

Mr Eric Van Ginderachter,  
Head of Unit,  
Market and Cases 11: Information Communication and Media,  
State Aids, Office : J-70 4/175  
European Commission,  
B-1049  
Brussels,  
Belgium.

November, 2007.

Subject State Aid No E 4/2005 – State Aid financing of RTÉ and TG4 Ireland

Dear Sir,

I refer to your letter of 3rd October 2007 concerning the above case.

Following a review of your letter I must inform you that the detailed proposals, including some issues of substance, on which commitments are sought require further deliberation and consequently the Irish authorities are not in a position to give final sign-off within the timeframe envisaged.

As you are aware the draft general scheme of the Broadcasting Bill was published in September 2006 and submitted to the Joint Oireachtas Committee on Communications Marine and Natural Resources for the purposes of public consultation.

The draft general scheme contains a comprehensive range of measures aimed at the general reform and updating of the regulatory environment for broadcasting in Ireland. The draft general scheme also incorporates a number of measures intended to address the concerns expressed by the Commission in respect of public service broadcasting, including but not limited to, further definition of public service mandates and independent oversight of mechanisms for public funding with a view to avoiding overcompensation.

The legislative proposals contained in the draft general scheme are currently under review as a consequence of both your reservations, as outlined previously, and the views expressed during the eConsultation process. It anticipated that this review will shortly be completed.

Accordingly, the Irish authorities envisage being in a position to address the issues raised by the Commission during the month of December 2007.

It should also be noted that the text of the draft general scheme as published in September 2006 is currently the subject of legal drafting by the Office of the Parliamentary Counsel, and subject to such changes as may arise out of the above mentioned review, it is anticipated that the consequent Broadcasting Bill will be published in the first quarter of 2008.

Yours sincerely

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Eoin O'Domhnaill  
Attaché



**EUROPEAN COMMISSION**

Competition DG

Markets and cases II: Information, Communication and Media  
**State aids**

Brussels, 03/10/07\*D/53924  
 DG COMP/C4/AAN/bhb/AAN  
 D(2007)0037

Permanent Representation of Ireland  
 to the European Union  
 Rue Froissart 89-93  
 B - 1040 Brussels

**Subject: State aid No E 4/2005 – State financing of RTE and TG4 – Ireland**

Dear Sir,

Reference is made to the preliminary views expressed by DG Competition in March 2005 (so-called "Article 17 letter") as well as subsequent correspondence in which your authorities outlined proposals to amend the current financing regime for RTE and TG4. Reference is further made to subsequent meetings with your authorities in which outstanding issues were discussed.

Your authorities informed the Commission about plans to reform the broadcasting regime and submitted drafts of the envisaged Broadcasting Act 2007 (the last one dating from September 2006). We understand that it is envisaged to submit the draft Broadcasting Bill to Parliament before the end of this year/beginning of next year, with adoption expected for early 2008.

The proposals which were outlined in the various letters from your authorities as well as those currently contained in the draft Broadcasting Bill 2007 appear to a large extent sufficient to ensure compliance of the future financing regime with EU State aid rules. However, and as discussed on previous occasions, there are still a number of outstanding issues on which we would appreciate further comments and eventually commitments from your authorities.

Under these circumstances and in order to allow the Commission to close the present investigation, we would invite your authorities to confirm and – where necessary – complement proposals to amend the current financing regime and to submit formal commitments in accordance with the overview given in the annex to this letter. These commitments should cover, both RTE and TG4.

The submission of such formal commitments would allow the Commission to close the investigation, pursuant to Articles 18 and 19 of the Procedural Regulation. In line with the Commission's approach in similar cases, the closure decision would formally take note of the commitments given by the Irish authorities and record acceptance of the appropriate measures proposed by the Commission.

We would appreciate if your authorities could respond within two weeks from the date of this letter (i.e. before 17<sup>th</sup> October 2007). If the commitments submitted by your authorities are satisfactory, the Commission would be able to close the investigation before the end of this year.

Yours sincerely,

Eric VAN GINDERACHTER

Subject State Aid No E 4/2005 – State Aid financing of RTÉ and TG4 Ireland

Minister,

As you are aware, there has been ongoing discussion and correspondence with the Competition DG at the European Commission with regard to the state financing of RTE and TG4. While this is based on complaints made a number of years ago, the current process builds from a letter from the Commission in March 2005.

Recent Developments

The Commission most recently wrote at the beginning of October 2007 and a copy of this letter is attached. This letter seeks certain written commitments from Ireland, based around the proposed Broadcasting Bill text, arising from the ongoing investigation.

The Commission sought a response to their letter by 17 October last. However, the commitments they seek are fundamentally associated with the Broadcasting Bill and the giving of commitments by the Irish Authorities will, to some extent, limit the policy scope of the Minister and Government in finalising the Bill for publication. For this reason the Department responded briefly to the Commission at the end of November to indicate that the text of the Bill was under final review and drafting and that Ireland hoped to respond to the Commission's letter shortly and to finish consideration of the issues. A copy of this is also attached.

Mr. Eric Van Ginderachter, who is the head of the unit that deals with telecoms and media cases in DG Competition, rang the undersigned on foot of our November response. He strongly urged that Ireland would commit to replying in full by 17 December. He stated that, since a meeting in November 2006, Ireland has had significant time to show progress in making some final decisions about the supervisory structures for public funding of public service broadcasting. He indicated that if Ireland was not able to provide a response on its position by 17 December, then the Commission would have to consider formally opening the investigation to a more detailed and thorough degree. He indicated that DG Competition wish to close this investigation now, but require commitments from Ireland to do so. There was discussion around some of the specific issues raised by DG Competition.

The undersigned rang Mr Van Ginderachter the following day and indicated that the Department would seek to provide a response by 17 December, if that were possible. A draft response has been prepared and is attached.

It would appear that the Commission is under internal pressure to have this case moved on is anxious to finalise it now.

Issues for Consideration

The Commission seems to have a real desire to close the investigation once it receives sufficient commitments from Ireland. Such closure would be very positive as it would effectively give a Commission stamp of approval to key aspects of the Broadcasting Bill and to the structure of public service broadcasting in Ireland in general. It would allow for timely progression of the Broadcasting Bill. The draft response does not provide the exact commitments sought by the Commission – rather it meets the requests in an appropriate and balanced manner that allows for sensible supervisory structures to be put in place. If the precise wording of the Commission request was provided, it might result in commitments being made that could oblige the development of potentially flawed, disproportionate and overly bureaucratic oversight mechanisms in respect of public service broadcasters.

Of course, the giving of any commitments to the Commission may have some negative consequences. Public service broadcasters may feel that the commitments have gone to far and that they will be unnecessarily fettered in delivering on their mandates. The Commission will announce any commitments publicly and there may be an element of spin to such announcements. The Commission appears to seek to use commitments from one Member State as grounds to seek commitments from others.

It may be the case that the Commission will not accept the draft letter attached as it does not go as far as the Commission wishes on certain items. In particular, the letter does not agree to meet a Commission desire that a statute based limit of 10% of annual public support be placed on reserves maintained by public service broadcasters. This is a wish of the Commission that the Department feels is entirely inappropriate for legislation and is not proportionate. If the Commission does not accept the draft letter proposed, it may be the case that some final negotiation takes place in the coming weeks. If that is so, the Department feels that in a few minor areas it could make further concessions, but that in general the draft letter has been prepared with a view to achieving a real and immediate final agreement with the Commission, and does not therefore contain much scope for further concession.

Officials are available to discuss these issues.

Given the proposal to meet the 17 December timeframe and the intention to send a draft to the Commission a day or two in advance, it would be useful to have your views on the attached as soon as possible.

Kevin O'Brien  
Broadcasting Policy Division  
12 December 2007.

## DRAFT

December 2007

Mr Eric Van Genderachter  
Markets and cases II: Information, Communications and Media  
State aids  
Competition DG  
European Commission  
Brussels

State aid No E 4/2005 – State financing of RTÉ and TG4 – Ireland

Dear Sir,

I refer to your letter of 3 October 2007 concerning the financing from public sources of the public service broadcasters RTÉ and Teilifis na Gaeilge (TG4).

In your letter you sought further elaboration and certain commitments in relation to the regulatory framework in Ireland in respect of public service broadcasting.

Following on from the publication after Irish Government approval of the draft general scheme of the Broadcasting Bill 2006, and taking into account, inter-alia, the Joint Committee on Communications, Marine and Natural Resources, Tenth Report, *Considerations, recommendations and conclusions on the Joint Committee's consultation on the draft General Scheme of the Broadcasting Bill*, your letter, and Departmental redrafting, the Irish Authorities wish to provide the following further explanations and commitments.

1. Public service remits (Commission paragraph 1.1)

The Irish Authorities commit to determine the scope of the public service remits of RTÉ and Teilifis na Gaeilge by enumerating their respective objects and duties in broadcasting legislation and to limit the use of public funding by RTÉ and Teilifis na Gaeilge to the achievement of such public service objects and duties.

