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**Subject: State Aid SA.39346 (2014/FC) – Ireland
Implementation of Commission Decision in case E 4/2005 - State
financing of Radio Teilifís Éireann (RTÉ) and Teilifís na Gaeilge
(TG4)**

Sir,

1. PROCEDURE

- (1) By letter dated 11 August 2014, the Commission received a complaint concerning the alleged non-compliance by the Irish authorities with Commission Decision of 27 February 2008 in case E 4/2005 - State financing of *Radio Teilifís Éireann* (RTÉ) and *Teilifís na Gaeilge* (TG4) ("the 2008 Decision")¹. The complaint also referred to a possible breach of Article 102 of the Treaty on the Functioning of the European Union ("TFEU").
- (2) The complaint was submitted on behalf of News 106 Ltd ("Newstalk" or "the complainant"). The complainant is a private radio broadcaster in the Republic of Ireland.
- (3) By letters of 2 and 31 October 2014, 12 November 2014, 12 January 2015, 11 March 2015, 9 June 2015, 28 October 2015, 3 and 24 March 2016 and during meetings of 16 December 2014, 3 September 2015 and 20 November 2015, the complainant supplied further information to the Commission.

¹ OJ C 121, 17.5.2008, p.5.

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- (4) The complaint was forwarded to the Irish authorities, who submitted their comments on 26 and 27 November 2014. The Irish authorities provided additional information on 4 and 5 December 2014, 26 January 2015, 28 April 2015, 12 May 2015, 18 August 2015, 15 October 2015, 29 January 2016, 6 April 2016, 13 and 16 May 2016.
- (5) On 20 May 2016, the Commission wrote to the complainant, expressing a preliminary view that there were insufficient grounds to consider that the way the measure had been implemented by the Irish authorities constitutes a breach of the terms and conditions of the 2008 Decision.
- (6) The complainant replied by letter dated 1 July 2016 in which it asked the Commission to reassess its preliminary findings.
- (7) The Irish authorities provided additional information on 30 September 2016, 1 February 2017 and 21 April 2017.
- (8) This letter addresses the complaint in so far as it concerns the State aid aspects of the behaviour and financing of RTÉ. The Commission understands that the matter of a possible breach of Article 102 TFEU has been subject to an investigation by the Irish Competition Authority – the Competition and Consumer Protection Commission.

2. CONTEXT OF THE PRESENT DECISION

- (9) The current system of financing public broadcasting in Ireland (i.e., the State financing of *Radio Teilifís Éireann* ("RTÉ") and *Teilifís na Gaeilge* ("TG4")) was approved by the Commission in the 2008 Decision.
- (10) In the 2008 Decision, the Commission considered that the licence fee financing constitutes State aid within the meaning of Article 107(1) TFEU that should be regarded as existing aid. The Commission also recorded the Irish authorities' commitments to implement appropriate measures to bring the financing system of public service broadcasting in Ireland in line with State aid rules and concluded that they were adequate to remove concerns regarding the funding regime.
- (11) In particular, the Irish authorities committed to determine the scope of the public service remit of public service broadcasters 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. In addition, the Irish authorities committed 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. Furthermore, the Irish authorities committed to introduce the evaluation procedure (i.e., public value and sectoral impact assessment) to determine to what extent new services to be provided by public service broadcasters will serve the democratic, social and cultural needs of society. Also, the Irish authorities confirmed that new activities will be formally entrusted upon the public service broadcasters. Furthermore, the Irish authorities committed that the public broadcasters will keep separate accounts distinguishing between public service and commercial activities and that the public funds can only be granted in relation to public service tasks, while deducting commercial revenues. The Irish authorities committed to establish an independent regulator – the Broadcasting Authority of Ireland ("BAI") – to ensure effective supervision and compliance of the public service broadcasters' fulfilment of the public service

obligations. They also provided safeguards regarding possible surpluses and adjustment to the public funding of the public service broadcasters and committed that annual reviews as well as five year reviews will be carried out to examine the fulfilment of the public service mission as well as the use of the public funding. In considering whether there should be an adjustment to the level of public funding, the reviews should consider whether any overcompensation has occurred. It was decided that public service broadcasters will report on annual basis on the use they have made of the public funding they have received. Finally, the Irish authorities committed to ensure arm's length principles in respect of transactions between public service objects and the pursuit of the object to exploit commercial opportunities. The commercial transactions should be carried out in an efficient manner so as to maximise revenues and any profits arising from such commercial activities should be utilised to subsidised public service broadcasting activities.

- (12) On 12 July 2009, the Broadcasting Act ("Broadcasting Act 2009") was signed into law. The BAI was established on 1 October 2009.

3. DESCRIPTION OF THE ALLEGED INFRINGEMENT OF STATE AID RULES

- (13) The complainant raises various issues under EU State aid rules on public service broadcasting. These issues concern specifically the lack of proper oversight and reporting into how and whether RTÉ's commercial operations conform to market standards.
- (14) Regarding effective independent supervision of the fulfilment of the public service tasks of RTÉ, the complainant considers that the national oversight mechanism in place under the Broadcasting Act 2009 is not sufficient to ensure that RTÉ operates within the terms of the 2008 Decision. The complainant alleges in particular that there is no proper oversight of RTÉ's accounting, governance and commercial strategy and that a gap in the regulatory framework has allowed RTÉ to refuse advertisements of its indirect competitors on arbitrary grounds and to undercut prices offered for similar radio advertising products. The complainant further alleges that there has never been an independent report on how or whether RTÉ's commercial operations conform to market standards. The reviews performed would not sufficiently address the objective of revenue maximisation imposed on RTÉ.
- (15) The complainant alleges that RTÉ would not respect market principles when carrying out commercial activities and thereby would not respect the revenue maximisation maxim which the complainant claims has been imposed on it by law and by the 2008 Decision. As supporting evidence the complainant mentions the refusal by RTÉ to air advertisements of its competitor Newstalk which contain the key wording "*Move the Dial*".
- (16) The complainant finally alleges that despite the RTÉ review system there is a risk of RTÉ being overcompensated. In particular, the complainant claims that overcompensation could arise also in periods where RTÉ actually reported deficits.
- (17) Accordingly, the complainant asks the Commission to find that in that respect Ireland has not fulfilled the conditions of the 2008 Decision. In its letter of 1 July 2016 the complainant stated that it does not pursue other matters raised earlier, such as issues relating to RTÉ's broadcasting transmission network and RTÉ's online activities. The complainant also stated that it does not dispute issues

related to the entrustment of RTÉ, its programming, the public value test and the separation of accounts.

4. ASSESSMENT

4.1. Preliminary remarks

- (18) State funding for public broadcasters is justified because it enables them to offer to the public services which are necessary to fulfil the public service mission expected from them and which, it is assumed, they would not provide in the absence of such funding. State funding shall thus only be used for the supply of the mandated public service. Therefore, the Commission rules on aid to public broadcasting expect from Member States to ensure that publicly funded broadcasters respect market principles when carrying out commercial activities on a certain market as buyer or seller in competition with commercial competitors.
- (19) The underlying rationale of that requirement is that public broadcasters should not use public funds to engage in anti-competitive practices, for example by price undercutting in the area of advertising below what can reasonably be considered to be market-conform. In that case public broadcasters would affect competition by a behaviour which they could afford for the sole reason that the resulting lower revenues from commercial activities are covered by the public funds.
- (20) Such conduct can be excluded by avoiding overcompensation. This means that the amount of public compensation must not exceed the net costs of the public service mission, taking into account the revenues derived from the public service mission and the net benefit of all commercial activities related to the public service activity.
- (21) The 2008 Decision aims to exclude that purely commercial activities would benefit from State aid. In that context, the Commission took note of the proposal by Ireland that the "revenue maximisation maxim" was intended to ensure that RTÉ would carry out its commercial activities on market terms. The 2008 Decision refers to that revenue maximisation maxim as a possible and sufficient tool (paragraph 185 of the 2008 Decision states: "*the revenue maximisation maxim should be sufficient to ensure that RTÉ does not undercut prices for instance on the advertising market*").
- (22) It is worth noting that the pursuance *in extremis* of a strict principle of revenue maximisation may run counter to aid to public broadcasters being acceptable. Public service broadcasting means, according to the Amsterdam Protocol, that the broadcaster proposes a programme which reflects and supports the democratic, social and cultural needs of each society. That means necessarily that the public broadcaster must not be primarily guided in its programming by the maximisation of its advertising income. On the contrary, it will have to offer a varied and distinguishing programme. That objective and the one of maximising advertising income can be mutually exclusive.
- (23) Therefore, "revenue maximisation" would not be admissible as an overarching leitmotiv for RTÉ's activity but only for the specific context of the commercial transactions of the broadcaster. That means that a low viewership programme has low, and prime popular content high, advertising prices, as demonstrated by the market parameters for determining those prices. It does not mean that RTÉ should shape its programmes to merely maximise advertising income, as it appears to be suggested in the complainant's letter of 1 July 2016.

- (24) The complainant's main concern appears to be that the absence of effective independent supervision of the fulfilment of the public service tasks of RTÉ leads to overcompensation of RTÉ and allows it to behave in a way that breaches market principles in the areas in which it is deemed to function as a commercial operator.

4.2. Independent supervision of RTÉ and reporting

- (25) As specified in the 2008 Decision², 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.
- (26) The Commission assessed the Irish supervision mechanism in the 2008 Decision and took into account the respective commitments given by Ireland, namely: (i) the enunciation of an object to exploit commercial opportunities; (ii) the statutory requirements regarding the arm's length principle; (iii) the control of commercial activities with respect to the arm's length principle by the BAI; and (iv) the reporting on the use of public funding. The Commission concluded that the proposed system fulfilled the requirement of efficient supervision and thus benefited from the derogation of Article 106(2) TFEU.
- (27) The Commission notes that all elements of the supervision commitments as set out in the 2008 Decision have been implemented in the Broadcasting Act 2009: (i) Section 114(1)(j) implements the element of the enunciation of an object to exploit commercial opportunities; (ii) Section 108(2) implements the statutory requirement concerning the arm's length principle; (iii) Section 108(3) implements the control of the respect of the arm's length principle by the BAI; (iv) Section 124(2) implements the annual reporting obligation on the use of public funding; and (v) Section 124(8) implements a periodical review obligation of the BAI.
- (28) As for the practical implementation and factual compliance with all requirements under Irish law, the Broadcasting Act 2009 established the BAI as a supervisory authority, independent from RTÉ. The BAI implemented an annual public funding review process, complemented by a five-year review process.

4.2.1. The annual reviews

- (29) The annual reviews examine the fulfilment of the public service mission by RTÉ and the adequacy of the public funding of that mission. The BAI acts independently in framing its terms of reference and seeks independent external advice in each case. The reviews constitute an extensive inquiry into the efficiency of RTÉ as well as into its revenue performance. This includes establishing whether RTÉ aims at maximising commercial revenues and assessing the issues of overcompensation and the retention of surpluses.
- (30) To this end, the BAI sought independent external advice to establish whether RTÉ attempted to maximise the potential for commercial revenue, in order to minimise the amount of public funding required to support it. The BAI also specifically sought from the consultants suggested process improvements. In particular, the BAI posed questions to its consultants as to whether RTÉ is undervaluing the cost of its television advertising and maximising its commercial revenue.

² Paragraph 93 of the 2008 Decision.

- (31) The complainant suggests that, although required by the 2008 Decision, the review of the Annual Statement of Performance Commitments of RTÉ is not being undertaken by the BAI. However, the Irish authorities explained that reporting on the fulfilment of its Annual Statement of Performance Commitments is an obligation on RTÉ under Section 102(4) of the Broadcasting Act 2009 and that RTÉ must report to the Minister for Communications, Energy and Natural Resources ("the Minister") and the BAI by 31 March of each year on the fulfilment of its commitments for the previous financial year.
- (32) Accordingly, each year RTÉ has submitted a Statement of Performance Commitments to the BAI, all of which have been reviewed by the BAI as part of the annual review of public funding process. The Annual Statement of Performance Commitments is a key element of the annual and multi-annual funding review.
- (33) Section 124(2) of the Broadcasting Act 2009 requires the BAI to review the broadcaster's performance specifically against its commitments for the year in question and, more generally, against its public service objects. As such, the focus of the annual review is determined both by RTÉ's statutory objects and the range of commitments given by the broadcaster for the year, which are drawn from its five year strategy agreed with the BAI. Furthermore, the commitments include measures relating to RTÉ's commercial performance.
- (34) From the complainant's letter of 1 July 2016 it appears that it takes issue with the fact that the annual reviews and the measuring of performance are conducted on the basis of the Annual Statement of Performance Commitments. The complainant objects to the fact that these commitments are set by RTÉ itself. For example, in respect of the 2012 review, the complainant states that the consultants "*simply reproduce the information provided in RTÉ's 2012 Performance Commitments Report*".
- (35) The complainant does not specify why it should be a problem that RTÉ sets its commitments within its public service mandate. It is not clear to the Commission why those commitments should not be an appropriate basis for measuring whether they were actually met. Even if they would not all be achieved, that may lead to a shortcoming with regards to self-set ambitions but that does not hint to overcompensation or non-market conform behaviour of the broadcaster. Unlike suggested by the complainant, RTÉ is not just self-assessing whether it complies with the Broadcasting Act 2009.
- (36) The complainant furthermore questions in general that the review process provides oversight of the market conformity of RTÉ's commercial activities.
- (37) However, the Commission notes that the 2011 review, for example, devotes a section to "RTÉ's advertising revenue, pricing and trading system". Also, the 2012 review compares advertising costs for 2012 and 2013, noting the changes in the nature of the discount systems implemented. The review analyses sources of revenue, considers economic factors and trends influencing these and compares the performance of RTÉ television with that of other competing broadcasters in the wider advertising market³, noting that RTÉ's share of advertising expenditure has declined marginally and the largest gainer appears to be BskyB⁴. This would indicate that the review gave this issue more than a cursory consideration.

³ Annual Review of Public Funding 2012, p. 68.

⁴ Annual Review of Public Funding 2012, p. 69.

- (38) In conducting the 2013 review for the BAI, Oliver & Ohlbaum (O&O) focussed on the overall economic performance of public service broadcasting. This analysis included the commercial revenues earned, the public income received, and the allocation of these revenues. Expenditure was assessed with regard to programming costs and transmission costs and other overheads, details of the content cost per hour, and costs per viewer/listener hour to measure the broadcaster's overall efficiency⁵. O&O found that RTÉ "*demonstrated sound financial management in 2013*"⁶. In relation to a decline in commercial revenue, O&O consider that the key driver behind these figures remains the economic conditions in Ireland, and hence the overall level of TV advertising spending⁷.
- (39) The 2014 review follows the same approach⁸. For example, it specifically refers to revenue maximisation at Section 5.9.2. It states that it has considered the extent to which the broadcasters are maximising opportunities for commercial sources of revenue and notes a sharp increase in RTÉ's advertising prices⁹. The review states that RTÉ demonstrated sound financial management in 2014, reporting a small net surplus for the second consecutive year¹⁰.
- (40) Commercial revenue maximisation is also addressed in Section 4.5.1 of the Annual Funding Review for 2015. It found that in 2015 RTÉ met its legislative requirement to maximise revenues through the achievement of positive growth in revenue streams¹¹.
- (41) In each case of the annual reviews, comments were offered on how the funding review process might be improved. The Irish authorities explained that also the consultants appointed to undertake the next annual reviews will be expected to assess and take a view on the extent to which RTÉ has exploited commercial opportunities in an efficient manner and maximised its revenue, in pursuit of its public service objects¹².
- (42) It is therefore apparent that the consultants assess the commercial performance of the broadcaster and whether it has maximised revenues. They have regard to a range of factors including trends and developments in the Irish economy and in the Irish broadcast advertising market, viewing and listening performance, advertising minutage available, the broadcaster's revenue targets and the appropriateness of the targets.
- (43) The Commission therefore does not find any evidence that the annual reviews of public funding undertaken to date by the BAI would not examine in detail all key headings of expenditure and track and analyse changes and trends year-on-year, as well as performance against commitments. Furthermore, the BAI benchmarks expenditure and performance against other Irish and international standards and trends and takes a view on whether the broadcaster provides value for money in fulfilling its public service objects.

⁵ Annual Review of Public Funding 2013, p. 27.

⁶ Annual Review of Public Funding 2013, p. 77.

⁷ Annual Review of Public Funding 2013, p. 79.

⁸ Annual Review of Public Funding 2014, p. 26.

⁹ Annual Review of Public Funding 2014, p. 80.

¹⁰ Annual Review of Public Funding 2014, p. 78.

¹¹ Annual Review of Public Funding 2015, p. 154-155.

¹² Request for Tender, Public Funding Review of Public Service Broadcasters, December 2015.

4.2.2. The Five Year Review

- (44) In addition to the annual reviews, the BAI conducted the first multi-annual review (the "Five Year Review") foreseen under section 124(8) of the Broadcasting Act 2009 (assisted by the consultancy group Crowe Horwath)¹³. Section 124(9) of the Broadcasting Act 2009 requires the BAI to take account of the level of commercial funding available to RTÉ in pursuance of its exploitation of commercial opportunities. With the help of the first Five Year Review from 2013, the BAI assessed the adequacy of public funding for meeting RTÉ's public service objectives.
- (45) The complainant considers in its letter of 1 July 2016 that there is clear evidence that Crowe Horwath was not given a mandate to assess the commercial activities proposed or deployed by RTÉ from the perspective of a 'revenue maximisation' maxim or a 'market conform' standard.
- (46) That statement is difficult to reconcile with the terms of reference for this review. They explicitly sought "*An analysis of the extent to which each public service broadcaster is operating in compliance with the provisions of sections 108¹⁴, 109(9)¹⁵, 109(10)¹⁶, of the Broadcasting Act*"¹⁷. This also concerned the commercial activities and the maximisation of RTÉ's commercial revenue. Accordingly, the review specifically addressed the question as to whether any overcompensation has occurred and the level of any such overcompensation.
- (47) Crowe Horwath assessed whether the strategic plans of the public service broadcaster identify "*the necessary efficiencies to minimise the call on public funds*" and also how the public service broadcaster will take "*full advantage of commercial opportunities without distorting the market or abusing their public funding*"¹⁸.
- (48) According to the Irish authorities, the Five Year Review methodology included interviews with external stakeholders, including the Independent Broadcasters of Ireland (IBI), which represents national, regional and local commercial radio stations throughout Ireland. Formal written submissions were also received from the IBI and TV3. Despite this, the consultants found no evidence of anti-competitive or disproportionate behaviour on the part of RTÉ¹⁹.
- (49) The Five Year Report notes that "*Both RTÉ and TG4 comply with legislative and regulatory requirements as set out by the European Commission and the BAI*" and furthermore that "*RTÉ and TG4 will, on the basis of their plans, continue to act in compliance with the overcompensation requirements under EU regulation.*"

¹³ Crowe Horwath, Review of Funding for Public Service Broadcasters, 23 May 2013.

¹⁴ Section 108(1): "*The commercial activities undertaken by a corporation...shall (a) be operated in an efficient manner so as to maximise revenues, and (b) be used to subsidise its public service objects.*" Section 108(2): "*All transactions or arrangements....shall be made at arm's length and on commercial terms.*"

¹⁵ Section 109(9): "*A corporation shall as soon as may be after the end of each financial year, send to the Minister- (b) a statement in respect of the total revenue and costs derived by the corporation in that financial year distinguishing between monies received or expended on – (i) activities in pursuance of its public service objects, and (ii) activities in pursuance of its exploitation of commercial opportunities object.*"

¹⁶ Section 109(10): "*A corporation shall include in the statement required under subsection (9) a statement of the cost accounting principles and methods by which costs and revenues have been assigned to such activities.*"

¹⁷ Crowe Horwath, Review of Funding for Public Service Broadcasters, Terms of Reference, p. 159.

¹⁸ Crowe Horwath, Review of Funding for Public Service Broadcasters, 23 May 2013, p. 7.

¹⁹ Crowe Horwath, Review of Funding for Public Service Broadcasters, p. 160.

*This will be for the annual reviews and the BAI to recommend to the Minister on foot of the actual outcomes during each year between 2013 and 2017*²⁰.

- (50) The Five Year Review found as part of its market analysis that RTÉ compares favourably with other European Public Service Broadcasters. Importantly, the review found that its share of the advertising market is not significantly out of line with other European Public Service Broadcasters²¹. It conducted quantitative analysis of RTÉ's commercial income and an econometric analysis to assess RTÉ's projections for the period 2013 -2017²².
- (51) Both the BAI and subsequently the Government accepted Crowe Horwath's recommendations that the annual review process should include an assessment of the methods employed by broadcasters with regard to cost control and maximising productivity and to addressing overcompensation concerns.

4.2.3. *Other review instruments*

- (52) RTÉ's commercial revenue from advertising was also analysed in Indecon's Review of the Advertising Market²³. The analysis did not find evidence of RTÉ holding prices down artificially.
- (53) Further evidence that there is sufficient oversight in respect of RTÉ's commercial activities may be found in an external auditing of RTÉ's annual accounts done by KPMG. This auditing includes the statement of costs and revenues by public service and non-public service activities. It confirms that the broadcaster's financial statements have been properly prepared and thereby show that the various other reviews of RTÉ appear to be on a solid base, as far as the financial assessment is concerned. There are no elements which would suggest that the external auditors could not legitimately rely on the annual financial accounts presented to them by RTÉ when reviewing them.
- (54) In addition, as mentioned in the complaint, the Minister has the possibility under Section 108(3) of the Broadcasting Act 2009 to direct the Compliance Committee of the BAI to submit a report on whether RTÉ's activities have been "*made at arm's length and on commercial terms*". The Irish authorities advised that to date this issue has been addressed in the context of the funding reviews conducted under Section 124 of the Broadcasting Act 2009, through which the BAI has sought to establish whether revenues has been maximised and the extent to which RTÉ complies with the commitments given to the Commission.
- (55) Furthermore, supervision of commercial activities of RTÉ is carried out by the Competition and Consumer Protection Commission (CCPC). In this respect, the Commission notes that the aspect of RTÉ's commercial activities has been the subject of examination by the CCPC following a complaint by Newstalk against RTÉ lodged in April 2014. The CCPC decided to close the investigation of the Newstalk complaint regarding RTÉ conduct in relation to the "*Guidelines for the acceptance on RTÉ Broadcasting Services of advertising for competing radio and television services*".

²⁰ Crowe Horwath, Review of Funding for Public Service Broadcasters, p. 161.

²¹ Crowe Horwath, Review of Funding for Public Service Broadcasters, p. 46.

²² Crowe Horwath, