements to be at arms’ length;
  - New services subject to consent of Minister.
Brief on NNI Submission

Public Service Broadcasting and the Press
Ensuring Fair Competition in the Digital Age

The National newspapers of Ireland wrote to the Minister for Communications, Energy and Natural Resources in August 2010 enclosing a submission "Public Service Broadcasting and the Press - Ensuring Fair Competition in the Digital Age" and requesting a meeting. The Minister met with NNI on the 13th October, 2010.

The NNI submission indicated that it "deals with the immediate challenges facing the Irish newspaper industry", vis-à-vis public service broadcasting, and indicated that these can be "addressed by the proper implementation of the existing legislation and competition (including State Aid) rules which is largely a question of compliance rather than policy".

The covering letter indicated that the submission was also being submitted to other relevant Departments and agencies. NNI circulated the submission to Members of Dáil Éireann and Seanad Éireann on 15th September, 2010.

The analysis of the submission made by NNI indicates that majority of the issues raised are similar to those raised during the RTÉ State Aid case resolved in 2008.

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 license fee revenue and direct grants to RTÉ.

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.

Negotiations with the European Commission and the Department of Communications, Energy and Natural Resources 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 implementation of this agreement is reflected in the provisions of the Broadcasting Act 2009.

The Broadcasting Act 2009 sets out, inter alia, the principal objects and associated powers and obligations of the public service broadcasting corporations, RTÉ and TG4. The Act also imposes extensive reporting requirements on the two corporations in regard to the pursuit of their objects and compliance with relevant obligations. These reporting requirements are supplemented by ex-ante and ex-post Ministerial and regulatory oversight mechanisms that are being used, when and as appropriate, in accordance with the provisions of the Act.

Recent PQ's on this matter attached.
Brief on NNI Submission

Public Service Broadcasting and the Press
Ensuring Fair Competition in the Digital Age

1. Background

The National newspapers of Ireland wrote to the Minister for Communications, Energy and Natural Resources in August 2010 enclosing a submission "Public Service Broadcasting and the Press - Ensuring Fair Competition in the Digital Age" and requesting a meeting.

The Minister met with NNI on the 13th October, 2010.

The NNI submission indicated that it "deals with the immediate challenges facing the Irish newspaper industry", vis-à-vis public service broadcasting, and indicated that these can be "addressed by the proper implementation of the existing legislation and competition (including State Aid) rules which is largely a question of compliance rather than policy".

The covering letter indicated that the submission was also being submitted to other relevant Departments and agencies. NNI circulated the submission to Members of Dáil Éireann and Seanad Éireann on 15th September, 2010.

2. Analysis of NNI Submission

The analysis of the submission made by NNI indicates that majority of the issues raised are similar to those raised during the RTÉ State Aid case resolved in 2008 and reflected in the provisions of the Broadcasting Act 2009. A detailed analysis of the NNI submission is provided in Appendix 1.

Currently NNI are focusing particularly on RTÉ's advertising on-line claiming it to be unfair etc. The Broadcasting Act is clear on this matter. Section 114(1)(b) of the Broadcasting Act 2009 requires RTÉs to establish and maintain a website in connection with its services and the allocation of public funding, vis-à-vis the licence fee, in pursuing this public service object is fully in line with the provisions of the legislation. Section 108 (1) of the Broadcasting Act 2009 clearly envisages that the commercial activities undertaken by RTÉ in the exploitation of its commercial opportunities, for example on-line, shall be used to subsidise its public service mandate. The Act also imposes extensive reporting requirements on the RTÉ in regard to the pursuit of its objects and compliance with relevant obligations. These reporting requirements are supplemented by ex-ante and ex-post Ministerial and regulatory oversight mechanisms that are being used, when and as appropriate.

