

January 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 Teilifis 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 Teilifis 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 Teilifis 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 Teilifis na Gaeilge, and for which RTÉ or Teilifis 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 Teilifis 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;
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#### 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.

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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 (see criteria for sectoral impact set out in point 9 below) and compliance by public service broadcasters with the terms of schemes.

In essence public access under Head 77 to view/listen to - but not re-use - the contents of the archive would not be subject to a sectoral impact assessment. However, the separate schemes for the re-use and exploitation of material held in the archives would be subject to sectoral impact assessments prior to any Ministerial approval. Re-use in this case which is subject to sectoral impact would, for instance, include downloading and storing permanently by individuals.

#### 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.

The Irish Authorities also commit to require the public service broadcasters to indicate in their public service broadcasting charters the proposed level of activity in respect of the publication of books and music for which public funding will be utilised.

7. TG4 (Commission paragraph 2)

The Irish Authorities confirm that equivalent mechanisms to those proposed in respect of RTE 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 paragraphs 4.1 and 4.2)

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. In considering whether there should be an adjustment to the level of public funding, the annual review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
- Statutorily mandated five year review of the adequacy or otherwise of the public funding made available to the public service broadcaster in order to meet its public service objectives as enunciated in statute, and an associated recommendation to the Minister as to any necessary adjustment as to the level of such public funding. In considering whether there should be an adjustment to the level of public funding, the five year review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
- The Irish Authorities also commit to require the BAI, on the basis of the above mentioned reviews, to make a recommendation to the Minister as to the level of adjustment to the public funding of public service broadcasters, and to, on its establishment, communicate to the BAI the Commission's policy in respect of the maintenance of surpluses by public service broadcasters<sup>1</sup> (a mechanism for such a communication is provided for in paragraph (i) of Head 117(10) of the draft general scheme of the Broadcasting Bill).

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

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<sup>1</sup> Commission Policy is set out at [http://ec.europa.eu/comm/competition/sectors/media/decisions\\_psb.pdf](http://ec.europa.eu/comm/competition/sectors/media/decisions_psb.pdf) for previous Commission Decisions, and at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:320:0005:0011:EN:PDF> ) for the 'Communication from the Commission on the application of State Aid rules to public service broadcasting'.

It is understood that under current published Commission Policy, (cf. in particular Commission decision of 24 April 2007, State aid E 3/2005 - Germany), a possible annual surplus (overcompensation) needs to be limited to what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of annual compensation payments). Exceptionally, a surplus exceeding the 10% threshold may remain with the public service broadcasters, provided that this amount is earmarked for a specific purpose, the costs of which are spelled out in advance and certified by an independent control body and that the use of these earmarked funds in accordance with its purpose is subject to ex post control. Furthermore, surpluses (overcompensation) accumulated at the end of a given period would need to be fully taken into account (i.e. deducted) when determining the financing needs of the public service broadcasters for the next period.

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

### 13. 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.

### 14. 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

**F | Mulqueen**

**From:** Nuala.McCormack@dfa.ie  
**Sent:** 30 January 2008 11:59  
**To:** Paul Mulqueen  
**Subject:** RE:

**From:** Paul Mulqueen [mailto:Paul.Mulqueen@dcenr.gov.ie]  
**Sent:** 30 January 2008 12:52  
**To:** McCormack Nuala BRUSSELS PR  
**Subject:** FW:  
**Importance:** High

**From:** Paul Mulqueen  
**Sent:** 30 January 2008 11:48  
**To:** 'eoin.o'domhnaill@dfa.ie'  
**Subject:**  
**Importance:** High

Eoin,

I am attaching a reply to DG Comp letter of 3<sup>rd</sup> October 2007.

DG Comp have asked for the letter by close of business today.

Can you confirm receipt and transmission to DG Comp.

Regards,

Paul Mulqueen  
Broadcasting Policy Division  
29-31 Adelaide Road  
Dublin 2  
353-1-6783092

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Tabhair aire:

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Is leis an údar amháin aon dearcaí nó tuairimí a léirítear. Scanadh an r-phost se  
Ní féidir a ráthú leis seo áfach nach bhfuil ábhar mailíseach ann.

---

**Paul Mulqueen**

**From:** Paul Mulqueen  
**Sent:** 30 January 2008 11:48  
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**Importance:** High  
**Attachments:** State aid No E 4 30 Jan.doc

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**From:** Nuala.McCormack@dfa.ie  
**Sent:** 01 February 2008 09:29  
**To:** Paul Mulqueen  
**Subject:** Receipt

**Attachments:** Perm\_Re.pdf



Perm\_Re.pdf (9 KB)

Paul,

Receipt for delivery of letter attached.

Regards

Nuala

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**Tabhair aire:**

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

82

Colm Ó Conaill

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**From:** Kevin O'Brien  
**Sent:** 28 January 2008 12:31  
**To:** Colm Ó Conaill  
**Cc:** Paul Mulqueen; Bill Morrissey; Aidan Dunning; Peter O'Neill; Suzanne Duke; Brendan O'Reilly  
**Attachments:** State aid No E 4 28 Jan (2).doc

Colm

Attached is a draft letter to DG Competition, European Commission, in relation to their State Aid investigation into funding of RTE/TG4. The text in bold and/or italics as well as the footnote is additional text proposed in the last few months by the Department beyond our opening position. We do not see any of the additional commitments as particularly problematic.

The Commission have indicated that they will accept this specific letter and move to close the investigation by end of February if they receive the letter by c.o.b. Wednesday.

The one caveat from the DG Competition is: "the above proposal is a proposal at service level and the final acceptance of the commitments submitted by the Irish authorities will depend on the outcome of the formal consultation process within the Commission." - i.e. they will consult with other DGs.

This matter was discussed with the Minister this a.m.

To meet the Commission decision, it would be very useful to have Ministerial sign off by tomorrow or Wednesday a.m. at the latest.

Regards

Kevin

DRAFT

January 2007

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*In essence public access under Head 77 to view/listen to - but not re-use - the contents of the archive would not be subject to a sectoral impact assessment. However, the separate schemes for the re-use and exploitation of material held in the archives would be subject to sectoral impact assessments prior to any Ministerial approval. Re-use in this case which is subject to sectoral impact would, for instance, include downloading and storing permanently by individuals.*

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.

**The Irish Authorities also commit to require the public service broadcasters to indicate in their public service broadcasting charters the proposed level of activity in respect of the publication of books and music for which public funding will be utilised.**

7. TG4 (Commission paragraph 2)

The Irish Authorities confirm that equivalent mechanisms to those proposed in respect of RTE 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 paragraphs 4.1 and 4.2)

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. *In considering whether there should be an adjustment to the level of public funding, the annual review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.*
  - Statutorily mandated five year review of the adequacy or otherwise of the public funding made available to the public service broadcaster in order to meet its public service objectives as enunciated in statute, and an associated recommendation to the Minister as to any necessary adjustment as to the level of such public funding. *In considering whether there should be an adjustment to the level of public funding, the five year review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.*
  - *The Irish Authorities also commit to require the BAI, on the basis of the above mentioned reviews, to make a recommendation to the Minister as to the level of adjustment to the public funding of public service broadcasters, and to, on its establishment, communicate to the BAI the Commission's policy in respect of the maintenance of surpluses by public service broadcasters<sup>1</sup> (a mechanism for such a communication is provided for in paragraph (i) of Head 117(10) of the draft general scheme of the Broadcasting Bill).*

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<sup>1</sup> Commission Policy is set out at [http://ec.europa.eu/comm/competition/sectors/media/decisions\\_psb.pdf](http://ec.europa.eu/comm/competition/sectors/media/decisions_psb.pdf) for previous Commission Decisions, and at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:320:0005:0011:EN:PDF>. ) for the 'Communication from the Commission on the application of State Aid rules to public service broadcasting'.

