



EUROPEAN COMMISSION

Brussels, 27.II.2008
C(2008)723 final

Subject: State aid E 4/2005 (ex NN 99/1999) - Ireland
State financing of *Radio Teilifís Éireann* (RTÉ) and *Teilifís na Gaeilge* (TG4)

Sir,

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

1. PROCEDURE

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

¹ Council Regulation no 659/1999 laying down detailed rules for the application of Article 93 EC [now Article 88 EC], OJ L 83, 27.03.1999, page 1.

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

- (2) Following several requests for information, the submission of additional information from the complainant as well as meetings with the Irish authorities, the Commission informed the Irish Government by letter dated 3 March 2005, in accordance with Article 17 (2) of the Procedural Regulation, about its preliminary concerns regarding the compatibility of the State aid granted to RTÉ, also outlining possible ways of addressing these concerns (hereafter "Article 17 Letter").
- (3) In May 2005, the Irish Government submitted its views and already came forward with a number of proposals to change the existing framework. The Irish Government also informed the Commission about plans to reform the Broadcasting Act.
- (4) The Commission met with representatives of the Irish Government on several occasions (March 2005, April and November 2006). The Irish authorities submitted additional information in January and December 2006, including the latest draft proposals for the new Broadcasting Bill (hereafter "draft Bill"). Additional clarification was provided in the course of 2007², including an update on the draft Bill.³
- (5) The Commission met with representatives of the complainant on several occasions (August 2005 and May 2007). On several occasions, the complainant submitted additional information⁴, illustrating – for instance - the alleged inadequate supervision of RTÉ's performance⁵ as well as the distortions of competition resulting from overcompensation⁶. As regards the draft Bill, the complainant reiterated its initial concerns and took the view that the proposed changes would not ensure full compliance with the requirements set out in the Broadcasting Communication. In this respect, the complainant claims that the draft Bill still does not contain a clear public service definition or allows for an

² The Commission services sought additional clarifications on specific issues in January, April, May and June 2007. These clarifications were submitted by the Irish authorities in February, May and June 2007.

³ So-called General scheme for the Broadcasting Bill 2006, hereafter "draft Bill": <http://www.dcmr.gov.ie/Broadcasting/Broadcasting+Bill/>

⁴ In particular in September, October and November 2005, November 2006 as well as May and October 2007.

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

⁶ More particularly, TV3 alleged that RTÉ was emptying the market. The Commission would like to point out that the scope of the present procedure as outlined in the Article 17 letter covers the question of the public service remit as regards sports broadcasts, whereas possible disproportionate effects on competition related to the scope of sports rights acquired by RTE are assessed separately.

overly broad scope of the public service remit⁷, would not provide for adequate supervision of the fulfillment of the public service mission⁸ and would still not exclude overcompensation⁹.

- (6) In October 2007, the Commission asked the Irish authorities to formally submit commitments on the necessary changes which had been discussed in the context of the procedure (and which were already outlined in the draft Broadcasting Bill) and - where necessary - to complement them.
- (7) In January 2008, the Irish Government submitted formal commitments to change the current financing regime by December 2008 at the latest.

2. DESCRIPTION OF THE BROADCASTING MARKET AND THE RELEVANT PLAYERS

2.1. The Irish broadcasting companies

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

- (8) RTÉ is the main public service broadcaster in Ireland. In 2006, RTÉ's total revenues amounted to approximately € 405 million. Approximately € 182.8 million (or 45%) were derived from licensee fee attributions and approximately € 222.2 million (or 55%) constituted commercial revenues.¹⁰
- (9) RTÉ's operations are divided into six main business divisions: RTÉ television, RTÉ Radio, RTÉ News and Current Affairs, RTÉ Performing Groups, RTÉ Publishing, and RTÉNL (Networks).
- (10) RTÉ's core activity is the broadcast of public service, free-to-air television (RTÉ One and RTÉ Two) and radio. Its television broadcasting can be received by over 99% of the population in Ireland. RTÉ's other public service activities include the operation of the RTÉ National Symphony Orchestra, the RTÉ Concert Orchestra and other performing groups. RTÉ also provides free-of-charge web based online services.¹¹
- (11) RTÉ's commercial activities consist primarily in the sale of advertising and sponsorship and in the provision of transmission network service to broadcasters (through RTÉNL) including the renting out of surplus tower/mast space. In

⁷ In this respect, the complainant alleges for instance that the scope of TG4's activities should be limited to only Irish language content, that the broadcasting of sporting events in respect of which commercial demand exists should be excluded from the public service remit of RTÉ and that the possibility for RTE and TG4 to offer pay-services, which should be regarded as manifestly wrong.

⁸ In this respect, the complainant argues that the new broadcasting authority could not be regarded as independent and its control competences were not stipulated in the draft Bill.

⁹ The complainant argues that the requirements of transparent accounts were still not properly implemented and that there was still no link between the public funds awarded to RTE and TG4 to the costs of complying with their public service obligations; instead the amount was simply determined based on the amount of licence fees collected.

¹⁰ See RTÉ's Annual Report 2006, page 49.

¹¹ See RTÉ's Annual Report 2006, pages 14 and 35.

addition, *RTÉ Television and RTÉ Radio* generate commercial revenue from the release of television programs on DVD/VHS and radio programs on audio CD, the licensing of RTÉ brands for events/magazines, the sales of television programs, the sale of television facilities (including studio facilities and fixed contribution links to programs makers and broadcasters), the sale of television and radio commercials production and the sale of television and radio archive material and clips. Furthermore, *RTÉ Publishing* earns commercial revenue from the sale of the RTÉ Guide (a television and radio listing magazine), sales of advertising and sponsorship in the magazine itself. RTÉ Publishing also hosts the Audience Interactive Unit which is a telecom service and responsible for the generation of revenue from all television and radio programs that have an interactive element (e.g. competitions and voting). Commercial revenues are also generated through e-publishing activities such as text service, online advertising and the operation of the rte.ie shop. Finally, *RTÉ Performing Groups* generate commercial revenues from the sale of public performances of the RTÉ orchestras and the release of audio CDs.¹²

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

2.1.2. TV3 Television Network Limited (TV3)

- (14) TV3 is an Irish commercial television channel 100% which started operations in 1998. It is owned by the United Kingdom-based private equity firm Doughty Hanson & Co. TV3's turnover amounts to approximately € 50 million.¹⁵
- (15) TV3 is the second national broadcaster¹⁶ and its transmission network covers more than 90% of the population in Ireland. TV3's revenues are derived from advertising, sponsorship and promotions, as well as certain programming and interactive applications.¹⁷

2.2. Television broadcasting in Ireland

- (16) In 2005, around 21.5% of the Irish television households were “Irish terrestrial households” *i.e.*, they received only the four Irish channels: RTÉ One, RTÉ Two,

¹² See RTÉ's submission of 22 June 2007.

¹³ See RTÉ's Annual Report 2006, page 23, as well as TG4's submission of 28 June 2007.

¹⁴ As of 1 April 2007, TG4 became an independent statutory entity, see S.I. No. 98 of 2007, *Teilifis na Gaeilge* (establishment day) order 2007.

¹⁵ http://www.doughtyhanson.com/Portfolio_PE.aspx.

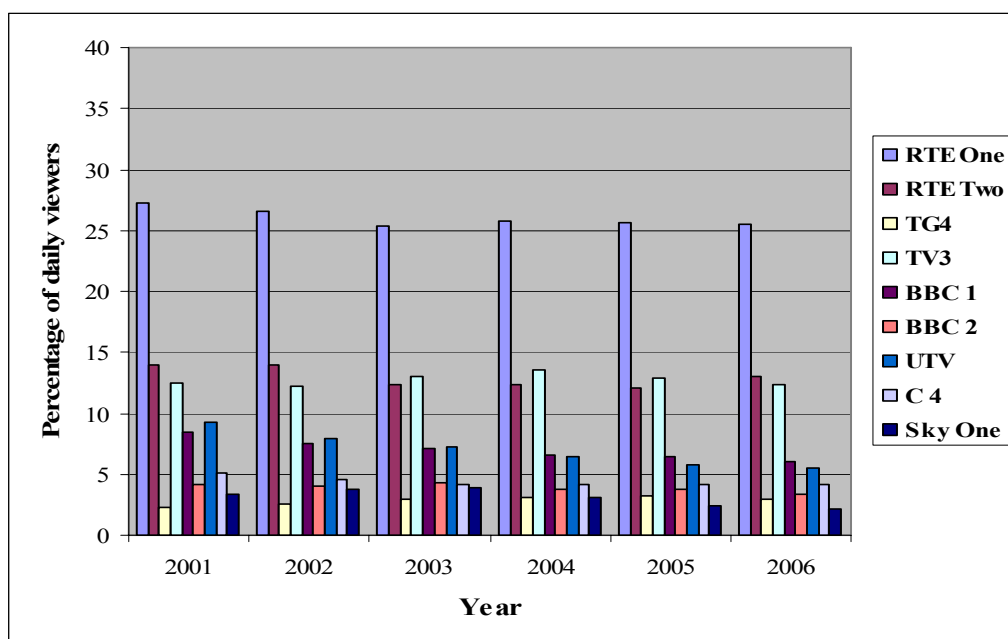
¹⁶ European Audiovisual Observatory Yearbook 2006: *Television in 36 European States*, volume 1, page 163.

¹⁷ http://www.doughtyhanson.com/Portfolio_PE.aspx.

TG4 and TV3. Approximately 15.7% of the Irish television households were "Multi terrestrial households" *i.e.*, they received the four Irish channels and at least one of the United Kingdom channels.¹⁸ In total there are, however, around 10 Irish television channels operating on the island in addition to the about six to ten foreign channels (mainly British) which are targeting Ireland.¹⁹ Since 2005, two new thematic channels, Setanta Sports and Paramount Comedy, are available in Ireland. In addition, Channel 6, a new Irish free-to-air commercial channel, was launched in 2006.

- (17) In 2005, the Irish television advertising market generated revenues of € 258 million.²⁰ In that year, RTÉ's net television advertising income amounted to approximately € 124 million or 48% of television advertising sales in Ireland.²¹
- (18) In terms of audience shares, RTÉ One and Two had, during the period from 2001 to 2006, a constant share of around 40% (all day) and 44-45% (peak time), TG4 of 2-3% (all day as well as peak time) and TV3 of 12-14% (all day and peak time). Foreign channels such as the BBC had a market share of around 13%; see figures 1 and 2 below.²²

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



¹⁸ See RTÉ's Digital Television and Radio Services in Ireland – An Introduction, July 2005.

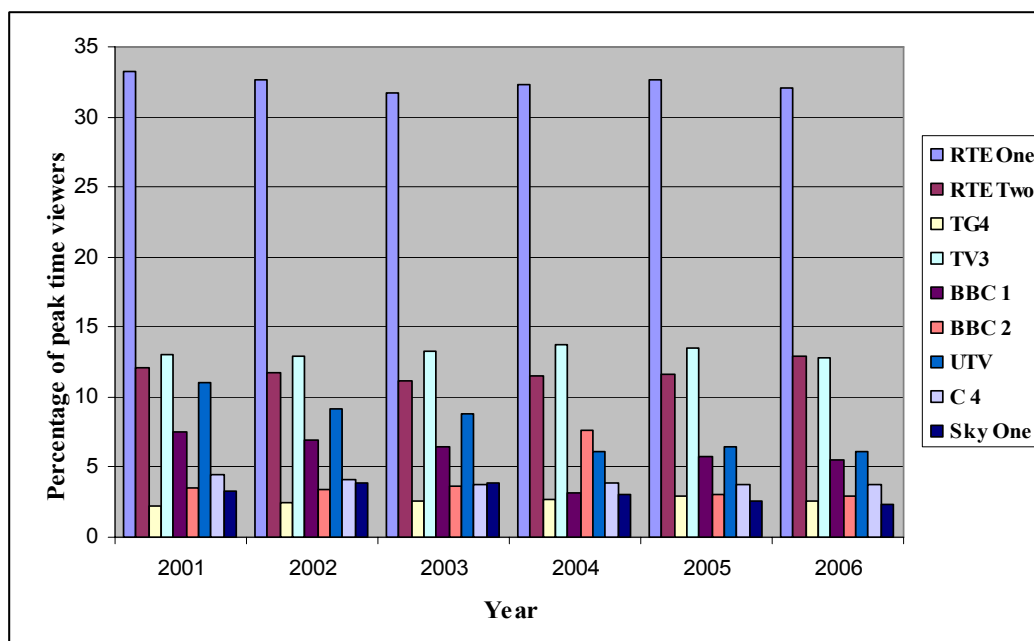
¹⁹ European Audiovisual Observatory Yearbook 2006: *Television in 36 European States*, volume 1, pages 162 to 164, and page 167.

²⁰ European Audiovisual Observatory Yearbook 2006: *Television in 36 European States*, volume 1, page 162.

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

²² Figures for the nine main television channels 2001 to 2005 come from the European Audiovisual Observatory Yearbook 2006: *Television in 36 European States*, volume 1. Figures for 2006 come from RTÉ's Annual Report 2006, which cites AGB Nielsen Media Research as source of the figures.

Figure 2: Television audience share (2001 – 2006), peak time

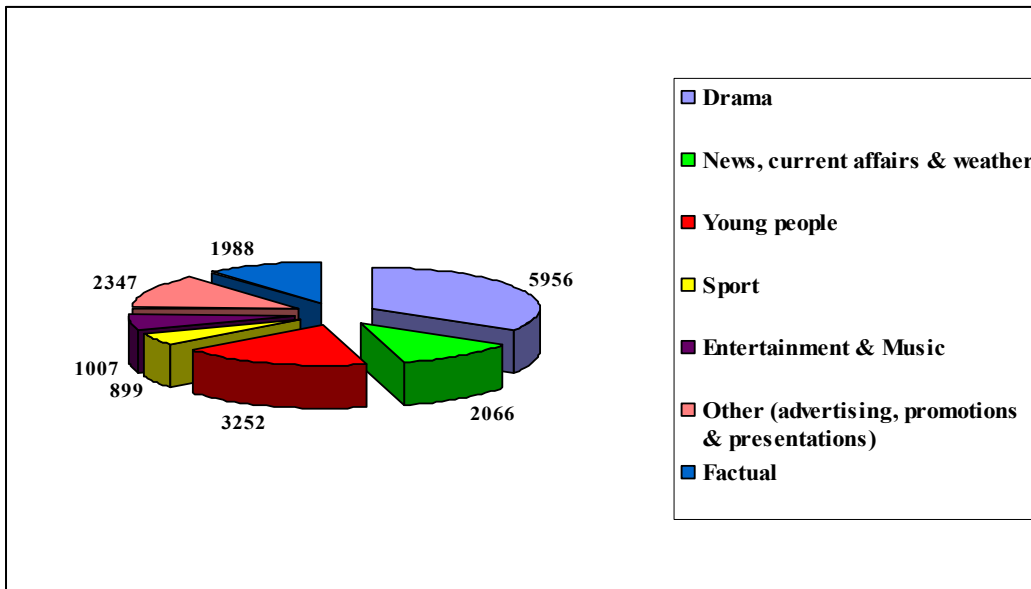


(19) Figure 3 below gives an overview of RTÉ's television output, including a breakdown of RTÉ programs by genre in 2006.²³ The overview includes indigenous programmes²⁴ and acquired programmes, totalling about 17715 broadcast hours. As can be seen from Figure 4 below, indigenous programmes account for almost 50% of RTÉ's programme output. As illustrated, RTÉ's most important program genres are drama (approximately 34%); young people (approximately 18%), news, current affairs and weather (approximately 12%) and factual (approximately 11%). Sports programmes account for approximately 5% and entertainment and music for approximately 6%.

Figure 3: RTÉ television output by genre, all day 2006

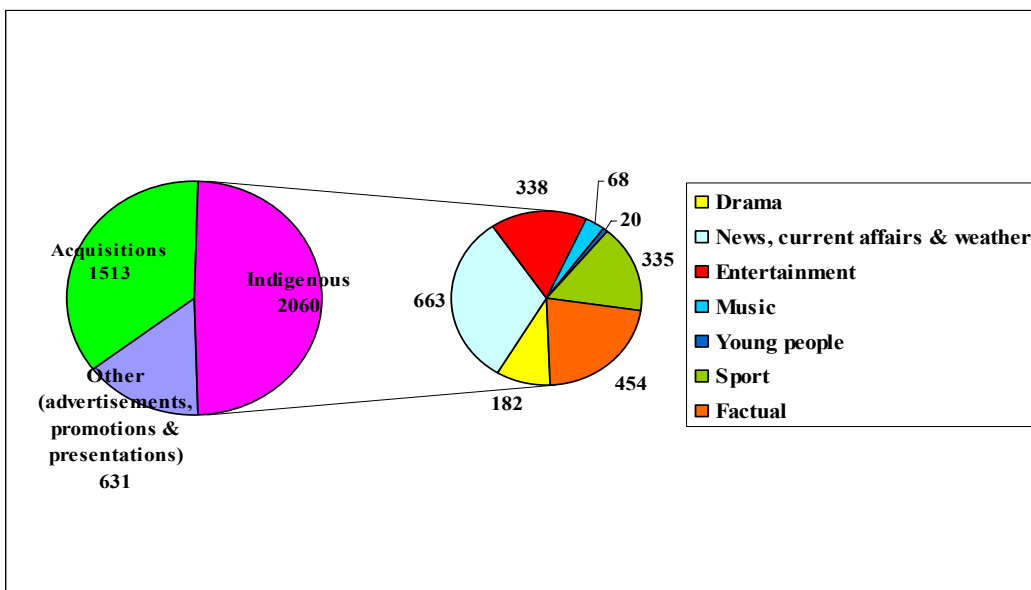
²³ See RTÉ's submissions dated 25 and 26 June 2007.

²⁴ Indigenous programs are programs produced by RTÉ and programs commissioned by RTÉ from independent production companies. RTÉ includes sports programs in its "indigenous program" category because all RTÉ coverage of sporting events (whether the footage used in such coverage is filmed by or on behalf of RTÉ or is licensed by RTÉ from another broadcaster or sports rights-holder) is customized by RTÉ for the Irish audience. Sports program is therefore a combination of the acquisition of the sports right as well as the total cost of production.



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

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



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

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

²⁶ Drama 1908 hours, and factual and news 812 hours (cf. TG4's submission dated 10 July 2007).

3. DESCRIPTION OF THE LEGAL FRAMEWORK GOVERNING PUBLIC SERVICE BROADCASTING

3.1. Public service remit and entrustment

- (22) RTÉ was established as a non-profit making organization and statutory corporation under the Broadcasting Authority Act 1960.
- (23) RTÉ's functions are laid in the Broadcasting Authority Act 1960 as amended²⁷ and in the Broadcasting Act 2001²⁸.
- (24) The main functions (duties and powers) are laid down in Section 16 (1) (of the Broadcasting Authority Act 1960), which provides that "the Authority" (RTÉ) shall establish and maintain a national television broadcasting service and shall have all such powers as are necessary for or incidental to that purpose. In addition, Section 16 (2) lists a number of specific powers granted "the Authority" (RTÉ) in order to fulfill its functions. These powers include for instance the organization of concerts in connection with the broadcasting service or the publication, "with or without charge", of magazines, books, papers and other printed matter as well as aural and visual material which "may seem to be conducive or incidental to its objects". They also include the possibility to establish and maintain broadcasting services of a local, community or regional character, to provide broadcasting services which are of a special interest to only certain members of the community and which are made available on a subscription or pay-per-view basis and to transmit by electronic means (other than by means of broadcasting) its programme schedules.
- (25) According to Section 17, RTÉ shall in its programming reflect the interests and concerns of the whole community, as well as the varied elements which make up the culture of the people of Ireland and have special regard for the elements which distinguish that culture and in particular for the Irish language. It shall also uphold the democratic values and have regard to the need for the formation of public awareness and understanding of the values and traditions of countries other than Ireland.
- (26) Section 28 (1) declares that the national television and sound broadcasting service maintained by RTÉ is a public service which shall continue to be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.
- (27) Pursuant to Section 28 (2), the programme schedules shall provide a comprehensive range of programs in Irish and English that reflect the cultural diversity of Ireland; include programs that entertain, inform and educate; cover sport events, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests. Programmes shall also cover news and current affairs in Irish and English, including proceedings in the Houses of the Oireachtas and the

²⁷ Irish Statute Book, Acts of Oireachtas, Broadcasting Authority Act, 1960, as amended in 1964, 1966, 1971, 1973, 1974, 1976, 1979 and 1993.