3. Recent Developments

NNI appeared before the Joint Committee on Communications, Energy and Natural Resources on 24th November, 2010. The Committee indicated afterwards that RTÉ will be invited to come before the Committee to respond to NNI’s claims. RTÉ have recently provided a background document on this issue "Digital Advertising and its impact on traditional publishers".
Appendix 1

Brief on
NNI Submission to the Minister for Communications, Energy and Natural Resources
Public Service Broadcasting and the Press
Ensuring Fair Competition in the Digital Age

1. Introduction

The National newspapers of Ireland wrote to the Minister on the 4th August 2010 enclosing a submission “Public Service Broadcasting and the Press - Ensuring Fair Competition in the Digital Age” and requesting a meeting.

The NNI submission indicated that it “deals with the immediate challenges facing the Irish newspaper industry”, vis-à-vis public service broadcasting, and indicated that these can be “addressed by the proper implementation of the existing legislation and competition (including State Aid) rules which is largely a question of compliance rather than policy”.

The covering letter indicated that the submission was also being submitted to other relevant Departments and agencies. NNI circulated the submission to Members of Dáil Éireann and Seanad Éireann on 15th September, 2010.

Chapter 2 summarises the NNI’s submission, and Chapter 3 addresses the issues raised in the submission.

2. Summary of NNI Submission

The NNI submission is structured on three main headings; “Introduction”, “Newspapers in the Digital World” and “The Way Forward”.

In summarising the submission this structure and its subheadings have been retained.

2.1. Introduction

NNI represents 18 national daily, Sunday and weekly newspapers and 35 local and regional newspapers. Some 4000 people are employed directly in the newspapers industry in Ireland.
They have a combined turnover of €700m with an annual exchequer tax payment of €100m. Newspapers are a major contributor to the cultural, social, economic, intellectual and political life of Ireland.

Newspapers face specific challenges as they face the Digital Age including; generating revenue from electronic content and competing for readers and advertisers with other media including broadcasters and aggregators.

NNI maintain that they face unfair competition from public-funded broadcasters. Specifically NNI maintain that RTÉ goes beyond the limits of its public service remit by providing news on its website and on mobile screens free of charge. NNI calls for effective control of RTÉ under the Broadcasting Act 2009 and a willingness by RTÉ to develop an effective policy to ensure fair trading vis-à-vis newspapers and other media.

NNI indicate that they would prefer not to receive government subsidies but that consideration should be given to providing a subsidy for newspapers to reflect the contribution that newspapers make to the public good.

2.2. Newspapers in the Digital World

2.2.1. Introduction

NNI point out that there have been huge developments and changes in the media industry in the last ten years. Mobile communications and on-line have opened up a whole new means of accessing news. A recent PWC report indicated that the value of that sector in advertising spend is €100m or 10% of the total advertising spend.

Newspapers face huge difficulties is asking users to pay for content where RTÉ is able to provide free on-line and mobile content. iPhone apps highlight the fast pace and issues, vis-à-vis RTÉ offering free apps. NNI point out that this is not solely an Irish problem.

2.2.2. Competition from Publicly-Funded Broadcasters

NNI claim that RTÉ’s on-line activities have damaged their chances of successfully charging for on-line content. NNI do not challenge RTÉ’s public service mission but insist that its activities on-line must be limited to its mission. NNI’s concerns cover advertising, charging for content and the need to secure a level playing field.

2.2.3. Advertising

NNI maintain that RTÉ’s news content is used to generate further revenues on-line. Examples include RTÉ property, RTÉ Motors, and RTÉ classifieds.

NNI also have concerns about RTÉ’s ability to use multi-media advertising solutions - Cross Media Solutions - utilising TV, radio, on-line, and press. NNI also has issues with
RTÉ plugging its on-line offerings in mainstream public service broadcasting. NNI asks for clarification as to how this is distinguished for accounting purposes.

NNI specifically objects to;

- any increase in the daily and hourly limits of advertising minutage given to RTÉ.
- sponsorship packages and “one for everyone in the audience” advertising.
- the recent BAI sanctioned increase on advertising limits for commercial broadcasters.

NNI claims that RTÉ’s offering in the on-line market amounts to unfair competition.

2.2.4. Charging for content

NNI indicates that it would like to like to be able to consider moving towards charging for certain levels of on-line content. However, NNI maintain that this is not an opportunity that NNI can exploit as RTÉ offer consumers free access to comparable news content on-line and via apps including material specifically written for their on-line offerings.