2. Supervisory mechanisms (Commission paragraph 1.2)

The Irish Authorities commit to introduce a requirement for-

- (a) RTÉ and Teilifis na Gaeilge to prepare and publish a public service broadcasting charter and consequent annual statement of commitments which would elaborate on the principles to be observed and the activities to be undertaken by the public service broadcasters in fulfilling their statutory remits;

- (b) the Broadcasting Authority of Ireland (BAI) to undertake reviews and make recommendations to the Minister in respect of the level of public funding of RTÉ and Teilifís na Gaeilge;
- (c) Ministerial consent, and the performance of public value and sectoral impact assessments in respect of the matters outlined in point 3;
- (d) Ministerial consent, following consultation with the BAI, in respect of-
  - alterations in the total time fixed for public service broadcasters to broadcast advertisements;
  - the establishment of subsidiaries, investments and joint ventures by public service broadcasters;
  - schemes for third party access to archives maintained by public service broadcasters;
  - alteration in approved levels of borrowing by public service broadcasters
- (e) the BAI or its statutory committees to, at the request of the Minister, report on compliance by RTÉ and Teilifís na Gaeilge in respect of the following matters-
  - ensuring that transactions or arrangements entered into by public service broadcasters as between public service objectives and the exploitation of commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) object are made at arm's length;
  - any arrangement in respect of third party access to the archives of public service broadcasters.
- (f) public service broadcasters to report on an annual basis on the use they have made of the public funding they have received, and to distinguish between transactions and arrangements entered into in pursuit of public service objects and the pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects).

3. Public value and sectoral impact tests (Commission paragraph 1.3.1)

The Irish Authorities commit, in respect of the operation of statutory mechanisms for the alteration of the statutory public service remit of RTÉ or Teilifís na Gaeilge, to introduce public value and sectoral impact assessments as an element in the operation of any such alteration mechanisms.

The Irish Authorities commit to the introduction of a public value and sectoral impact assessment in respect of the following services, falling within the ambit of the public service remit of RTÉ or Teilifís na Gaeilge, and for which RTÉ or Teilifís na Gaeilge propose the use of public funds:

- (a) the variation in the number of public service television or radio channels operated by RTÉ or Teilifís na Gaeilge;

- (b) the establishment and maintenance by RTÉ or Teilifís na Gaeilge of public service free-to-air community, local, or regional broadcasting services;
- (c) the establishment and maintenance by RTÉ or Teilifís na Gaeilge of public service non-broadcast, non-linear, audio visual media services (this does not encompass the making available of material broadcast free-to-air by RTÉ or Teilifís na Gaeilge on non-traditional "broadcast" platforms e.g. mobile phones and websites); and
- (d) the establishment and maintenance by RTÉ or Teilifís na Gaeilge of significant new public services not expressly stipulated by legislation (this does not include new public services which are expressly required by legislation e.g. the launch of a public broadcasting service to Irish communities overseas (section 3 of the Broadcasting (Amendment) Act 2007) and the requirement placed on RTÉ by section 11(8) of the Broadcasting (Amendment) Act 2007 to provide analogue television viewers with information on the digital switchover process).

4. Pay services (Commission paragraph 1.3.2)

In the light of the Commission's concerns the Irish Authorities propose to preclude the use of public funding for public service broadcasting services which are of a special interest to only certain members of the community and which are made available on a subscription or pay-per-view basis.

RTÉ and Teilifís na Gaeilge may continue to be permitted to operate such a service solely on a commercial basis as is currently provided for in the Broadcasting Act 2001.

The Irish Authorities may renew discussion of this issue with the Commission at a future date.

5. Archives (Commission paragraph 1.3.3)

Head 77 of the draft general scheme of the Broadcasting Bill as published on 6 September 2006, for the purposes of public consultation, mandates access by the public to the archived material held by the public service broadcasters as a consequence of their broadcasting activities.

The head also stipulates that public service broadcasters must prepare two schemes for the reuse by third parties (e.g. educationalists, researchers, other broadcasters, other audio and audio visual content providers – as opposed to the general public) of archived material held by the public service broadcasters – one scheme must relate to the non-commercial educational reuse of archived material, the second to the commercial reuse of archived material.

In essence the head provides a statutory mechanism, which has not pertained prior to the proposed legislation, for third parties to reuse archived material held by public service broadcasters on terms dictated primarily by the purposes for which the material is to be reused – i.e. commercial or non-commercial purposes. It is envisaged that material intended for commercial reuse would be available on standard market terms.

In relation to the concerns raised by the Commission, the Irish Authorities would make the following points-

- Subsection (2) of Head 77 permits public access to the material contained in the archives but not the reuse of that material.
- Subsection (3) of Head 77 requires the promulgation of schemes which permit third parties, as opposed to the general public or the public service broadcaster itself, to reuse and exploit the material held in the archives (it should be noted however, that public service broadcasters will naturally continue to enjoy the right to reuse the material contained in their own archives).
- Subsection (3) of Head 77 also requires Ministerial approval before the promulgation of any such scheme – such approval only having being granted following consideration of the advice of the BAI as to the sectoral impacts.

The Irish Authorities see inherent public value in allowing access and reuse of the archival material held by public service broadcasters, and as a consequence has limited assessment of the operation of the provisions outlined in Head 77 to their sectoral impact and compliance by public service broadcasters with the terms of schemes.

#### 6. Exercise of powers (Commission paragraph 1.3.4)

In relation to the concerns raised by the Commission in respect of the powers outlined for RTÉ or Teilifís na Gaeilge in heads 109 and 114 of the draft general scheme of the Broadcasting Bill, as issued for public consultation on 6 September 2006, the Irish Authorities wish to make the following points-

- Such powers may only be exercised in pursuance of the public service objects and the exploitation of commercial opportunities object and can not be exercised in isolation. For example the power to publish can only be exercised in the context of the pursuit of a particular object. If that object is the exploitation of a commercial opportunity that arises during the course of a public service function then the public service broadcaster can not use public funding in the exercise of the power to publish.
- The oversight of the exercise of such powers has both ex ante and ex post dimensions – ex ante in the context of the proposed approval and review of public service broadcasting charters and annual statements of commitment (heads 103 and 104) - and ex post in the context of the annual and five year reviews of public funding levels proposed under head 117.

7. TG4 (Commission paragraph 2)

The Irish Authorities confirm that equivalent mechanisms to those proposed in respect of RTÉ with regard to entrustment, definition of public service remit, control of overcompensation and applicability of arms-length principles in respect non-public service commercial transactions will apply to Teilifis na Gaeilge.

8. Separate entrustment (Commission paragraph 2.1)

The Irish Authorities commit to separate entrustment for the new activities envisaged in the draft general scheme of the Broadcasting Bill as published on 6 September 2006.

9. Basic features of the public value/impact assessment (Commission paragraph 2.2)

As regards the public value-sectoral impact assessment proposed in respect of the activities outlined in point 3 above the following processes and criteria are envisaged:

*Process*

On notification by the public service broadcaster that it is requesting the Minister's consent to engage in the activities outlined in point 3 above, the Minister, the BAI and the public service broadcaster shall endeavour to agree a description of the activity proposed by the public service broadcaster.

Following such agreement the Minister will consult with the BAI as to the modalities of the public value and sectoral impact assessments – in particular in respect of the timelines for the process and the nature of associated public consultation.

The Minister will then conduct a public value assessment of the proposals as against the public value criteria outlined below, having consulted with the BAI, the public service broadcaster and such other persons as he or she considers appropriate.

The BAI will conduct a sectoral impact assessment of the proposals as against the sectoral impact criteria outlined below, having consulted with the Minister, the public service broadcaster and such other persons as it deems appropriate – such an assessment is likely to take a five year perspective of the potential impact of the proposed services.

The BAI will report the outcome of its sectoral impact assessment to the Minister and make such recommendations as it sees fit.

The Minister will consider the BAI's sectoral impact assessment advices and the outcome of the public value assessment before coming to a final decision whether or not to grant the consent sought by the public service broadcaster. In granting his or her consent the Minister may attach such conditions or require such modifications to the proposals as he or she sees fit.

In publishing his or her decision the Minister shall also publish a statement outlining the consultations that have been carried out and, subject to confidentiality requirements in respect of commercially sensitive material, make publicly available all documents furnished to the Minister during the course of the consultation.

#### *Indicative criteria*

##### Public value

- Compliance of the proposed service with the public service remit as outlined in statute.
- Compatibility with the goals of the Audio Visual Media Services Directive and Council of European recommendations in respect of public service broadcasting.
- Cost of the proposed service and its impact on existing public service provision.
- Extent to which the proposed service will contribute to meeting the democratic cultural, linguistic, educational, and social needs of Irish society, of individual groups within Irish society, and of Irish communities outside of the island of Ireland.
- Extent to which the proposed service is accessible by the public.
- Extent to which the proposed service will reach under-served audiences.
- Contribution of the proposed service to individual's or societal group's interest in, and familiarity with, new forms of services and technology (e.g. in pursuit of the goals of the i2010 agenda and European digital switchover)
- Contribution of the proposed service to media plurality.
- Such other matters as the Minister adjudges relevant and appropriate.

##### Sectoral impact

- Extent to which the proposed service impacts on availability, choice, quality and accessibility of services for content viewers and listeners
- Extent to which the proposed service complements or displaces existing service offerings
- Impact of the proposed service on sectoral development, innovation and investment.
- Impact of the proposed service on related markets
- Such other matters as the BAI adjudges relevant and appropriate.

10. Alteration of statutory remit or memorandum of association (Commission paragraph 2.3)

The Irish Authorities commit to the incorporation, in any statutory mechanism which provides for the amendment of the statutory remit or memorandum of association of RTÉ or Teilifís na Gaeilge, of a requirement for the Minister to consult with the BAI as to the public value and sectoral impact of any such amendment.

11. Supervision (Commission paragraph 3)

The Irish Authorities commit to the establishment of a new independent content regulator – the BAI - which will assist and advise the Minister in the monitoring of RTÉ and Teilifís na Gaeilge's performance as against their public service remits, and will in particular-

- (a) on an annual basis carry out a review of, and report to the Minister on, the extent to which RTÉ and Teilifís na Gaeilge have, during the previous financial year, fulfilled the commitments outlined in their annual statement of commitments for that financial year; and
- (b) every five years, or such shorter period as directed by the Minister, carry out a review of, and report to the Minister on, the adequacy or otherwise of the level of public funding made available to RTÉ and Teilifís na Gaeilge in order to fulfil their public service objectives as enunciated in statute.

12. Avoidance of overcompensation (Commission paragraph 4.1)

The Irish Authorities commit to the establishment of the following mechanisms to safeguard against overcompensation of public service broadcasters RTÉ and Teilifís na Gaeilge-

- The use of public funding limited by statute to the public service objects enunciated in statute.
- Statutory requirement that surpluses generated by activities in pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) shall be used to subsidise the attainment of the public service objects.
- Requirement on public service broadcasters to report on an annual basis on the use they have made of the public funding they have received.
- Statutorily mandated annual review by the BAI of the fulfilment or otherwise by the public service broadcaster of the commitments outlined in the public service broadcaster's annual statement of commitments, and an associated recommendation to the Minister as to the level of any necessary public funding adjustment.

- Statutorily mandated five year review of the adequacy or otherwise of the public funding made available to the public service broadcaster in order to meet its public service objectives as enunciated in statute, and an associated recommendation to the Minister as to any necessary adjustment as to the level of such public funding.

The Irish Authorities commit to the establishment of the following mechanisms to ensure arm's length principles apply in respect of transactions as between public service objects and the exploitation of commercial opportunities object in relation to RTÉ and Teilifis na Gaeilge-

- Enunciation of an object for public service broadcasters to exploit such commercial opportunities as may arise during the course of the public service broadcaster's fulfilment of its public service objects.
- Statutory requirement for transactions and arrangements entered into by public service broadcasters between, on the one hand the public service objects, and on the other hand, the pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) to be made at arm's length.
- On foot of a request of the Minister the BAI must prepare and submit to the Minister a report on compliance by the public service broadcasters with the arm's length requirement outlined above.
- Require public service broadcasters to report on an annual basis on the use they have made of the public funding they have received, and to distinguish between transactions and arrangements entered into in pursuit of public service objects and the pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects).

### 13. Surplus (Commission paragraph 4.2)

The Irish Authorities commit to introduce a requirement on the BAI, in the context of the latter body's proposed five year review of the adequacy or otherwise of the level of public funding of RTÉ or Teilifis na Gaeilge (Head 117 of the draft general scheme of the Broadcasting Bill 2006), to review, taking account of reserves provided for specific purposes, the level of surpluses held by RTÉ or Teilifis na Gaeilge with a view to avoiding overcompensation of the two public service broadcasters.

### 14. Investments (Commission paragraph 4.3)

The Irish authorities confirm that the arm's length principle would apply to the making of investments in pursuit of the object to exploit such commercial opportunities as may arise during the course of the public service broadcaster's fulfilment of its public service objectives.

15. Tax exemptions (Commission paragraph 5)

The Irish Authorities can confirm that commitments to amend the tax status of RTÉ by making all RTÉ activities subject to the corporation tax code have taken place.

The licence fee income being received by RTÉ is now taken into account in calculating its taxable income and is now calculated for corporation tax purposes. This measure is in place for accounting periods on or after 1<sup>st</sup> January 2007.

Therefore the public funding provided to RTÉ is taxable. Accordingly, both the public funding received and all revenue generated from commercial or other non public service activities is subject to the corporation tax code.

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

Yours sincerely

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Attaché,  
Permanent Representation