²⁸ Irish Statute Book, Acts of Oireachtas, Broadcasting Act, 2001.

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

- (28) The functions as laid down in the Broadcasting Authority Act 1960 also applied to TG4. With the adoption of the Broadcasting Act 2001, these functions were laid down separately. However in substance, they largely mirror those of RTÉ with a particular focus of TG4's programs on the Irish language.
- (29) RTÉ's remit was further specified in the so-called public service broadcasting charter which was published by the Department of Communications, Marine and Natural Resources (DCMNR) for the first time in June 2004. The charter is a statement of principles that clarifies what is expected of RTÉ, including RTÉ's accountability to its audience.²⁹ However, at present, the charter does not have a statutory basis. RTÉ issued a set of guiding principles "Implementing the Public Service Broadcasting Charter", in which RTÉ sets out the commitment to meet the expectations outlined in the charter and presents RTÉ's vision, mission, values, goals and strategic corporate plan.³⁰ Since 2003, RTÉ publishes annual statements of commitments, including more specific commitments on how to deliver on its public service obligations. These statements should be such as to allow a measurement and independent verification at the end of each year. As part of its annual reporting RTÉ has committed to demonstrate how each specific commitment has been met (see on the reviews which are carried out in this respect below, paragraphs (157) to (159)).

3.2. Supervision

- (30) Within RTÉ³¹, the RTÉ Authority has the task of ensuring that RTÉ meets all its obligations. The RTÉ Authority is required to forward to the Minister information and annual reports concerning the financial performance as well as information regarding the performance of RTÉ's functions. The Minister submits these documents to the Irish Parliament.
- (31) The Broadcasting Commission of Ireland (BCI), an independent statutory organisation which was established in September 2001 has regulatory and control functions with regard to television and radio services in Ireland, but mainly as regards commercial broadcasters (key functions include for instance the licensing of independent broadcasting services, the development of codes and rules in relation to programming and advertising standards and the monitoring of all licensed services to ensure that licence holders comply with their statutory obligations and terms of their contracts). There is, however, no specific competence for supervising how RTÉ delivers on its duties.
- (32) It appears that since 2003, compliance with RTÉ's commitments is subject to control in the context of the annual reviews on a possible licence fee adjustment (see also below on the financial aspects, paragraph (36) *et seq.*).

²⁹ See <http://www.rte.ie/about/organisation/psb.pdf>

³⁰ See http://www.rte.ie/about/guiding_principles.html

³¹ The RTÉ Authority and RTÉ are one and the same legal entity; see the Broadcasting Authority Act 1960, RTÉ's Annual Report 2006, page 32, and RTÉ's submission dated 8 April 2004.

3.3. The financing of public service broadcasting

- (33) According to the Wireless Telegraphy Act 1926, every person or undertaking that has a television or equipment capable of receiving a television signal must pay a television license. The licence fee is collected through the Irish Post Office *An Post*, which subsequently transfers the monies to the DCMNR. Each year, the Minister allocates almost the totality of revenues from the license fee (net of collection costs) to RTÉ.³²
- (34) In 2002, the Irish Government decided to base the annual adjustment of the licence fee on the consumer price index (CPI), with an adjustment for the extent to which RTÉ's programme output commitments were achieved. Any such possible increase in the licence fee level is preceded by an annual review, the exact terms of which are set by the Minister. These reviews comprise the financial performance of RTÉ, but also the achievement of its output commitments. The review is carried out by an independent expert which also makes recommendations to the Minister.³³ The Minister may then decide to increase the licence fee level. The last such increase was decided by the Minister in 2007. Based on the Television Licences Regulation 2007, the level of the licence fee was increased as of 1st January 2008 to € 160.³⁴
- (35) The amount paid to RTÉ shall only be used for the programme schedules set out in Section 28(2), for complying with its duties under Section 17, in exercising its powers under Section 16 (with the exception however of the powers related to subscription or pay-per-view services as well as programme schedules transmitted by electronic means), but also for providing, pursuant to its powers, any service (other than a broadcasting service) for the benefit of the public.³⁵
- (36) According to RTÉ's Annual Report 2006, all license fee money was used to partly fund RTÉ's television division, radio division, news & current affairs division and its performing groups (this also includes the cost of the support provided to TG4). On the other hand, license fee revenue is not directly attributed to RTÉ Publishing, RTÉ Network, and Corporate HQ or to any other non-channel activity or service (such as RTÉ's free-of-charge web based online public services).

³² See Broadcasting Authority Act 1960, Section 22 as well as Broadcasting Authority (Amendment) Act, 1976, Section 8.

³³ See for instance the RTÉ Licence Fee Adjustment Review 2006, provided by Indecon in November 2007: <http://www.dcmnr.gov.ie/NR/rdonlyres/B22A0ED5-82E1-4498-A72A-0D8AF5646D5C/0/RTÉLicenceFeeAdjustment2006Report.doc>

³⁴ Before this, the licence fee level was last increased in 2006 to € 158 (i.e. an increase by 1.3%).

³⁵ Cf. Section 28 (8) of Broadcasting Act 2001 for RTÉ and Section 45 (6) for TG4.

- (37) In 2006, RTÉ received license fee revenues totalling approximately € 182.8 million. This corresponds to 45% of total revenues which amounted to approximately € 405 million in that year. Approximately € 125 million was allocated to RTÉ's television business division.³⁶ Within the television business division, license fee money currently contributes only to RTÉ's indigenous programs. No license fee money is attributed to the cost of acquired programs or the funding of other than programme costs.
- (38) At the same time, the television business division incurred costs of approximately € 257 million on public service television. Out of this amount almost € 202 was spent on indigenous programs.³⁷
- (39) In total, RTÉ's 2006 public service television activities incurred a deficit amounting to approximately € 132 million.³⁸ This deficit was covered with revenues generated from RTÉ's commercial activities which amounted to € 222.2 million. With total operating costs amounting to € 380.5 million, RTÉ achieved an operating surplus of € 24.5 million and after deduction of financial costs a surplus of € 10.2 million.
- (40) In 2006, TG4's revenues amounted to approximately € 42 million. Approximately € 38.4 million (or 91%) constituted state funding and approximately € 3.5 million (or 9%) were derived from commercial activities.³⁹ TG4's commercial activities comprise advertising and sponsorships, as well as program sales and ancillary activities.

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

- (41) Based on the information submitted by the complainant and the Irish Government, the Commission carried out a preliminary assessment of the financing regime in favour of RTÉ under the EU State aid rules and informed Ireland of its preliminary findings in the Article 17 letter of March 2005.
- (42) The main conclusions were that the payments of license fee revenues constituted state aid within the meaning of Article 87 (1) of the EC Treaty. Considering that the legal basis for the license fee was adopted prior to Ireland's accession to the EU in 1973, and remained applicable without significant subsequent alterations, the Commission also considered that the licence fee funding could be regarded as existing aid.

³⁶ See RTÉ's Annual Report 2006, pages 52 and 53. Approximately € 14.2 million was attributed the RTÉ performing groups and € 33.7 million to RTÉ Radio.

³⁷ The difference between the amount of licence fees attributed to RTÉ's television business division and the amounts spent is due to the fact that only indigenous programs (or around 50% of total broadcast output) are funded by license fee money.

³⁸ This information is based on RTÉ's Annual Report 2006.

³⁹ See RTÉ's Annual Report 2006, pages 25 and 60, as well as TG4's submission of 28 June 2007.

- (43) As regards the compatibility of the licence fee funding regime, the Commission had raised concerns regarding the definition of the public service remit, entrustment and control of the public service obligations as well as the proportionality of the aid. The Commission also indicated ways in which compliance with EU State aid rules could be achieved.
- (44) More particularly, the Commission considered that the legal provisions did not clearly and precisely define the scope of activities other than broadcasting (comprising activities such as publication of magazines, books or papers, or recorded aural and visual material with or without charge), and which of those activities could - as part of the public service tasks of RTÉ - be financed through the licence fee. Consequently, there was a risk that purely commercial activities would ultimately benefit from State aid. The Commission also objected to the possibility of RTÉ to use licence fee revenues to provide “*any service (other than a broadcasting service)*”, without there being a further specification of the actual nature or scope of such service and formal entrustment by the Irish authorities.
- (45) The Commission also considered that there were no satisfactory *ex-post* controls to verify whether state funding exceeded the net public service costs (overcompensation) or whether commercial activities had been unduly benefited from licence fee revenues (cross-subsidisation) or whether RTÉ's commercial activities were in line with market principles (market-conform behaviour).

5. IRELAND'S RESPONSE TO THE ARTICLE 17 LETTER

- (46) In May 2005, the Irish Government submitted observations on the Commission's preliminary assessment as well as proposals to address the concerns identified in the Article 17 letter. It also informed the Commission about the work on a new Broadcasting Act.
- (47) In relation to activities other than broadcasting, the Irish Government accepted that the current legal framework does not sufficiently ensure that license fees can be used only in pursuance of RTÉ's public service remit. In this respect, the Government suggested to clarify that RTÉ could only use state resources in pursuance of its public service mandate as defined in the Broadcasting Act and to remove the general authorisation to use state resources to provide any service (other than a broadcasting service).
- (48) The Irish Government also informed the Commission that it envisaged expanding RTÉ's public service remit so that RTÉ may use state resources to transmit programs by electronic means (i.e. by means other than broadcasting)⁴⁰ and by imposing an obligation on RTÉ to maintain an audio-visual archive.
- (49) The Irish Government further agreed that the establishment of a more independent supervisory body would be appropriate.
- (50) The Irish Government confirmed that the Transparency Directive was transposed into Irish law in 2004. It also explained that RTÉ had refined its reporting system

⁴⁰ As stated above, under the current legislation, this is part of RTÉ's powers, but the legal provisions do not allow RTÉ to use licence fee money in this respect (paragraph (24) and paragraph (35)).

so that its reports now reflect the invoicing of inter-company charges, the provision of additional reporting information on public service and non-public service activities and a refined treatment of corporate HQ costs. RTÉ's financial statement now also include revenue and expenditure information by business division, by channel, service and broadcast genre, and an analysis of revenues and costs of RTÉ's public service and non-public service activities. Similar information is also available in relation to TG4.