2.2.5. Securing a level playing field

NNI outline the European framework for Public Service Broadcasters namely, the “Amsterdam Protocol” and the “Communication from the Commission on the application of State Aid rules to public service broadcasting”. NNI outline the implementation of these rules and the resolution of the Irish PSB State Aid case via the Broadcasting Act 2009.

NNI seek the proper application of the Broadcasting Act 2009 and a clear divide between commercial and public service activities by RTÉ and ongoing regard to European practice in this area.
2.3. NNI - The Way Forward

NNI calls for action in a number of areas including rigorous application of the Broadcasting Act 2009, consistent with EU competition rules, and also amendment to the Act.

Specifically, NNI calls for, a clear definition of RTÉ’s remit, greater transparency, fair competition and supervision, and for the Minister to address the following as a matter of urgency.

2.3.1. Advertising

NNI believes that RTÉ should not be allowed to operate unhindered in the advertising market and that it should be regulated in relation to time, but also its in-programming advertising, its website and print activities, and cross-media advertising straddling various platforms (the latter NNI maintains is inimical to fair competition). NNI maintain that these activities should be operated in compliance with S.108(2) of the Act. NNI maintain that the public arm of RTÉ should not be allowed to subsidise the commercial arm of RTÉ.

NNI specifically request that the Minister not give approval to an extension of RTÉ’s daily or hourly advertising limits.

NNI maintain that specific activities like RTÉ property, RTÉ Motors, and RTÉ Classifieds, go beyond what is permissible under the Act S.114(1)(j) and that the Minister must ensure that RTÉ does not operate outside its statutory objects.

---

1 S. 108.—(1) The commercial activities undertaken by a corporation in pursuance of its exploitation of commercial opportunities object shall—

- (a) be operated in an efficient manner so as to maximise revenues, and
- (b) be used to subsidise its public service objects.

(2) All transactions or arrangements entered into by a corporation as between the activities arising from—

- (a) its public service objects, and
- (b) its exploitation of commercial opportunities object, shall be made at arm’s length and on commercial terms.

(3) On the direction of the Minister, the Compliance Committee shall prepare and submit to the Minister a report on compliance by the corporation with the requirements of subsection (2).

---

2 S. 114.—(1) The objects of RTÉ are—

- (a) to establish, maintain and operate a national television and sound broadcasting service which shall have the character of a public service, 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,
- (b) to establish and maintain a website and teletext services in connection with the services of RTÉ under paragraphs (a), (c), (d), (e), (f), (g), (h) and (i),
- (c) to establish and maintain orchestras, choirs and other cultural performing groups in connection with the services of RTÉ under paragraphs (a), (f), (g) and (h),
- (d) to assist and co-operate with the relevant public bodies in preparation for, and execution of, the dissemination of relevant information to the public in the event of a major emergency,
2.3.2. Defining the Limits of RTÉ's Public Service Remit and Commercial Activities

NNI maintain that the statutory definition of RTÉ remit is not very clear and that the line between its public service remit and commercial activities is also unclear. NNI maintain that RTÉ's object of establishing a website in connection with its other public service activities should be strictly limited and that it should not be part of its remit to provide on online written news service and that teletext services should be tightly defined.

NNI submits that the Minister has overall responsibility to supervise RTÉ to ensure compliance.

2.3.3. The Public Service Statement

NNI maintain that the forthcoming public service statement should include a list of current and prospective activities covered by RTÉ's public service remit and that the Minister should not grant consent unless the activities are covered by the Act.

2.3.4. Transactions between RTÉ's Public Service and Commercial Activities

NNI maintain that more active supervision of RTÉ is required to ensure that RTÉ respect market principles including the requirement that transactions between the public service and commercial elements of RTÉ are conducted at arm's length.

NNI submits that the Minister request the BAI compliance committee to report on compliance by RTÉ with the requirement of Section 108(2) of the Act.

(e) to establish and maintain archives and libraries containing materials relevant to the objects of RTÉ under this subsection,
(f) to establish, maintain and operate a television broadcasting service and a sound broadcasting service which shall have the character of a public service, which services shall be made available, in so far as RTÉ considers reasonably practicable, to Irish communities outside the island of Ireland,
(g) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish, maintain and operate, in so far as it is reasonably practicable, community, local, or regional broadcasting services, which shall have the character of a public service, and be available free-to-air,
(h) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish and maintain non-broadcast non-linear audio-visual media services, in so far as it is reasonably practicable, which shall have the character of a public broadcasting service (such consent not being required in respect of such services which are ancillary to a broadcasting service provided under paragraphs (a), (d), (f) and (g)),
(i) to establish, maintain, and operate one or more national multiplexes,
(j) so far as it is reasonably practicable, to exploit such commercial opportunities as may arise in pursuit of the objects outlined in paragraphs (a) to (i).
2.3.5. Combating other Anti-competitive practices

NNI maintains that the "Communication from the Commission on the application of State Aid rules to public service broadcasting" requires, not only that public service broadcasters respect the arms' length principle, but also that they undertake their commercial investments in line with the market economy principle and do not engage in anti-competitive practices with regard to their competitors. NNI maintain that the latter needs to be fully addressed by the Minister and where applicable the Competition Authority or the European Commission.

NNI maintains that while the Act does not require compliance with the market economy investor principle, they believe that the Act may need to be amended in this regard.

NNI maintain that the Minister has a duty to ensure that RTÉ does not engage in anti-competitive practices.

2.3.6. The Section 109(9) statement - Accounts

NNI maintains that RTÉ must make it crystal clear what is received and spent in exploiting its commercial opportunities as distinct from its public service objects.

NNI maintain that the Minister should issue directions on the format of RTÉ's annual statement and the BAI asked to prepare a general guidance in line with Section 109(9) of the Broadcasting Act 2009.

2.3.7. Ministerial consent for new services

NNI maintain that RTÉ should not be permitted to offer additional ancillary services without a full public value test being undertaken. S. 114(g) and (h) and S. 103(8)(c).

---

3 Communication from the Commission on the application of State aid rules to public service broadcasting. C 257/1.
27/10/2009.

4 S. 69. "The Commission considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice."

5 S. 93. "When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. Member States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding."

6 S. 109. (9) Without prejudice to subsection (3) and section 110, a corporation shall as soon as may be after the end of each financial year, send to the Minister—

   (a) a statement of the use it has made, of the monies paid to it under section 123 in that financial year, in pursuance of its public service objects, and

   (b) a statement in respect of the total revenue and costs derived by the corporation in that financial year distinguishing between monies received or expended on—

      (i) activities in pursuance of its public service objects, and

      (ii) activities in pursuance of its exploitation of commercial opportunities object.
3. **Addressing NNI’s submission**

3.1. **General Overview**

The analysis of the submission made by NNI indicates that majority of the issues raised are similar to those raised during the RTE State Aid case resolved in 2008. These are itemised below.

NNI’s covering submission states that their concerns can be “addressed by the proper implementation of the existing legislation and competition (including State Aid) rules which is largely a question of compliance rather than policy”.

The specific issues raised have been itemised below with a note detailing the Sections of the Broadcasting Act 2009 where they are implemented and details of the up to date position.

RTÉ has separately confirmed in writing to the Department that its online activities are in compliance with the regulatory framework.

Further macro issues on media policy raised are suitable for consideration in the Minister’s proposed digital media review details of which are outlined below. The NII have indicated a willingness to participate in this review.

3.1.1. **Media Review**

The Minister has indicated that he intends to establish a deliberative forum that will examine how Ireland can best embrace the advent of the digital era.

The motivation for such a forum is to try to expand the digital capabilities of Irish people in order to develop a global market in the trade of digital services and harness the wider economic, social and cultural benefits of ICT.

