

Mr Ó hÓbáin

Mr O' Neill

Secretary General

Minister

Note for Information

State financing of RTE and TG4

1. Outcome of recent meeting with Commission

The Broadcasting Policy Division met with representatives of the EU Commission's, Telecommunications and Media State Aid Unit, on 27th April 2006. A note of the meeting is attached (Tab A).

In summary, the outcome of the meeting was satisfactory with an indication from the Commission that the matters under discussion were on the right track.

The Commission's primary focus was on the draft provisions of the Broadcasting Bill and in particular on the definition of Public Service Remit and the entrustment of TG4. Other issues discussed included public funding of RTE, RTE's funding of commercial activities, tax status of RTE, broadcasting to the Irish Diaspora in the UK, new State Aid complaint by Setanta Sports, linear/non linear services, public Value Test (PVT), a request for a copy RTE's Annual Report and Accounts for 2005 and a breakdown of RTE's broadcasts by genre (esp sport). These issues are now being followed up.

2. Additional Issues

The Commission's earlier letters raised a number of issues, to which the Commission has not requested a reply, but which merit consideration by Ireland. The most significant of these issues is that the Commission has made clear its view that the annual grant-in-aid provided to RTÉ for TG4 should be the subject of a formal state aid notification.

We have written to the Office of Attorney General for further consideration of the Commission's views on these issues, as the position adopted by Ireland on state aid notification for TG4, following earlier legal advice, does not concur with the Commission's view.

Paul Mulqueen

Broadcasting Policy Division

May, 2006.

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Paul Mulqueen

From: Paul Mulqueen
Sent: 12 May 2006 10:56
To: 'Elleonora.SOARES@cec.eu.int'
Subject: RTÉ's Annual Report and Financial Statements
Sensitivity: Confidential

Dear Elleonora,

I attach a copy of RTÉ's Annual Report and Financial Statements for your confidential information. I must stress the confidential nature of RTÉ's Annual Report and Financial Statements at this stage as they have not been published yet.

The draft copy of the Broadcasting Bill we were working from during our meeting is the latest version. Bill Morrissey has informed me that the next version will be available around the end of this month. I will forward you a copy at that stage.

Regards,

Paul Mulqueen
Broadcasting Policy Division
Department of Communications, Marine and Natural Resources,
29-31 Adelaide Road,
Dublin 2.

Tel:353 1 6783092
Fax 353 1 6783099
paul.mulqueen@dcmnr.gov.ie

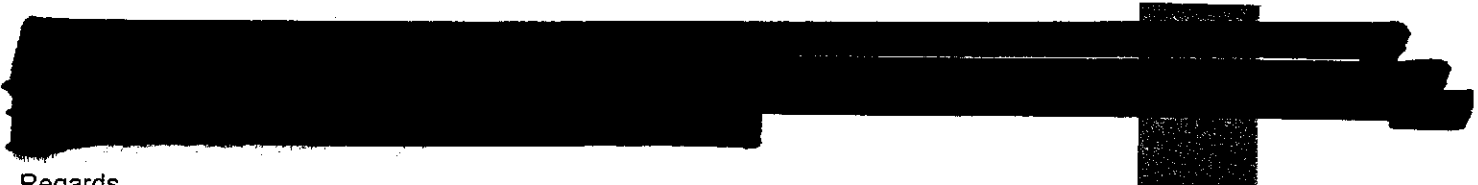
Paul Mulqueen

From: Paul Mulqueen
Sent: 05 October 2006 15:28
To: 'Patrick_Mooney@ag.irlgov.ie'
Cc: Kevin O'Brien
Subject: State Aid funding of RTE/TG4

Hi Patrick,

I refer to our letter dated 5th May 2006 in relation to the above.

Perhaps you can let me know if you have further instructions to offer.



Regards,

Paul Mulqueen
Broadcasting Policy Division
Department of Communications Marine and Natural Resources,
29-31 Adelaide Road,
Dublin 2.

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paul.mulqueen@dcmnr.gov.ie

Note of Meeting with DG Comp

20 November 2006

DG Competition attendees: Eric Van Ginderachter, Alexandra Antoniadis, Ellenora Soares.