- (51) Furthermore, the Irish Government agreed with the introduction of an *ex-post* monitoring mechanism to evaluate the necessity of the public funding. To this end, the Government proposed that the envisaged new supervisory body could provide the Government with an assessment of the necessity of public funding.
- (52) Finally, the Government agreed to require RTÉ to conduct its commercial activities (including those of its subsidiaries) under market conditions and to seek to maximize the commercial exploitation of its public service products. The new independent control body would periodically report to the Government on the compliance of RTÉ with these requirements.

6. FINAL ASSESSMENT OF THE CURRENT LEGAL FRAMEWORK

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

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

6.1.1. Transfer of state resources

- (54) The Commission considers license fee money used to finance public service broadcasting in Ireland to constitute state resources within the meaning of Article 87 (1) EC Treaty. In line with its established decision-making practice, the Commission examines in this respect in particular whether the measure in question constitutes a compulsory levy and whether the revenues from the levy are under the control of the State.⁴¹
- (55) The television license fee is a compulsory levy imposed by law. The licence fees are paid to the Government, which then distributes the revenues to RTÉ in accordance with national legislation.⁴² The license fee is destined to finance the activities of RTÉ as a public service broadcaster (a service in the general interest). The Commission therefore considers that the Irish State exercises control over the licence fee revenues.

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

⁴² See on this aspect also BBC 24-hours news channel Decision, paragraph 22 and TV2 Decision, paragraph 59 as well as Commission decision in State aid E 3/2005 paragraph 146.

6.1.2. *Economic advantage*

- (56) The Commission considers that financing from license fee money reduces the operating costs that RTE would normally have to bear and provides RTE with an economic advantage compared to other broadcasters which finance their activities based on commercial revenues only.
- (57) The Commission considers that the Altmark-conditions are not fulfilled. It is recalled that in this judgment, the Court held that compensation payments to an undertaking which discharges public service obligations do not qualify as State aid if four conditions are cumulatively fulfilled:⁴³
- First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
 - Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.
 - Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
 - Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate production means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (58) As discussed in more detail below (cf. paragraphs (88) to (90) and (108) to (113)), it does not appear that the first and third conditions can be considered as fulfilled. In any event, the Commission considers that the second condition is not fulfilled. Based on the information submitted, it appears that the payments to RTE consist of the (almost) totality of licence fee revenues collected from citizens/undertakings. This amount is determined based on the licence fee level. Even though the Government has introduced a review mechanism, the review carried out in the past (which admittedly examined past performance and future outlook) does not clearly reveal the parameters on which the final determination of the licence fee level/revenues is based. Thus, it does not seem that the compensation for public service obligations is calculated by the Irish authorities

⁴³ Judgement of 24 July 2003, Case C-280/00, Altmark Trans and Regierungspräsidium Magdeburg, Rec.2003, p.I-7747.

based on parameters which have been established in advance in relation to the provision of the public service activities.⁴⁴

- (59) As to the fourth condition, the Commission notes that RTÉ has not been chosen by a public procurement procedure to fulfil the public service tasks. Also, the Commission has not received any information which would have demonstrated⁴⁵ that the financing granted to RTÉ has been determined on the basis of an analysis of the costs which a typical well-run undertaking. In this respect, the Commission observes that the 2006 review into the financial performance and delivery on its public service remit referred to the need for benchmarking of RTÉ's cost structure with public service broadcasters in other Member States as well as other commercial operators in Ireland. However, there is no evidence that RTÉ's costs were reduced to such "benchmarked" costs. In light of these observations, the Commission considers that the fourth condition is not satisfied either.

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

- (60) According to established case law, "*...aid must be found to be incompatible with the common market if it has or is liable to have an effect on intra-Community trade and to distort competition within such trade. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid....*"⁴⁶
- (61) The Commission generally considers that the State financing of public service broadcasters is liable to distort competition and affect trade between Member States given the international trade in programmes and programme rights, the cross-border effects of advertising (in particular in areas close to the border and where both sides of the border the same language is spoken) and because the ownership structure of private competitors may extend over several Member States.⁴⁷

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

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

⁴⁶ Cf. Judgment of the Court of 15 December 2005, Case C-148/04, *Unicredito Italiano SpA*, [2005] ECR I-11137, paragraphs 55 and 56 with reference to judgement of 17 September 1980, Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11; judgement of 22 November 2001, Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21; and judgement of 29 April 2004, *Italy v Commission*, Case C-372/97, [2004] ECR I-3679, paragraph 52).

⁴⁷ Cf. Broadcasting Communication, paragraph 18.

- (62) RTÉ competes with broadcasters and program producers at both national and international level (especially with those established in the United Kingdom).⁴⁸ In addition, RTÉ also engages in a number of commercial activities at national and international level such as, for example, advertising sale, attracting sponsorships, the sale and acquisition of program rights and online services. Therefore, State funding strengthens RTÉ's position compared to those other broadcasters.
- (63) Through its membership of the European Broadcasting Union, RTÉ also exchanges, acquires and sells television programs with other European broadcasters.
- (64) In light of the above, the Commission considers the financial advantages granted RTÉ distort competition and affect trade between Member States within the meaning of Article 87 (1) EC Treaty.

6.2. The nature of the aid

- (65) According to the Procedural Regulation, existing aid means all aid which was introduced before the entry into force of the EC Treaty in the respective Member States and which is still applicable.⁴⁹ On the other hand, changes to an existing aid, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the Common Market, are to be regarded as new aid.⁵⁰
- (66) In *Namur-Les Assurances du Crédit SA* the Court clarified that “... [w]hether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.”⁵¹ Where the relevant legal provisions were not changed as regards the nature of the advantage or the activities of the beneficiaries, there was no new aid.
- (67) According to the case law in *Gibraltar*, not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Tribunal, “it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.”⁵²

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

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

⁵⁰ See Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L140, page 1, of 30 April 2004.

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

⁵² Joined Cases T-195/01 and T-207/01, *Government of Gibraltar v. Commission* (“Gibraltar”), [2001] ECR II-3915, paragraph 11.

- (68) Based on the above, the Commission has examined whether the legal framework of the financing regime for the public service broadcasters was adopted before the entry into force of the EC Treaty in Ireland and whether subsequent modifications are severable from the original measure or whether the non-severable changes affect the actual substance of the original legal framework (*i.e.*, the nature of the advantage or the source of financing, the purpose or legal basis of the aid, the beneficiaries or the scope of activities of the beneficiaries⁵³) so that the latter as a whole is transformed into a new aid.
- (69) At the outset, the Commission observes that the practice of allocating annual licence fee payments to public service broadcasters from state resources was well established before Ireland joined the European Community in 1973. The financing of the national broadcasting system from license fee income dates back to 1926, when the legal base for collecting the levy – the Wireless Telegraphy Act - was adopted. RTÉ was established by the Broadcasting Authority Act 1960 and its functions and duties were laid down in Sections 16 (1) and (2) and 17 of the Broadcasting Authority Act 1960.
- (70) Furthermore, the Commission considers that subsequent amendments to the Broadcasting Authority Act 1960 (as well as other legal acts governing the provision of public service broadcasting in Ireland) can be regarded as not affecting the existing aid nature of the financing regime as initially established:
- (71) The Commission observes that the Broadcasting Authority Act 1960 initially provided for the allocation of licence fee to RTÉ for a five-year period.⁵⁴ This allocation was regularly renewed until it was placed on a permanent footing in 1976 with Section 8 of the amended Act of 1976 providing for the annual payment of licence fee revenues to RTÉ.
- (72) In the Commission's view, the regular renewal as well as the setting up of a permanent financing system for RTÉ's in the form of annual payments can be regarded as being a change of a more administrative nature, while the purpose, nature and source of financing as well as the beneficiary remained the same.
- (73) Similarly, the Commission considers that the Irish Government's decision in 2002 to base annual adjustment of the licence fee on the consumer price index (CPI), can be regarded as a technical modification comparable to a change in the methodology for determining the financial means available to public service broadcasters, which in accordance with Commission practice, is not regarded as a severable and substantive amendment.⁵⁵

⁵³ Cf. Opinion of Advocate General Trabucchi delivered on 4 December 1974, in Case 51/74, *van der Hulst*, [1975] ECR, p. 79.

⁵⁴ See Section 22 of the Broadcasting Authority Act 1960.

⁵⁵ Cf. Commission decision in the case E 3/2005 Aid to the German public broadcasters, paragraph 205.

- (74) Furthermore, the licence fee increases decided by the Irish Government in the past (the last one being the increase as of 1st January 2008) should not be regarded as new aid. As in similar cases, the Commission is of the view that the increase is the consequence of an increased financial need of public service broadcasters in fulfilling their public service mission, while the remit and the funding arrangements remained unchanged.⁵⁶
- (75) The Commission further considers that the establishment by RTÉ of wholly-owned subsidiary RTÉNL cannot be separated from or regarded as affecting the existing aid character of the initial funding regime. This company carries out some of the public service activities which previously fell under the responsibility of RTÉ (the tasks of RTÉ included transmission services) and hence, may also benefit from public funding.
- (76) The Commission also observes that the Broadcasting Act 2001 introduced new powers for RTÉ (see for instance as regards pay-per-view services or electronic transmissions). However, the Commission observes that the current Broadcasting Act explicitly excludes these services from receiving licence fee funds so that the introduction of these additional powers does not involve additional State funding.
- (77) Finally, the Commission observes that the Broadcasting Act 2001 introduced the possibility for RTÉ to use licence fee revenues to provide, pursuant to its powers “any service (other than broadcasting service) for the benefit of the public.”⁵⁷ Based on the explanations given by the Irish authorities that this possibility was limited to services being incidental to the broadcasting tasks, the Commission considers that this possibility to offer ancillary activities cannot be regarded as severable substantive amendment to the initial funding regime.⁵⁸
- (78) The Commission concludes that the licence fee financing, including the above mentioned amendments, can be regarded as constituting existing aid.

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

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

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

⁵⁷ See Section 28 (8) (d) of the Broadcasting Act 2001.

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

⁵⁹ Published in OJ C 320 of 15 December 2001, page 5.

(80) In accordance with the case-law of the European Court of Justice, the following conditions must be fulfilled in order for an aid to be declared compatible under Article 86 (2) EC Treaty⁶⁰:

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

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

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

6.3.1. *Definition of the public service remit*

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

⁶⁰ Cf. also "Broadcasting Communication", paragraph 29.