Action it is anticipated will be needed in six critical areas to meet this objective, namely;

1. Development of our digital skills
2. Improvement in our broadband infrastructure
3. Ensuring security and privacy in the use of digital information

---

7 114.—(1) The objects of RTE are—

(g) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish, maintain and operate, in so far as it is reasonably practicable, community, local, or regional broadcasting services, which shall have the character of a public service, and be available free-to-air;

(h) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish and maintain non-broadcast non-linear audio-visual media services, in so far as it is reasonably practicable, which shall have the character of a public broadcasting service (such consent not being required in respect of such services which are ancillary to a broadcasting service provided under paragraphs (a), (d), (f) and (g)),

8 103.—(8) The Minister, in deciding on the public value of a proposal under this section shall consider the following matters—

(c) the costs and revenues associated with the proposal and any impact on existing public service provision
(4) Increasing the use of digital technologies on the public service
(5) The creation of a single European digital market
(6) Ensuring the right public policy, regulatory and market conditions to encourage the development of the internet in Ireland.

The Minister envisages that a small group would set the agenda for the subsequent forum and highlight issues for priority and immediate consideration including;

(1) The potential for new media platforms and their effect on traditional media outlets, and the values we want to protect and promote in this changing media environment
(2) How to encourage the active and wide participation of a digitally-enabled citizenry in the online revolution as well as how to promote the production of local digital content using new technologies
(3) The role of Comreg, BAI and government businesses and civic society in the regulation and development of converging digital industries

The Minister hopes that the forum will adopt a flexible, innovative and open approach as the questions that prioritise the questions that need to be asked about the regulation and development of new digital technologies.

3.2. The Broadcasting Act 2009

The majority of the issues raised by NNI reflect issues where agreement was reached with the EU Commission in the settlement of the RTÉ State Aid case in 1999. The implementation of this agreement is reflected in the provisions of the Broadcasting Act 2009.

The Broadcasting Act 2009 sets out, inter alia, the principal objects and associated powers and obligations of the public service broadcasting corporations, RTÉ and TG4. The Act also imposes extensive reporting requirements on the two corporations in regard to the pursuit of their objects and compliance with relevant obligations. These reporting requirements are supplemented by ex-ante and ex-post Ministerial and regulatory oversight mechanisms that are being used, when and as appropriate, in accordance with the provisions of the Act.

Of the items raised by NNI the following fall in to this category and the commitment given to the EU Commission is outlined, the Section of the broadcasting Act where this is implemented and a general outline on the current position;

- Advertising
  - The Irish Authorities committed to introduce a requirement for Ministerial consent, following consultation with the BAI, in respect of alterations in the total fixed time for Public Service Broadcasters to broadcast advertisements. This commitment is implemented under Section 106(3)\textsuperscript{9} of the Broadcasting Act 2009. The total daily time for broadcasting advertisements and the maximum period given to

\textsuperscript{9} 106.— (3) Subject to the requirements of section 41(2), a corporation providing a broadcasting service under this Part shall, subject to the approval of the Minister following consultation with the Authority, fix—

(a) the total daily time for broadcasting advertisements, and (b) the maximum period given to advertisements in any hour.
advertisements in any one day for RTÉ and Tecliís na Gailge is a matter for the Minster following consultation with the BAI.

RTÉ have written to the Minister requesting an increase in their advertising minutage, Section 106(3) of the Broadcasting Act, 2009 requires that the Minister following consultation with the authority approve or otherwise of such requests, the matter is currently with the BAI.

- Public Service Remit of RTÉ
  - The Irish authorities committed to determine the Public service remit of RTÉ and Tecliís na Gailge by enumerating their respective objects and duties in broadcasting legislation and to limit the use of public funding by RTÉ and Tecliís na Gailge to the achievement of such public service objects and duties. This commitment is implemented under Sections 114 and 118 of the Broadcasting Act 2009.

- Public Service Broadcasting Statement
  - The Irish authorities committed to introduce a requirement for RTÉ and Tecliís na Gailge to prepare and publish a public service broadcasting statements 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.

  This commitment is implemented under Section 101 of the Broadcasting Act 2009. Section 101(1) of the Broadcasting Act, 2009 provides that RTÉ, following a public consultation, shall prepare not later than 12 July 2010 (12 months after the passing of the Act) a public service statement setting out the principles to be observed and activities to be undertaken by it. RTÉ submitted their public service statement on July 12, 2010 in line with the requirements of the Act.

  Section 101(3) of the Broadcasting Act, 2009 requires The Minister to consult with the Broadcasting Authority of Ireland (BAI) prior to my granting of consent to the public service statement. A submission from the BAI in respect of this consultation is expected shortly.

- Exploitation of Commercial opportunities
  - The Irish authorities committed to introduce a requirement for RTÉ and Tecliís na Gailge to ensure 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 fulfillment of its public service objects) object are made at arm's length. This commitment is implemented under Sections 108 and 114 of the Broadcasting Act 2009.
One of the principal objects of RTÉ under Section 114(1) (b) of the Broadcasting Act 2009 is to establish and maintain a website in connection with its services and the allocation of public funding, vis-à-vis the licence fee, in pursuing this public service object is fully in line with the provisions of the legislation.

Section 108 (1) of the Broadcasting Act 2009 clearly envisages that the commercial activities undertaken by RTÉ in the exploitation of its commercial opportunities, for example on-line, shall be used to subsidise its public service mandate.

- Ministerial Consent for new Services (ancillary services)
  - The Irish authorities committed to introduce a requirement for RTÉ and Teilifís na Gáille in respect of the establishment of subsidiaries, investments and joint ventures.

This commitment is implemented under Sections 103 and 104 of the Broadcasting Act 2009. Ancillary services are defined in the Broadcasting Act 2009.

Section 103 of the Broadcasting Act 2009 provides for both RTÉ and TG4 to vary the number of channels it operates subject to the consent of the Minister. This section also sets out the procedure that the Minister must adopt in making a decision on whether to consent to any new or additional channels. These procedures provide for the Minister to, inter alia, consult with RTÉ and other interested parties, consider the sectoral impact of the new services, following an assessment by the Broadcasting Authority of Ireland, and to consider the public value of these channels.

In relation to the development of additional channels, RTÉ has recently clarified that it wishes to develop a number of new TV service channels for carriage on the public service Digital Terrestrial Television multiplex. In accordance with section 103, the required consultations with RTÉ and the Authority have commenced on the proposals and it is intended to complete consideration of this issue as soon as possible.

- Funding
  - The BAI to undertake review and make recommendations to the Minister in respect of the level of public funding of RTÉ and Teilifís na Gáille. This commitment is implemented under Section 124 of the Broadcasting Act 2009.

As well as reviewing corporations annually on the extent to which they have fulfilled their annual statement of performance commitments, Section 124(2) of the Broadcasting Act, 2009 also provides that the BAI, as part of this annual review, report on the adequacy or otherwise of the public funding to enable the corporation to meet its public service objects. Upon completing their review, the BAI shall make a recommendation in their report to the Minister an annual television license fee modification, if any. Section 124(8) of the Broadcasting Act, 2009 provides that the
BAI shall carry out a review solely on the basis of the adequacy of a corporation's public funding not later than July 12, 2012.

- Accounts and Audit – Section 109(9) Statement

Section 109(11) of the Broadcasting Act, 2009 provides that the BAI, at the direction of the Minister, shall prepare guidance for corporations as regards the cost accounting principles and methods to be considered by corporations in preparing a Financial Statement under Section 109(9). Section 109(9) requires a corporation as soon as may be after the end of each financial year to send to the Minister a financial statement i) of the use it makes of television license fee monies it receives and ii) in respect of total revenue and costs derived by the corporation distinguishing between monies received and expended on public service activities and non-public service/commercial activities. RTÉ included these Financial Statements upon submission of their 2009 Group Annual Report in April 2010 and this material is now on the public record.

3.2.1. State Aid case

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 license fee revenue and direct grants to RTÉ.

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.

Negotiations with the European Commission and the Department of Communications, Energy and Natural Resources 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.