It is understood that under current published Commission Policy, (cf. in particular Commission decision of 24 April 2007, State aid E 3/2005 - Germany), a possible annual surplus (overcompensation) needs to be limited to what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of annual compensation payments). Exceptionally, a surplus exceeding the 10% threshold may remain with the public service broadcasters, provided that this amount is earmarked for a specific purpose, the costs of which are spelled out in advance and certified by an independent control body and that the use of these earmarked funds in accordance with its purpose is subject to ex post control. Furthermore, surpluses (overcompensation) accumulated at the end of a given period would need to be fully taken into account (i.e. deducted) when determining the financing needs of the public service broadcasters for the next period.

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

#### 13. 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.

#### 14. 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

Buan Ionadaíocht  
na hÉireann  
chuig an Aontas Eorpach



84  
Permanent Representation  
of Ireland  
to the European Union

30 January 2008

Mr Eric Van Ginderachter  
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 Teilifís 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 Teilifís na Gaeilge by enumerating their respective objects and duties in broadcasting legislation and to limit the use of public funding by RTÉ and Teilifís 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 Teilifís 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 Teilifis 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 Teilifis 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 Teilifis 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 Teilifis na Gaeilge, and for which RTÉ or Teilifis 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 Teilifis na Gaeilge;
- (b) the establishment and maintenance by RTÉ or Teilifis na Gaeilge of public service free-to-air community, local, or regional broadcasting services;
- (c) the establishment and maintenance by RTÉ or Teilifis 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 Teilifis na Gaeilge on non-traditional "broadcast" platforms e.g. mobile phones and websites); and
- (d) the establishment and maintenance by RTÉ or Teilifis 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 Teilifis 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 been 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 (see criteria for sectoral impact set out in point 9 below) and compliance by public service broadcasters with the terms of schemes.

In essence public access under Head 77 to view/listen to - but not re-use - the contents of the archive would not be subject to a sectoral impact assessment. However, the separate schemes for the re-use and exploitation of material held in the archives would be subject to sectoral impact assessments prior to any Ministerial approval. Re-use in this case which is subject to sectoral impact would, for instance, include downloading and storing permanently by individuals.

#### 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.

The Irish Authorities also commit to require the public service broadcasters to indicate in their public service broadcasting charters the proposed level of activity in respect of the publication of books and music for which public funding will be utilised.

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 paragraphs 4.1 and 4.2)

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. In considering whether there should be an adjustment to the level of public funding, the annual review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
  - Statutorily mandated five year review of the adequacy or otherwise of the public funding made available to the public service broadcaster in order to meet its public service objectives as enunciated in statute, and an associated recommendation to the Minister as to any necessary adjustment as to the level of such public funding. In considering whether there should be an adjustment to the level of public funding, the five year review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
  - The Irish Authorities also commit to require the BAI, on the basis of the above mentioned reviews, to make a recommendation to the Minister as to the level of adjustment to the public funding of public service broadcasters, and to, on its establishment, communicate to the BAI the Commission's policy in respect of the maintenance of surpluses by public service broadcasters<sup>1</sup> (a mechanism for such a communication is provided for in paragraph (i) of Head 117(10) of the draft general scheme of the Broadcasting Bill).

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

<sup>1</sup> Commission Policy is set out at [http://ec.europa.eu/comm/competition/sectors/media/decisions\\_psb.pdf](http://ec.europa.eu/comm/competition/sectors/media/decisions_psb.pdf) for previous Commission Decisions, and at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:320:0005:0011:EN:PDF>.) for the 'Communication from the Commission on the application of State Aid rules to public service broadcasting'.

It is understood that under current published Commission Policy, (cf. in particular Commission decision of 24 April 2007, State aid E 3/2005 - Germany), a possible annual surplus (overcompensation) needs to be limited to what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of annual compensation payments). Exceptionally, a surplus exceeding the 10% threshold may remain with the public service broadcasters, provided that this amount is earmarked for a specific purpose, the costs of which are spelled out in advance and certified by an independent control body and that the use of these earmarked funds in accordance with its purpose is subject to ex post control. Furthermore, surpluses (overcompensation) accumulated at the end of a given period would need to be fully taken into account (i.e. deducted) when determining the financing needs of the public service broadcasters for the next period.