- (83) “Given the specific nature of the broadcasting sector, a 'wide' definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity” (cf. paragraph 33 of the Broadcasting Communication).
- (84) “The public service remit might include certain services that are not "programmes" in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.” (cf. paragraph 34 of the Broadcasting Communication).
- (85) Despite the freedom of Member States to define the public service remit, the Broadcasting Communication requires that Member State’s definition must be sufficiently precise and clear. The definition “... should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not.” A clear and precise definition is also important “...for non-public service operators, so that they can plan their activities.” and “...that Member States' authorities can effectively monitor compliance...” (cf. paragraphs 37-39 of the Broadcasting Communication).

6.3.1.1. Public service definition for television broadcasting

- (86) In line with the preliminary views expressed in the Article 17 Letter, the Commission considers that, as regards RTÉ’s television programme activities (including the specific requirement for TG4 to broadcast in the Irish language), the current public service definition is sufficiently precise and clear, taking into account that the Commission accepts a "wide" definition comprising a varied and balanced program schedule. The overview of RTÉ’s programmes above (cf. paragraphs (19) *et seq.*) illustrates the varied character of the television offer in accordance with its public service remit as set out in the Broadcasting Act.
- (87) More specifically, as regards sports broadcasts, the Commission considers that sports can be part of the public service mission of providing a balanced and varied programme. The Commission further observes that RTÉ's (and TG4's) offer remained below 10% (see Figure 3 above).⁶¹ The Commission does not therefore consider that the inclusion of sports programmes into the remit of RTÉ and TG4 constitutes a manifest error.

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

6.3.1.2. Public service definition for activities other than broadcasting

- (88) In the Article 17 letter, the Commission took the preliminary view that the public service remit for activities other than broadcasting was not sufficiently precise (in particular the possibility granted to RTÉ to may provide “any service other than a broadcasting service” and that the powers granted to RTÉ did not sufficiently differentiate between services/products of a public service or of a commercial nature.
- (89) Despite the explanations of the Irish authorities as to the incidental character of “any service other than broadcasting”, the Commission considers that such a general authorisation may lead to an extension of the public service remit needs therefore to be defined with sufficient precision (see also below on the need for a clear entrustment). In the absence of such further clarification as regards the exact scope of the public service remit, control of both the fulfilment of the public service remit and the use of the licence fee would not seem to be effective.
- (90) Furthermore, based on the current legal provisions, it is not clear to what extent the exercise of powers (such as to publish books or audiovisual material) is part of the public service tasks or would have to be regarded as a purely commercial activities, with the consequence that it would have to be carried out under market conditions (i.e. charging market prices) and could not benefit from State funds.
- (91) Consequently, the Commission takes the view that the current legal provisions do not allow to determine beforehand the scope and limits of public service activities other than broadcasting as opposed to purely commercial activities.

6.3.2. *Entrustment and supervision*

- (92) Pursuant to paragraph 40 of the Broadcasting Communication, “...*the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference).*” Furthermore, the Broadcasting Communication requires that, “*whenever the scope of the public service remit is extended to cover new services the definition and entrustment act should be modified accordingly, within the limits of Article 86(2).*”⁶²
- (93) Furthermore, paragraph 41 requires “...*that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitor its application.*” In this respect, paragraph 42 of the Broadcasting Communication clarifies that it “...*is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking.*” Finally, paragraph 43 states that “[i]n the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.”

⁶² Cf. paragraph 35 of the Broadcasting Communication.

6.3.2.1. Entrustment

- (94) As stated above, it is not sufficiently clear what RTÉ is supposed to deliver as a public service as regards activities other than broadcasting. It would seem to remain mostly at the public service broadcasters' discretion to determine the scope of its activities in this respect, without there being a clear entrustment.
- (95) Furthermore, and in line with established Commission practice, a mere authorisation granted to a public service broadcaster to perform activities which are described in a very broad way (such as the possibility to offer "any service...") cannot be regarded as sufficient for the act of entrustment. This general possibility would need to be further substantiated and the public service broadcaster be specifically entrusted with the provision of the thus specified services, in particular where the service in question loses its purely ancillary character and is of a certain significance.⁶³ The Commission observes that there is currently no requirement for such an entrustment.

6.3.2.2. Supervision

- (96) The Commission is not convinced that the existing legal provisions ensure an effective control of whether RTÉ has fulfilled its public service tasks.
- (97) The RTÉ Authority's reporting obligations and the preceding responsibility of ensuring that RTÉ complies with its legal obligations would not, in the Commission's view, be sufficient to ensure effective supervision, since the RTÉ Authority is not a control body independent from the RTÉ but rather an integral part of it.
- (98) As regards the reports transmitted to the Minister as well as reports submitted by the Minister to the Irish Parliament, the Commission considers that such reports may be an appropriate basis for a control of the fulfilment of the public service broadcasters' obligations.⁶⁴ However, based on the current legal framework it is not clear how the fulfilment is assessed and what are the possible consequences of non-compliance. Also, the BCI does not seem to exercise the required control over public service broadcasters but only - and on different matters - over commercial operators.
- (99) Finally, the Commission would like to point out that effective supervision presupposes clear public service obligations against which the fulfilment can be measured. As pointed out above (see paragraphs (88) to (91)), this is not in all respects the case.

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

⁶⁴ The Commission takes note in this respect on the reviews which are carried out in the last years by an independent expert on behalf of the Ministry and which also look into the achievement of output commitments for RTÉ.

6.3.3. Proportionality

- (100) Pursuant to paragraph 47 of the Broadcasting Communication, “the Commission has to verify, under Article 86 (2), that the derogation from the *normal application of the competition rules for the performance of the service of general economic interest does not affect competition in the common market in a disproportionate manner. The test is of a "negative" nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the interests of the Community.*”
- (101) Furthermore, paragraph 49 of the Broadcasting Communication clarifies that the proportionality assessment “...requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities. ...Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86 (2) and the Protocol.” The requirements concerning the separation of accounts in line with the Transparency Directive are laid down in paragraphs 50 – 56.
- (102) In accordance with paragraph 57 of the Broadcasting Communication, “... the Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However...it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid.”
- (103) Finally, paragraph 58 of the Broadcasting Communication points out that “...there might be market distortions which are not necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors. Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster....”
- (104) Against this background, the proportionality assessment to be carried out by the Commission comprises the following aspects: (1) separate accounting, (2) control of the limitation of State funding to the net public service costs and (3) examination of possible market distortions which are not inherent to the fulfilment of the public service remit.

- (105) As consistently held by the Commission, when examining existing aid, the examination of the Commission is focussed on the existence of adequate safeguards in the relevant legal acts which would ensure the respect of the above requirements.⁶⁵

6.3.3.1. Transparent accounts

- (106) The Commission notes that, according to Section 54 of the Broadcasting Act 2001, the accounts of the so-called "secondary broadcasting services" (*i.e.*, commercial activities) shall be kept separate from any of RTÉ's other activities. As referred to above (see paragraph (39)), RTÉ distinguishes in its annual accounts between public service costs and revenues as opposed to non public service costs.
- (107) The Commission nevertheless observes that the provisions do not contain all the requirements as set out in the Transparency Directive (for instance as regards cost allocation rules). Furthermore, the Commission remains concerned about a correct separation of accounts since the delimitation between public service and other activities is not sufficiently clear (in particular to what extent the exercise of certain powers is part of the remit and may benefit from licence fee funds; see above in paragraph (90)).

6.3.3.2. Overcompensation

- (108) As stated in paragraph (102) above, the Commission needs to examine whether the legal framework provides for the necessary safeguards which ensure that the financial compensation granted to public service broadcasters does not exceed the net public service costs linked to the fulfilment of the public service mission. The determination of the net public service costs requires a clear establishment of the public service costs based on separate accounts (see also paragraph (101) and (106) to (107) above) as well as the determination of the commercial revenues to be taken into account. The limitation of the compensation to the net public service costs needs to be subject to adequate *ex post* control.
- (109) The Irish Government claimed that the funding of RTÉ is proportionate within the meaning of Broadcasting Communication. The cost associated with fulfilling RTÉ's public service remit by far exceeded the funding it receives from the state.
- (110) Even though the financial data for 2006 confirms that the public service costs for instance for the television business division (amounting to € 257 million) were indeed in excess of the public funds attributed to this division (amounting to € 125 million), the Commission nevertheless observes that the overall financial result of RTÉ in 2006 recorded a surplus of approximately € 10 million. This result is due to the positive contribution of commercial activities. In this respect, the Commission recalls that in order to be in line with the Broadcasting Communication, the public funding shall not exceed the net public service costs, *i.e.* the costs of delivering the public services after having deducted revenues from the commercial exploitation of the public service.

⁶⁵ Cf. Commission decision concerning the licence fee financing of France 2 and France 3, paragraph 56 and Commission decision on the aid to German public service broadcasters E 3/2005, paragraph 264.

- (111) Apart from the existence or absence of overcompensation in a particular year, the Commission considers that there is a need for structural safeguards such as *ex-post* controls of the use of public funding to exclude overcompensation and cross-subsidization of purely commercial activities.
- (112) More particularly and in line with its previous decision making practice, the Commission considers that the legal framework should contain clear provisions limiting the available annual public funding to the net public service costs incurred in any given financial year as well as adequate control mechanisms which make sure that the public service broadcasters do not enjoy more financial means than necessary to cover the net public service costs.⁶⁶ The control mechanisms need to make sure that excess money does not, in principle, remain at the free disposal of the public service broadcaster. Where the funding is determined and the compensation granted on an annual basis, excess money would normally need to be recovered or deducted from next year's payment. Where the financing regime is based on contributions which are determined for a longer period, any excess money detected at the end of a given year would not automatically need to be withdrawn from the public service broadcaster immediately but could under certain conditions (and within the limits of 10% of annual compensation payments) be carried over to the next year. In any case, at the end of a certain period of time, any remaining excess would need to be definitively withdrawn from the company in question.⁶⁷
- (113) The Commission observes that the current legal framework does not provide for such safeguards since the amount to be allocated to RTÉ each year is determined based on the existing licence fee level without taking account of a possible surplus in the past.