3.2.2. The Amsterdam Protocol

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.
PARLIAMENTARY QUESTION NO. 1569

Dail Eireann

To ask the Minister for Communications, Energy and Natural Resources his view on the submission made by newspapers which claims that RTE is using it's state subsidy provided through the licence fee to produce on-line content for its website and that this constitutes state aid and unfair competition with newspapers; and if he will make a statement on the matter.

- Leo Varadkar.

For WRITTEN answer on Wednesday, 29th September, 2010.

Ref No: 33199/10

REPLY

Minister for Communications, Energy and Natural Resources (Mr. E. Ryan)

I have received a detailed written submission from National Newspapers of Ireland on a number of matters of concern to them including those raised by the Deputy, and I propose to meet with National Newspapers of Ireland in the near future to discuss these further.

As the Deputy will be aware, the Broadcasting Act 2009 sets out, inter alia, the principal objects and associated powers and obligations of the public service broadcasting corporations, RTÉ and TG4. The Act also imposes extensive reporting requirements on the two corporations in regard to the pursuit of their objects and compliance with relevant obligations. These reporting requirements are supplemented by ex-ante and ex-post Ministerial and regulatory oversight mechanisms that are being used, when and as appropriate, in accordance with the provisions of the Act.
On the specific issue raised by the Deputy, one of the principal objects of RTÉ under Section 114(1)(b) of the Broadcasting Act 2009 is to establish and maintain a website in connection with its services and the allocation of public funding, vis-à-vis the licence fee, in pursuing this public service object is fully in line with the provisions of the legislation.

Section 108 (1) of the Broadcasting Act 2009 clearly envisages that the commercial activities undertaken by RTÉ in the exploitation of its commercial opportunities, for example on-line, shall be used to subsidise its public service mandate.
PARLIAMENTARY QUESTION NO. 72

Dáil Éireann

To ask the Minister for Communications, Energy and Natural Resources his views on the submission he received from the National Newspapers of Ireland regarding unfair competition by RTÉ; his further views on the NNI's concerns regarding unfair competition in relation to RTÉ's online services in particular; if he has satisfied himself that his Department and the Broadcasting Authority of Ireland are monitoring the situation sufficiently; and if he will make a statement on the matter.


For ORAL answer on Wednesday, 20th October, 2010.

Ref No: 37789/10

REPLY

Minister for Communications, Energy and Natural Resources (Mr E Ryan)

As I outlined to the House in a written reply on the 29th September I have received a detailed written submission from National Newspapers of Ireland (NNI) on a number of matters of concern to them. I met with representatives of NNI on the 13th of October when they gave me a comprehensive briefing on the issues facing their industry.

As the Deputy will be aware, the Broadcasting Act 2009 sets out, inter alia, the principal objects and associated powers and obligations of the public service broadcasting corporations, RTÉ and TG4. On the specific issue raised by the Deputy, one of the principal objects of RTÉ under Section 114(1)(b) of the Broadcasting Act 2009 is to establish and maintain a website in connection with its services and the allocation of public funding, vis-à-vis the licence fee, in pursuing this public service object is fully in line with the provisions of the legislation. Section 108 (1) of the Broadcasting Act 2009 clearly envisages that the commercial activities undertaken by RTÉ in the exploitation of its commercial opportunities, for example on-line, shall be used to subsidise its public service mandate.
The Act also imposes extensive reporting requirements on the two corporations in regard to the pursuit of their objects and compliance with relevant obligations. These reporting requirements are supplemented by ex-ante and ex-post Ministerial and regulatory oversight mechanisms that are being used, when and as appropriate.

With regard to the wider issues raised I intend to organise a digital forum, in the near future, that will examine how Ireland can best embrace the advent of the digital era. As a major initial step, I will convene before the end of the year a one day gathering of key stakeholders. This event would set the agenda for the priority issues requiring further consideration in the ever changing digital media environment, including, inter-alia, new media platforms and their effect on traditional media outlets. I welcome NNI’s agreement to input into this initiative and look forward to engaging further with NNI in this context in the near future.