DCMNR attendees: Kevin O'Brien, Bill Morrissey, Paul Mulqueen

1. Update on progress with Broadcasting Bill

DG Comp officials were briefed on the overall progress of the Broadcasting Bill, the legislative process from here, and the fact that a general election had been signalled for the first half of 2007.

The brief covered the two track approach taken following the approval of the draft bill by Government on 6th September 2006. The draft heads had been sent to the Parliamentary draftsman and a public consultation process - the eConsultation process - had been initiated by the Jiont Oireachtas Committee on Communications Marine and Natural Resources (JOCMNR).

DG Comp inquired if the submissions would be published. They were informed that our understanding was that the JOCMNR were considering this matter. In any case a number of the main players had independently made there submissions available.

2. Developments in broadcasting sector, including proposals for amendments to DTT legislation, separation of TG4 and broadcasting to Irish communities in the UK

DG Comp officials were brought up to date on a number of developments in the Broadcasting area.

On **Digital Terrestrial Television (DTT)** DG Comp were briefed on recent developments. In particular they were given a brief outline on the recent history of DTT. This covered the enactment of legislation in 2001, the lack of take up and the need for more workable legislation. DG Comp were given a flavour of our thinking on Multiplex operation. DG Comp indicated that they would like to see the draft DTT legislation.

On the **separation of TG4 from RTE** DG Comp were advised that the Government had decided in July 2006 to establish TG4 as a standalone company. The separation was scheduled for 1ST April 2007 and from that date TG4 would be an independent public sector broadcaster. TG4's remit would remain unchanged.

On **broadcasting to Irish communities in the UK** DG Comp were advised of the government desire to progress Broadcasting to Irish communities in the UK at the earliest possible opportunity. DG Comp were briefed on the background including a brief history of Tara TV, a commercial service, which ceased operations on commercial grounds in 2001. DG Comp were advised that it was now proposed to amend the existing remit of RTE to allow RTE to broadcast to the UK, as envisaged in the draft broadcasting bill, but to bring forward legislation shortly to achieve this general objective.

3. **Response to DG Comp queries in e-mail of 4 October**

Mr Morrissey explained the provisions of the Bill that were of interest to DG Comp outlining the origins of some of the provisions in the 1960 legislation and the construction of powers and objects that appeared to cause the DG Comp officials some difficulties as a construct.

DG Comp indicated that they felt that the provision on **services made available of subscription or Pay per View basis** was too general and may cause confusion. The Irish authorities agreed to reflect and provide further clarification.

DG Competition were very strong on **reserve funds and over compensation** maintaining that it was a very important issue for them and that there should be no over compensation. DG Comp maintained that the current provision in Art 117 was much too general. They maintained a 10% cap on the reserve was the normal practice and that 10% would allow sufficient flexibility. The issue was not individual to RTE. DG Comp indicated that this cap reflected a recent decision involving Denmark and was a reflection of EU policy going forward. DG Comp also sought clarification in relation to how a decrease in funding would operate or in what circumstances. The relevant review provisions of the Bill were explained. Following discussion DG Comp indicated that specific projects and their costs that were planned and earmarked for the future would not breach the 10% rule. The 10% rule would therefore only apply to non earmarked funds and these DG Competition maintained had to be proportionate. DG Comp referred to the 10% as meaning funds at "free disposal". There was agreement that the Irish authorities would reflect on the issue and look at the wording in this area following DG Competition's clarifications.

DG Comp raised concerns that the provision on **non broadcasting activities – the link between public services and commercial activities** opened the door to anti-competitive commercial operations and that it only provided ex-post regulation. The oversight provisions of the legislation were explained to the general satisfaction of DG Comp. The Irish authorities agreed to put the clarifications given in a letter to DG Comp.

DG Comp sought more clarity in relation to their interpretation of what was envisaged by Head 75 on **new channels and services**. DG Comp sought clarity on new services like non linear/web-streaming etc. It was agreed that the Irish authorities would include the clarifications given at the meeting in a letter back to DG Competition.

The meeting ended with **agreement that the Irish authorities would write to DG Competition setting out formally what had been agreed from the meeting within three weeks.**

**Broadcasting Policy Division
November 2006**



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21 December 2006

Mr Eric Van Ginderachter
Head of Unit
Telecommunications and Media State Aid 11
European Commission
Directorate General for Competition
Office J-70 04/08 BE - 1049
Brussels
Belgium

Subject: E4/2005 (Ex NN99/99) State financing of RTÉ and TG4

Dear Eric,

I refer further to our meeting on the 20th November 2006 where I undertook to write to you on a number of issues.

1. Services made available on a subscription or pay-per-view basis

This matter is contained in heads 109(1)(i) and 114(1)(i) of the draft general scheme of the Broadcasting Bill. This provision was intended to explore the policy issue of whether or not to widen the potential financing mechanisms available to public service broadcasters to fund public service programming. It envisages a scenario where due to the normal limitations on the overall level of public funding available (i.e. the limits on Exchequer funds available for public service broadcasting and the level of the television licence fee that the public is willing to accept) that certain specialist types of public service programming would not happen, unless a source of co-funding was available.

From the discussions with the Commission on 20 November 2006 it is understood that such a provision might confuse the demarcation between public service activities and the exploitation of commercial opportunities.

It is therefore proposed to reconsider the current approach in the light of the outcome of the public consultation process currently being undertaken on the draft general scheme by the Joint Oireachtas Committee on Communications Marine and Natural Resources and the Commission's concerns.

2. Reserve funds and over-compensation

In the light of the discussions with the Commission on 27 April 2006 on the subject of the level of reserves held by public service broadcasters, Head 117(10) of the draft general scheme was amended to require the Broadcasting Authority of Ireland (BAI) in a five year review of the level of public funding to take account of "(a) the existing resources available to the ..[public service broadcaster]". This amendment was intended to ensure that the BAI would consider the overall resources available to the public service broadcaster in assessing the level of public funding – such overall resources would obviously include cash reserves available to the public service broadcaster.

However, from the discussions with the Commission on 20 November 2006 it is understood that such a provision might be regarded as being too general in nature to achieve the objective set of ensuring that public service broadcasters are not overcompensated.

The Commission's clarification as regards the maintenance of a strict 10% cap on unallocated cash reserves (as opposed to cash reserves held for identified purposes) held by a public service broadcaster is noted. As a consequence it is proposed to reconsider the current approach in the light of the outcome of the public consultation process and the Commission's concerns.

In relation to the Commission's concerns regarding overcompensation we can confirm that under Head 117 of the draft general scheme either an increase/decrease in public funding is provided for i.e. that the BAI may recommend an increase/decrease in funding and the Minister or the Government may accept and implement such a recommendation.

The Commission has queried the situations where such a decrease might occur. Whilst in the main the expectation is for gradual increases in public funding to reflect inflation (without overcompensating the public service broadcaster), the following hypothetical scenarios are instances where a decrease in public funding might occur:

- The public service broadcaster fails to achieve its commitments under the Annual Statement of Commitments or Public Service Broadcasting Charter and has been overcompensated;
- The cost base of the public service broadcaster reduces and it does not propose to increase the existing levels of its public service output; and
- The public service broadcaster gains considerable additional income from exploiting the commercial opportunities available to it and it does not propose to increase the existing levels of its public service output.

3. Non-broadcasting activities – the line between public service and commercial services

Paragraphs (a) to (i) of Heads 109(1) and 114(1) of the draft general scheme outline the objectives that public service broadcasters can pursue with the aid of public

funding, subject to necessary consents. Paragraph (j) of Heads 109(1) and 114(1) requires the public service broadcasters to exploit such commercial opportunities as may arise in the context of the pursuit of public service activities.

The explicit powers of the public service broadcasters are detailed in heads 109(4) and 114(4) of the draft general scheme. These powers may only be exercised in pursuance of the stated objectives. Some of the powers may be used in the context of the pursuance of both a public service object and the exploitation of commercial opportunities object. The use of public funding in the exercise of such powers in pursuance of public service objectives will be subject to the ex post oversight of the proposed BAI. The Irish Authorities are confident that this framework will result in public funding only being used in pursuance of public service objectives.

The specific powers in Head 109(4)(i),(j) and (l) restate the existing powers of RTÉ under section 16(2) of the Broadcasting Authority Act 1960 as amended.

The Commission's concerns that the text in the draft general scheme in relation to some of the stated powers may not provide sufficient clarity as to the activities that qualify as public service activities is noted.

It is proposed to consider the existing text of Heads 109(4) and 114(4) in the light of the outcome of the public consultation process and the Commission's concerns.