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

- (114) In general terms, the Commission considers that where public service broadcasters commercially exploit the public service and carry out commercial activities in competition with other operators, this should be done on purely market terms. Non-market behaviour would lead to distortions of competition which are not inherent to the fulfilment of the public service and could reduce commercial revenues. To the extent that these revenues are to be used to finance public service costs, non-market conform behaviour could eventually lead to State financing in excess of what is necessary for the fulfilment of the public service remit.
- (115) For these reasons, the Commission has in its decision-making practice required Member States to adopt measures which ensure that public service broadcasters are required to respect market principles (i.e. the requirement for all commercial activities to be carried out on market terms, including the prohibition to undercut

⁶⁶ Cf. France 2 and France 3 licence fee financing Decision, paragraphs 67 and 68 and Commission decision concerning German public broadcasters E 3/2005, paragraph 281.

⁶⁷ Cf. Commission decision on the *ad hoc* financing of Dutch public service broadcasters C 2/2004 (ex NN170/2003).

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

- (116) To the extent that RTÉ carries out commercial activities through subsidiaries which do not receive any licence fee funding, it could be argued that these subsidiaries would not normally engage in non-market conform behaviour such as undercutting of prices. On the other hand, this organisational separation does not ensure that the financial relationship between RTÉ and its subsidiaries would be necessarily at arm's length. In addition, several commercial activities are carried out within RTÉ with the inherent risk of non-market conform behaviour to the extent that losses may be covered by State funds⁶⁹. Furthermore, and as referred to above (see paragraph (22) *et seq.*), the current legislation also foresees the possibility of offering certain services or products without charge, without in being clearly established that they are part of the public service tasks. The Commission considers that in this context the offer of products "without charge" cannot be regarded as acting in line with market conditions. Failure to carry out commercial activities under market conditions may be an indication of overcompensation incompatible with the Common Market.
- (117) Finally, the Commission observes that the Broadcasting Act does not contain clear obligations imposed on RTÉ to carry out commercial activities under market conditions. There is also no control that RTÉ respects the principles of market conform, behaviour.

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

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

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

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

7. APPROPRIATE MEASURES TO ENSURE COMPATIBILITY OF THE FINANCING REGIME

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

7.1. The public service remit

- (120) Ireland should clarify the public service remit with regard to activities other than broadcasting. The legal framework needs to make sure that purely commercial activities are not part of the public service remit and do not benefit from state funding. The definition of the public service tasks should be sufficiently clear in order to determine *ex ante* under which circumstances a particular activity included in the powers of RTÉ is of a public service nature and when it constitutes a commercial service/product.
- (121) The determination of whether in particular new media activities satisfy the same democratic, social and cultural needs of society should be based on a set of criteria suitable to assess the public service character of the service in question also in light of other already available offers on the market. The legal framework needs to provide for a sufficiently precise public service remit, allowing other business operators to plan their activities and control bodies to effectively monitor compliance.

7.2. Entrustment and supervision

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

7.3. Proportionality

7.3.1. Transparency

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

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

7.3.2. *Overcompensation*

- (125) Ireland should adopt the necessary provisions which ensure that the public funding of public service broadcasters is limited to the net public service costs. This implies on the one hand that only costs related to the public service are taken into account (excluding costs/losses incurred by commercial activities). On the other hand, it needs to be ensured that all commercial revenues generated by the exploitation of the public service are deducted. This also implies that it needs to be ensured that the deductible commercial revenues are those that would be generated under market conditions (see also assessment concerning the respect of market principles below).
- (126) In addition, there must be clear rules and control of any possible surplus at the end of a given financial year as well as at the end of a certain period. This means in particular that any accumulated surplus at the end of a licence fee period needs to be fully deducted from the compensation granted for the next license fee period. This also means that possible surpluses recorded at the end of any given financial year shall not exceed what is necessary as a buffer against unforeseen fluctuations in costs or revenues (*i.e.*, 10% of the annual compensation). A higher annual reserve could be justified, for instance where the surplus is intended to be used for predetermined projects, the costs of which have been certified by an independent body and which are to be carried out at a later, provided that there are satisfactory control mechanisms ensuring that these reserves cannot be used for other purposes.

7.3.3. *Commercial activities carried out in line with market practices*

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

8. COMMITMENTS SUBMITTED BY THE IRISH GOVERNMENT IN JANUARY 2008

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

8.1. The public service remit

- (130) The Irish Authorities committed to determine the scope of the public service remits of RTÉ and TG4 by enumerating their respective objects and duties in broadcasting legislation and to limit the use of public funding by RTÉ and TG4 to

the achievement of such public service objects and duties (cf. point 1 of the letter).

- (131) The draft Bill contains provisions laying down the exact scope of the public service broadcaster's remit by clearly setting out the "objects" (cf. in particular Heads 109 for RTÉ and 114 for TG4) and other duties (cf. for instance Head 77). Furthermore, Head 116 clearly stipulates that the receipts from the licence fee may only be used for clearly identified objects and duties.
- (132) The stated objects relate to the following activities, *e.g.*, the maintenance of orchestras, choirs, performing groups, maintenance of libraries and archives as well as new media activities (*e.g.*, website and teletext services in connection with its public service broadcasting activities and so-called "non-broadcast non-linear audiovisual media services").
- (133) In addition, the Irish Authorities commit to introduce a requirement for RTÉ and TG4 to prepare and publish a public service broadcasting charter and consequent annual statement of commitments which would elaborate on the principles to be observed and the activities to be undertaken by the public service broadcasters in fulfilling their statutory remits (cf. point 2 (a) of the letter).
- (134) In particular Heads 103 and 104 of the draft Bill foresee the adoption of a Broadcasting Charter as well as annual statements of commitments which further implement and specify the public service remit. After having carried out a public consultation, RTÉ and TG4 are required to prepare public service broadcast charters every five years which outline the activities they will undertake over that five year period in order to meet their statutory remits. This Broadcasting Charter must be approved by the Minister, following consultation with the Broadcasting Authority of Ireland (hereafter "BAI") concerning the sector impact of such a charter, before being adopted by RTÉ and TG4. In addition, RTÉ and TG4 are required to prepare annual statements of commitments which outline the intended outputs of the broadcaster in the following twelve months. Before any such commitments are adopted, RTÉ and TG4 must consult with the Minister and the BAI on the sector impact of the commitments.
- (135) As regards the distinction between public service and other activities (in particular in relation to the exercise of powers as currently foreseen in Heads 109 and 114 of the draft Bill), the Irish authorities assured the Commission that there is a distinction between the exercise of powers in pursuance of the public service objects on the one hand and the exploitation of commercial opportunities object on the other (cf. point 6 of the letter). If that object is the exploitation of a commercial opportunity that arises during the course of a public service function then the public service broadcaster can not use public funding in the exercise of this power.
- (136) The oversight of the exercise of such powers has both *ex ante* and *ex post* dimensions: *ex ante* in the context of the proposed approval and review of public service broadcasting charters and annual statements of commitment (cf. Heads 103 and 104), and *ex post* in the context of the annual and five year reviews of public funding levels proposed under Head 117. The Irish Authorities also commit to require the public service broadcasters to indicate in their public

service broadcasting charters the proposed level of activity in respect of the publication of books and music for which public funding will be utilised.

- (137) As regards the initial plan to allow RTÉ to offer services on a subscription or pay-per-view base, the Irish authorities proposed in the context of their commitments to preclude the use of public funding for public service broadcasting services which are of a special interest to only certain members of the community and which are made available on a subscription or pay-per-view basis. RTÉ and TG4 may continue to operate such a service solely on a commercial basis as is currently provided for in the Broadcasting Act 2001 (cf. point 4 of the letter).
- (138) Finally, and as regards the archive service, the Irish authorities explained that Head 77 of the draft Bill mandates access by the public to the archived material held by the public service broadcasters as a consequence of their broadcasting activities (cf. point 5 of the letter).
- (139) Public service broadcasters will be required to prepare two schemes for the reuse by third parties (e.g. educationalists, researchers, other broadcasters, other audio and 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 and a second to the commercial reuse of archived material. Material intended for commercial reuse would be available on standard market terms.
- (140) The promulgation of schemes which permit third parties (as opposed to the general public or the public service broadcaster itself) to reuse and exploit the material held in the archives requires Ministerial approval. Such approval will only be granted following consideration of the advice of the BAI as to the sectoral impacts. Whereas public access to view/listen to - but not re-use - the contents of the archive can be offered by RTÉ based on the legal provisions of the Broadcasting Act, the separate schemes for the re-use and exploitation of material held in the archives would be subject to sectoral impact assessments prior to any Ministerial approval. Re-use in this case which is subject to sectoral impact would, for instance, include downloading and storing permanently by individuals.

8.2. Entrustment and supervision

8.2.1. Entrustment

- (141) The Irish Authorities give a commitment to separate entrustment for the new activities envisaged in the draft Bill (cf. point 8 of the letter). The Irish authorities also committed to foresee the requirement of a Ministerial Consent for a number of activities (see below). The Ministerial Consent is preceded by a public value and sectoral impact test (cf. point 2 (c) of the letter). In addition, the Irish authorities have committed to require Ministerial consent, following consultation with the BAI, in respect of alterations in the total time fixed for public service broadcasters to broadcast advertisements; the establishment of subsidiaries, investments and joint ventures by public service broadcasters, schemes for third party access to archives maintained by public service broadcasters and alteration in approved levels of borrowing by public service broadcasters (cf. point 2 (d) of the letter).

(142) The Irish Authorities commit to introduce public value and sectoral impact assessments in a number of circumstances, including alterations of the statutory public service remit of RTÉ or TG4 (see on this point Heads 110 and 115) or memorandum of association (cf. point 10 of the letter) as well as for the following services, falling within the ambit of the public service remit of RTÉ or TG4, and for which RTÉ or TG4 propose the use of public funds (cf. point 3 of the letter):

- the variation in the number of public service television or radio channels operated by RTÉ or TG4;
- the establishment and maintenance by RTÉ or TG4 of public service free-to-air community, local, or regional broadcasting services;
- the establishment and maintenance by RTÉ or TG4 of public service non-broadcast, non-linear, audio visual media services (this does not encompass the making available of material broadcast free-to-air by RTÉ or TG4 on non-traditional “broadcast” platforms e.g. mobile phones and websites); and
- the establishment and maintenance by RTÉ or TG4 of significant new public services not expressly stipulated by legislation.

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

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

⁷¹ For instance local public service broadcasting or non-broadcast non-linear audio-visual media service.

⁷² Supplementary services (formerly termed ancillary services) are defined as an activity which is in accordance with the public service remits, incurs expenditure in excess of € 5, and is an activity which RTÉ and TG4 have not engaged in, in a significant manner in the previous five years.

⁷³ See Ireland's 1 May 2007 submission.

⁷⁴ *Ibid.*

- (145) In their commitments, the Irish authorities included the following envisaged processes and criteria (cf. point 9 of the letter):
- (146) As regards the procedures to be followed, the Irish authorities explained that on notification by the public service broadcaster that it is requesting the Minister's consent to engage in new activities (see paragraph (143) above), the Minister, the BAI and the public service broadcaster shall endeavour to agree a description of the activity proposed by the public service broadcaster. Following such agreement the Minister will consult with the BAI as to the modalities of the public value and sectoral impact assessments – in particular in respect of the timelines for the process and the nature of associated public consultation. The Minister will then conduct a public value assessment of the proposals as against the public value criteria outlined below, having consulted with the BAI, the public service broadcaster and such other persons as he or she considers appropriate.
- (147) The BAI will conduct a sectoral impact assessment of the proposals as against the sectoral impact criteria outlined below, having consulted with the Minister, the public service broadcaster and such other persons as it deems appropriate – such an assessment is likely to take a five year perspective of the potential impact of the proposed services. The BAI will report the outcome of its sectoral impact assessment to the Minister and make such recommendations as it sees fit. The Minister will consider the BAI's sectoral impact assessment advices and the outcome of the public value assessment before coming to a final decision whether or not to grant the consent sought by the public service broadcaster.
- (148) In granting his or her consent the Minister may attach such conditions or require such modifications to the proposals as he or she sees fit. In publishing his or her decision the Minister shall also publish a statement outlining the consultations that have been carried out and, subject to confidentiality requirements in respect of commercially sensitive material, make publicly available all documents furnished to the Minister during the course of the consultation.
- (149) As regards the assessment of the public value, the Irish authorities have informed the Commission of the following indicative criteria:
- compliance of the proposed service with the public service remit as outlined in statute,
 - compatibility with the goals of the Audio Visual Media Services Directive and Council of European recommendations in respect of public service broadcasting,
 - cost of the proposed service and its impact on existing public service provision,
 - extent to which the proposed service will contribute to meeting the democratic cultural, linguistic, educational, and social needs of Irish society, of individual groups within Irish society, and of Irish communities outside of the island of Ireland,
 - extent to which the proposed service is accessible by the public,

- extent to which the proposed service will reach under-served audiences,
- contribution of the proposed service to individual's or societal group's interest in, and familiarity with, new forms of services and technology (e.g. in pursuit of the goals of the i2010 agenda and European digital switchover),
- contribution of the proposed service to media plurality
- as well as such other matters as the Minister adjudges relevant and appropriate.

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

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

8.2.2. *Supervision*

(151) The Irish Authorities commit to the establishment of a new independent content regulator – the BAI - which will assist and advise the Minister in the monitoring of RTÉ and TG4s performance as against their public service remits, and will in particular (1) on an annual basis carry out a review of, and report to the Minister on, the extent to which RTÉ and TG4 have, during the previous financial year, fulfilled the commitments outlined in their annual statement of commitments for that financial year; and (2) every five years, or such shorter period as directed by the Minister, carry out a review of, and report to the Minister on, the adequacy or otherwise of the level of public funding made available to RTÉ and TG4 in order to fulfil their public service objectives as enunciated in statute (point 11 of the letter).

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

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

8.3. Proportionality

8.3.1. Transparent accounts

- (154) The Irish authorities commit to introduce a requirement for the public service broadcasters to distinguish in their accounts between transactions and arrangements entered into in pursuit of public service objects and the pursuit of the object to exploit such commercial opportunities in accordance with the requirements of the Transparency Directive as transposed into Irish law (cf. point 12 of the letter).
- (155) Under Head 100, the BAI, having consulted with the Minister and with RTÉ and TG4, prepares and publishes guidance for RTÉ and TG4 as regards cost accounting principles and methods to be considered by RTÉ and TG4 in preparing revenue and cost statements. RTÉ and TG4 are required, following guidance from the BAI as regards cost accounting principles, to prepare a statement of revenues and costs distinguishing as between commercial and public service activities.

8.3.2. Overcompensation

- (156) The Irish authorities commit to introduce a requirement for the public service broadcasters to report on an annual basis on the use they have made of the public funding they have received, based on separate accounts as outlined above.
- (157) Furthermore, the Irish authorities commit to introduce a requirement for the BAI to undertake reviews and make recommendations to the Minister in respect of the level of public funding of RTÉ and TG4 (cf. points 2 (b) and 12 of the letter).
- (158) The Irish Authorities commit to the establishment of the following mechanisms to safeguard against overcompensation of public service broadcasters RTÉ and TG4:
- The use of public funding limited by statute to the public service objects enunciated in statute.
 - Statutory requirement that surpluses generated by activities in pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) shall be used to subsidise the attainment of the public service objects.
 - Requirement on public service broadcasters to report on an annual basis on the use they have made of the public funding they have received.
 - Statutorily mandated annual review by the BAI of the fulfilment or otherwise by the public service broadcaster of the commitments outlined in the public service broadcaster's annual statement of commitments, and an associated recommendation to the Minister as to the level of any necessary public funding adjustment. In considering whether there should be an adjustment to the level of public funding, the annual review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.

- Statutorily mandated five year review of the adequacy or otherwise of the public funding made available to the public service broadcaster in order to meet its public service objectives as enunciated in statute, and an associated recommendation to the Minister as to any necessary adjustment as to the level of such public funding. In considering whether there should be an adjustment to the level of public funding, the five year review process will consider whether any overcompensation has occurred. The Irish Authorities wish to confirm that, in light of such consideration, it is possible that there could be a recommendation by the BAI for a decrease in the level of public funding.
- The Irish Authorities also commit to require the BAI, on the basis of the above mentioned reviews, to make a recommendation to the Minister as to the level of adjustment to the public funding of public service broadcasters, and to, on its establishment, communicate to the BAI the Commission's policy in respect of the maintenance of surpluses by public service broadcasters⁷⁵ (a mechanism for such a communication is provided for in paragraph (i) of Head 117(10) of the draft Bill).

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

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

- The public service broadcaster fails to achieve its commitments under the annual statement of commitments or public service broadcasting charter and has been overcompensated;
- The cost base of the public service broadcaster reduces and it does not propose to increase the existing levels of its public service output; and

⁷⁵ It is understood that under current published Commission policy (cf. in particular Commission decision of 24 April 2007, State aid E 3/2005 - Germany), a possible annual surplus (overcompensation) needs to be limited to what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of annual compensation payments). Exceptionally, a surplus exceeding the 10% threshold may remain with the public service broadcasters, provided that this amount is earmarked for a specific purpose, the costs of which are spelled out in advance and certified by an independent control body [the BAI] and that the use of these earmarked funds in accordance with its purpose is subject to ex post control. Furthermore, surpluses (overcompensation) accumulated at the end of a given period would need to be fully taken into account (i.e. deducted) when determining the financing needs of the public service broadcasters for the next period.

- The public service broadcaster gains considerable additional income from exploiting the commercial opportunities available to it and it does not propose to increase the existing levels of its public service output.⁷⁶

8.3.3. Commercial activities carried out in line with market practices

- (161) The Irish Authorities commit to introduce a requirement for the BAI or its statutory committees to, at the request of the Minister, report on compliance by RTÉ and TG4 in respect of the following matters: (1) ensuring that transactions or arrangements entered into by public service broadcasters as between public service objectives and the exploitation of commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) object are made at arm's length and (2) any arrangement in respect of third party access to the archives of public service broadcasters (cf. point 11 of the letter).
- (162) The Irish Authorities commit to the establishment of the following mechanisms to ensure arm's length principles apply in respect of transactions as between public service objects and the exploitation of commercial opportunities object in relation to RTÉ and TG4 (cf. point 12 of the letter):
- Enunciation of an object for public service broadcasters to exploit such commercial opportunities as may arise during the course of the public service broadcaster's fulfilment of its public service objects.
 - Statutory requirement for transactions and arrangements entered into by public service broadcasters between, on the one hand the public service objects, and on the other hand, the pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) to be made at arm's length.
 - On foot of a request of the Minister the BAI must prepare and submit to the Minister a report on compliance by the public service broadcasters with the arm's length requirement outlined above.
 - Require public service broadcasters to report on, on an annual basis, on the use they have made of the public funding they have received, and to distinguish between transactions and arrangements entered into in pursuit of public service objects and the pursuit of the object to exploit such commercial opportunities (as may arise during the course of the public service broadcaster's fulfilment of its public service objects) in accordance with the requirements of the Transparency Directive as transposed into Irish law.
- (163) Furthermore, the Irish authorities confirm that the arm's length principle would apply to the making of investments in pursuit of the object to exploit such commercial opportunities as may arise during the course of the public service broadcaster's fulfilment of its public service objectives (point 13 of the letter).

⁷⁶ See Ireland's 21 December 2006 submission, page 2.

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

8.4. Final remarks

- (165) The Irish Authorities confirmed that equivalent mechanisms to those proposed in respect of RTÉ with regard to entrustment, definition of public service remit, control of overcompensation and applicability of arms-length principles in respect non-public service commercial transactions will apply to TG4 (cf. point 7 of the letter).
- (166) Finally, the Irish Authorities commit, subject to legal drafting and enactment by the Houses of the Oireachtas, to implement into national law by December 2008 the various outstanding commitments outlined above by means of the Broadcasting Bill 2008.

9. ASSESSMENT OF THE COMMITMENTS PROVIDED BY IRELAND

9.1. The public service remit

- (167) The Commission considers that the commitments given by the Irish authorities are adequate to provide for a sufficiently precise and clear public service definition.
- (168) Firstly, the Commission considers that the enunciation of objects and duties (covering broadcasting activities as well activities other than broadcasting) which read in conjunction constitute the public service mission further clarify the exact scope of the public service tasks and thus the activities which may benefit from State funds. In particular as regards the exercise of powers granted to RTÉ, the Commission is satisfied with the commitments and explanations provided by the Irish authorities which ensure that activities such as the publication of books or audiovisual material would be qualified ex ante (in the context of the Broadcasting Charter as well as the annual statements of commitments) and following consultation with the BAI as purely commercial activity or – where a public service need is shown - as a public service so that the scope of publicly funded activities would be known in advance and could be checked afterwards.

- (169) Secondly, the Commission considers that the legal requirement for RTÉ and TG4 to adopt a Charter as well as annual statements of commitments help further clarifying the scope and limits of the public service remits.⁷⁷ In this respect, the Commission notes that the Broadcasting Charter will need to be approved by the Minister following consultation with the BAI. It is also noted that RTÉ is supposed to consult with the BAI (and the Minister) on the statements of commitment and their impact on the market and that the BAI will also be responsible for checking compliance with the annual statements of commitments in its annual reviews.
- (170) Thirdly, the Commission considers that the evaluation procedure (i.e. public value and sectoral impact test) which will be introduced by the Irish authorities is an adequate means to determine to what extent new services serve the democratic, social and cultural needs of society and thereby to establish the public service character of the services in question. The Commission notes in particular that the services which will be subject to such an evaluation (and separate entrustment; see on this aspect below) will be clearly identified. The services mentioned here include so-called supplementary (or ancillary) services so that the previously existing general authorisation for RTÉ to offer any new service will in the future be replaced by a Ministerial Consent, laying down in more specific terms the scope of additional public service activities.
- (171) In this context, the Commission further considers that the criteria to be established (such as accessibility of the service, the extent to which the proposed service will reach under-served audiences, contribution to individual's or societal group's interest in new forms of services and technology as well as contribution to media plurality) allow for a transparent evaluation of the public service character and for determining whether such activities serve the democratic, social and cultural needs of society in line with the requirements of the Broadcasting Communication. The Commission also considers that the sectoral impact assessment to be carried out by the BAI, as well as the possibility for third parties to participate in public consultations or through other forms (decided by the Minister) is appropriate to address concerns about the potentially distortive effects of new activities.
- (172) Overall, the evaluation procedure seems appropriate to strike a balance between the public service objectives of public service broadcasters and possible disproportionate effects on competition and trade, which could in the wording of the Amsterdam protocol run against the interest of the Community.
- (173) Fourthly and as regards more specifically the archive service, the Commission is satisfied that the launching of RTÉ's archive service would be – to the extent it would go beyond the possibility for the public to view/listen and involve in particular the possibility for downloading and storing permanently - subject to a sectoral impact assessment. Thereby, potentially distortive effects in competition caused by such an offer would be assessed and could be remedied in the context of the impact test carried out by the BAI.

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

9.2. Entrustment and supervision

- (174) The Commission considers that the commitments given by the Irish authorities ensure that new activities of RTÉ are formally entrusted upon the public service broadcasters.
- (175) In this respect the Commission notes that for a number of clearly enumerated circumstances a Ministerial Consent is required before RTÉ can engage in such new activities. These circumstances comprise in particular new activities which are not covered by the existing remit, such as new television channels, "non-broadcast, non-linear audiovisual media services" as well as any significant new public service not expressly stipulated by legislation.⁷⁸ As also referred to above, the Commission is also satisfied that the granting of Ministerial Consent is preceded by a public value and market impact assessment.
- (176) Furthermore, the Commission considers that the commitments given by Ireland as regards the establishment of the independent BAI to ensure effective supervision and compliance of the public service broadcasters' fulfillment of the public service obligations satisfy the requirement for adequate control.⁷⁹
- (177) In this respect, the Commission also notes that, according to Head 25, the BAI must undertake reviews of the extent to which RTÉ and TG4 have met their commitments under their annual statement of commitments. In addition to these *ex post* control mechanisms, the Commission notes the *ex ante* advisory functions of the BAI, for instance its advise to the Minister on RTÉ and TG4's strategic plans, the public service charter and the annual commitments. Part of the BAI's duties comprise the *ex ante* assessment of the public value and sector impact of certain alterations and extensions to the public service remit as referred to above.
- (178) The Commission also considers that the clearer public service remit will allow the BAI to carry out a more effective control, including a control to what extent public service broadcaster stayed within the limits of their mission.

9.3. Proportionality

9.3.1. Transparent accounts

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

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

⁷⁹ Its independence as well as the objectives and different functions of the BAI (including the sectoral impact and public value test as well as the control of RTE's compliance with its obligations) are clearly stipulated in Heads 24, 25 and 28 of the draft Bill.

(180) In this respect, the Commission notes that the draft Bill foresees that the BAI, after having consulted the Minister, prepares and publishes guidance to RTÉ as regards the cost accounting principles and methods to follow in its annual reporting. Finally, the Commission observes that following a further clarification of the scope of the public service remit and the use of licence fee money, the separate accounts would adequately reflect the net public service costs and thus allow the control of overcompensation as stipulated in paragraph 49 of the Broadcasting Communication.

9.3.2. *Overcompensation*

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

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

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

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

9.3.3. Commercial activities carried out in line with market practices

(185) The Commission considers that the commitments given by the Irish authorities (see paragraphs (161) *et seq.*) as currently reflected in the draft Bill contain the necessary safeguards to ensure that public service broadcasters carry out their commercial activities (whether intra-group or with non-related companies) on market terms and that the financial needs of public service broadcasters are not unnecessarily increased through any such non-market conform behaviour since the net public service costs will be determined after having deducted commercial revenues generated in full compliance with market principles. The Commission notes in particular that the arm's length principle applies also to investments of public service broadcasters and that commercial activities shall be operated in an efficient manner so as to maximize revenues. The revenue maximisation maxim should be sufficient to ensure that RTÉ does not undercut prices for instance on the advertisement market.⁸⁰ The Commission is satisfied that compliance with market principles is subject to control by the BAI. In this respect, the Commission notes in particular that the BAI must prepare and submit to the Minister a report on compliance.

10. CONCLUSIONS

- (186) In accordance with Article 17 of the Procedural Regulation, the Commission informed Ireland about its preliminary views that the current broadcasting legislation was no longer compatible with the Common Market.
- (187) Having assessed the information and arguments subsequently submitted by Ireland, the Commission, in accordance with Article 18 of the Procedural Regulation, concluded that the existing aid scheme is no longer compatible with the Common Market. Based on the discussions with the Irish authorities on ways of ensuring full compliance with Community law, the Commission also recommended appropriate measures to ensure future compatibility.
- (188) With the submission of commitments, Ireland accepted to implement these appropriate measures. With the present decision, the Commission takes note of these commitments provided by Ireland, records acceptance in accordance with Article 19 of the Procedural Regulation and closes the procedure.
- (189) The Commission reminds Ireland to notify the Commission of the entry into force of the Broadcasting Act 2008 and submit the final law to the Commission before December 2008.

⁸⁰ See on this aspect for instance the Commission decision concerning *ad hoc* financing of Dutch public service broadcasters, paragraph (174) where the Commission concluded its assessment of alleged undercutting of prices on the advertising market stating that "...there is currently no evidence that the Ster did not attempt to maximise its advertising revenues and that its behaviour would have led to an increased need for State funding." (underlined here)

(190) The present letter is without prejudice to the possibility for the Commission to continuously assess existing aid schemes under Article 88 (1) of the EC Treaty, and to propose appropriate measures required by the progressive development or the functioning of the common market.

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

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

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

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission

Table of content

1.	PROCEDURE	1
2.	DESCRIPTION OF THE BROADCASTING MARKET AND THE RELEVANT PLAYERS	3
2.1.	The Irish broadcasting companies	3
2.1.1.	Radio Telefís Éireann (RTÉ) and Teilifís na Gaeilge (TG4)	3
2.1.2.	TV3 Television Network Limited (TV3)	4
2.2.	Television broadcasting in Ireland	4
3.	DESCRIPTION OF THE LEGAL FRAMEWORK GOVERNING PUBLIC SERVICE BROADCASTING	8
3.1.	Public service remit and entrustment	8
3.2.	Supervision	9
3.3.	The financing of public service broadcasting	10
4.	PRELIMINARY ASSESSMENT AS SET OUT IN THE "ARTICLE 17 LETTER"	11
5.	IRELAND'S REPSONSE TO THE ARTICLE 17 LETTER	12
6.	FINAL ASSESSMENT OF THE CURRENT LEGAL FRAMEWORK	13
6.1.	State aid under Article 87(1) of the EC Treaty	13
6.1.1.	Transfer of state resources	13
6.1.2.	Economic advantage	14
6.1.3.	Distortion of competition and affect on trade between Member States	15
6.2.	The nature of the aid	16
6.3.	Compatibility of the aid under Article 82(2) of the EC Treaty	18
6.3.1.	Definition of the public service remit	19
6.3.1.1.	Public service definition for television broadcasting	20
6.3.1.2.	Public service definition for activities other than broadcasting	21
6.3.2.	Entrustment and supervision	21
6.3.2.1.	Entrustment	22
6.3.2.2.	Supervision	22
6.3.3.	Proportionality	23
6.3.3.1.	Transparent accounts	24
6.3.3.2.	Overcompensation	24

6.3.3.3.	Market distortions not inherent to the fulfillment of the public service remit: commercial activities should be carried out in line with market practices.....	25
6.3.4.	Conclusion on the compatibility of the aid under Article 86(2) of the EC Treaty	26
7.	APPROPRIATE MEASURES TO ENSURE COMPATIBILITY OF THE FINANCING REGIME.....	27
7.1.	The public service remit.....	27
7.2.	Entrustment and supervision	27
7.3.	Proportionality.....	27
7.3.1.	Transparency	27
7.3.2.	Overcompensation.....	28
7.3.3.	Commercial activities carried out in line with market practices.....	28
8.	COMMITMENTS SUBMITTED BY THE IRISH GOVERNMENT IN JANUARY 2008	28
8.1.	The public service remit.....	28
8.2.	Entrustment and supervision	30
8.2.1.	Entrustment.....	30
8.2.2.	Supervision.....	33
8.3.	Proportionality.....	34
8.3.1.	Transparent accounts	34
8.3.2.	Overcompensation.....	34
8.3.3.	Commercial activities carried out in line with market practices.....	36
8.4.	Final remarks	37
9.	ASSESSMENT OF THE COMMITMENTS PROVIDED BY IRELAND	37
9.1.	The public service remit.....	37
9.2.	Entrustment and supervision	39
9.3.	Proportionality.....	39
9.3.1.	Transparent accounts	39
9.3.2.	Overcompensation.....	40
9.3.3.	Commercial activities carried out in line with market practices.....	41
10.	CONCLUSIONS	41