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

### 13. 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.

### 14. Tax exemptions (Commission paragraph 5)

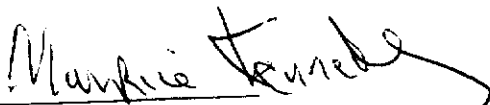
The Irish Authorities can confirm that commitments to amend the tax status of RTÉ by making all RTÉ activities subject to the corporation tax code have taken place.

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

A handwritten signature in black ink, appearing to read "Marie Keene", written over a horizontal line.

Counsellor  
Permanent Representation of Ireland to the EU  
Rue Froissart 89-93  
1040 Brussels

Buan Ionadaíocht  
na hÉireann  
chuig an Aontas Eorpach



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Permanent Representation  
of Ireland  
to the European Union

30 January 2008

Mr Eric Van Ginderachter  
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 Teilifis 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 Teilifis 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 Teilifis 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 Teilifis na Gaeilge, and for which RTÉ or Teilifis 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 been 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 (see criteria for sectoral impact set out in point 9 below) and compliance by public service broadcasters with the terms of schemes.

In essence public access under Head 77 to view/listen to - but not re-use - the contents of the archive would not be subject to a sectoral impact assessment. However, the separate schemes for the re-use and exploitation of material held in the archives would be subject to sectoral impact assessments prior to any Ministerial approval. Re-use in this case which is subject to sectoral impact would, for instance, include downloading and storing permanently by individuals.

#### 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.

The Irish Authorities also commit to require the public service broadcasters to indicate in their public service broadcasting charters the proposed level of activity in respect of the publication of books and music for which public funding will be utilised.

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 paragraphs 4.1 and 4.2)

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. In considering whether there should be an adjustment to the level of public funding, the annual review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
  - Statutorily mandated five year review of the adequacy or otherwise of the public funding made available to the public service broadcaster in order to meet its public service objectives as enunciated in statute, and an associated recommendation to the Minister as to any necessary adjustment as to the level of such public funding. In considering whether there should be an adjustment to the level of public funding, the five year review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
  - The Irish Authorities also commit to require the BAI, on the basis of the above mentioned reviews, to make a recommendation to the Minister as to the level of adjustment to the public funding of public service broadcasters, and to, on its establishment, communicate to the BAI the Commission's policy in respect of the maintenance of surpluses by public service broadcasters<sup>1</sup> (a mechanism for such a communication is provided for in paragraph (i) of Head 117(10) of the draft general scheme of the Broadcasting Bill).

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

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<sup>1</sup> Commission Policy is set out at [http://ec.europa.eu/comm/competition/sectors/media/decisions\\_psb.pdf](http://ec.europa.eu/comm/competition/sectors/media/decisions_psb.pdf) for previous Commission Decisions, and at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:320:0005:0011:EN:PDF>. ) for the 'Communication from the Commission on the application of State Aid rules to public service broadcasting'.

It is understood that under current published Commission Policy, (cf. in particular Commission decision of 24 April 2007, State aid E 3/2005 - Germany), a possible annual surplus (overcompensation) needs to be limited to what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of annual compensation payments). Exceptionally, a surplus exceeding the 10% threshold may remain with the public service broadcasters, provided that this amount is earmarked for a specific purpose, the costs of which are spelled out in advance and certified by an independent control body and that the use of these earmarked funds in accordance with its purpose is subject to ex post control. Furthermore, surpluses (overcompensation) accumulated at the end of a given period would need to be fully taken into account (i.e. deducted) when determining the financing needs of the public service broadcasters for the next period.

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

### 13. 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.

### 14. Tax exemptions (Commission paragraph 5)

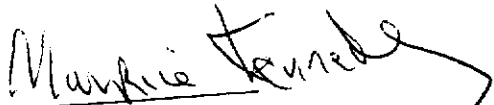
The Irish Authorities can confirm that commitments to amend the tax status of RTÉ by making all RTÉ activities subject to the corporation tax code have taken place.

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

A handwritten signature in black ink, appearing to read "Marie Keene", written over a horizontal line.

Counsellor  
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