4. New channels and services

Head 75 is a key part of the overall corpus of supervisory arrangements proposed in relation to Irish public service broadcasters.

The head outlines a number of activities where the Minister's consent is required before the public service broadcaster can engage in the activity concerned. The head also requires that before the Minister decides to grant such consent he or she must publicly consult the public service broadcaster, other appropriate third parties and in particular the BAI as to the public value and sectoral impact of the proposed activity.

The activities which require such consent include-

1. Where the public service broadcaster proposes to vary the number of radio or television channels it proposes are necessary to deliver on its remit;
2. Where the public service broadcaster proposes to delegate the performance of a significant function which is central to the achievement of its remit to a third party e.g. outsourcing of preparation of news and current affairs;
3. Where the public service broadcaster proposed to pursue the public service objectives outlined in paragraphs (g), (h) and (i) of head 109(1) and paragraphs (f), (g), (h) and (i) of head 114(1); and
4. Where the public service broadcaster proposes to undertake supplementary services.

Subhead (1) defines a supplementary service (formerly termed ancillary services) as an activity which-

- Is in accordance with the remit of the public service broadcaster,
- Incurs expenditure of more than €5 million per annum, and
- Is an activity which the public service broadcaster has not engaged in, in a significant manner, in the previous five years i.e. it may be an activity which is new or which the public service broadcaster has not engaged in for a considerable period.

The text of this head will be finalised in the light of the outcome of the public consultation process.

5. Network and transmission services

The powers proposed in paragraphs (p) and (q) of Heads 109(4) and 114(4) are intended primarily to be in pursuance of the objects outlined in paragraphs (b) and (h) of Heads 109(1) and 114(1) in relation to online media. They are not considered to be sufficient in their own right to empower public service broadcasters to provide digital terrestrial television services in Ireland.

As outlined at our recent meeting the Irish Authorities new proposals for broadcasting are being brought forward in a new Broadcasting (Amendment) Bill 2006.

This Bill has two principal objectives. The first is to amend the public service remit of RTÉ to allow it to broadcast to Irish communities living outside the island of Ireland (sections 3, 14 and 15). The second is to amend the Broadcasting Act 2001 to allow for the development of digital terrestrial television and radio services in Ireland.

Please find attached for information the text of this Bill.

Yours sincerely,



Mr Kevin O' Brien
Principal Officer
Broadcasting Division

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Paul Mulqueen

From: Paul Mulqueen
Sent: Thursday, December 21, 2006 12:19 PM
To: 'eirc.vanginderachter@ec.europa.eu'
Cc: 'Elleonora.SOARES@ec.europa.eu'; Kevin O'Brien; Bill Morrissey
Attachments: 21 December 2006.pdf; B7006S-memo.pdf; B7006S.PDF

Dear Eric,

I enclose for you information a letter form Mr Kevin O' Brien following on from our meeting of the 20th November 2006.

May I also wish you and you staff a merry Christmas and a happy New Year.

Regards,

Paul Mulqueen
Assistant Principal
Broadcasting Policy Division
Department of Communications Marine and Natural Resources
29-31 Adelaide Road
Dublin 2
Ireland



21 December 2006

Mr Eric Van Ginderachter
Head of Unit
Telecommunications and Media State Aid II
European Commission
Directorate General for Competition
Office J-70 04/08 BE - 1049
Brussels
Belgium

Subject: E4/2005 (Ex NN99/99) State financing of RTE and TG4

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The text of this head will be finalised in the light of the outcome of the public consultation process.

5. Network and transmission services

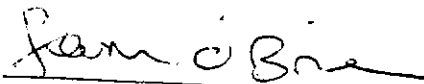
The powers proposed in paragraphs (p) and (q) of Heads 109(4) and 114(4) are intended primarily to be in pursuance of the objects outlined in paragraphs (b) and (h) of Heads 109(1) and 114(1) in relation to online media. They are not considered to be sufficient in their own right to empower public service broadcasters to provide digital terrestrial television services in Ireland.

As outlined at our recent meeting the Irish Authorities new proposals for broadcasting are being brought forward in a new Broadcasting (Amendment) Bill 2006.

This Bill has two principal objectives. The first is to amend the public service remit of RTÉ to allow it to broadcast to Irish communities living outside the island of Ireland (sections 3, 14 and 15). The second is to amend the Broadcasting Act 2001 to allow for the development of digital terrestrial television and radio services in Ireland.

Please find attached for information the text of this Bill.

Yours sincerely,



Mr Kevin O' Brien
Principal Officer
Broadcasting Division



**AN BILLE CRAOLACHÁIN (LEASÚ) 2006
BROADCASTING (AMENDMENT) BILL 2006**

EXPLANATORY AND FINANCIAL MEMORANDUM

[This Memorandum is not part of the Act and does not purport to be a legal interpretation.]

Introduction

The Broadcasting (Amendment) Bill seeks to establish a more flexible and market-responsive model for licensing DTT in Ireland and to allow for progress to be made towards analogue switch-off. Ensuring that the Irish public continues to have access to a range of quality programming on a universal and free-to-air basis is a core broadcasting policy objective. The development of a DTT platform will involve an upgrade from a legacy analogue system to a modern digital system, which can allow broadcasters to offer more, in terms of content and services, to Irish viewers.

In addition, the Bill will also amend the remit of RTÉ to allow it to utilise public funding in the provision of a broadcasting service to Irish emigrant communities abroad.

Provisions of Bill

There are 18 Sections in the Bill and one Schedule to the Bill.

Section 1 provides for the short title, collective citation, construction and commencement. These are standard provisions in legislation.

Section 2 provides for interpretation and provides definitions for a number of terms used throughout the Bill.

Section 3 provides for the Authority (RTÉ) to establish and maintain multiplexes, and sets out a provision for RTÉ and TG4 channels, which ensures that these services are carried on the first multiplex. It also sets out a fall-back provision for TV3 if certain conditions in Section 4 are not met. It provides that TG4 and TV3 may make payments to the Authority in respect of this must-carry provision and may request an increase in capacity for the carriage of their service.

This section also provides for the Authority to establish and maintain a broadcasting service of a public service character that reflects the RTÉ services and TG4, to Irish communities outside the Island of Ireland.

Section 4 outlines the functions of the Broadcasting Commission of Ireland (BCI) with regard to arranging for and entering into contracts with multiplex contractors to provide additional multiplexes of programming (bundles of channels and content, on both digital terrestrial television and digital terrestrial radio). The BCI will be required to ensure compliance by contractors with the provisions of this Act. It also sets out the conditions to allow for provision of the analogue commercial licensee (TV3) services on the DTT platform, and for any Northern Ireland service that could be designated by the Minister in the future.

Section 5 provides that the Commission for Communications Regulation (ComReg) is required to make available licences for DTT services, for both RTE, and other multiplex service providers. These licences shall allow for the possibility that multiplexes may, so far as it is reasonably practicable to do so, be made available to the whole community in the State. In addition, this Section allows for the possibility that ComReg may allocate further licences for DTT, to be contracted by the BCI, and also other services. It also provides for the Minister to make provisions for the use of services under *Section 5* in the event of a declared emergency.

Section 6 provides that the Commission for Communications Regulation (ComReg) is required to make available licences, both to RTE and other providers, in a similar arrangement to that of *Section 5* but for digital sound broadcasting.

Section 7 provides for ComReg to levy fees by regulation in relation to various broadcasting licences, including multiplex licences, with the Minister's consent.

Section 8 provides that the BCI should run a competition for the awarding of multiplex contracts (both TV and radio), which should be publicly advertised. The competition (applications procedure) can be initiated by the Commission as frequencies become available. Under this provision the BCI has discretion to set the coverage area for any multiplex services and services can include regional and local digital services.

Section 9 sets out the criteria to be considered by the BCI when awarding contracts to multiplex contractors. The BCI is also empowered to include additional criteria when deemed necessary.

Section 10 allows the BCI to set out the terms and conditions for multiplex contracts and sets out a number of terms and conditions which may or may not be included. In addition, it provides that the Commission may suspend or terminate the contract under certain conditions, that the contractor may pay fees to the Commission and that each multiplex contract shall be open to inspection by the public.

Section 11 sets out the provisions to allow consideration by the Minister for Communications, Marine and Natural Resources of a date for analogue switch-off, having consulted with all relevant stakeholders. It provides for the Minister, following consideration of a report from the Commission or the Authority, or at any stage, to issue a policy direction in this regard.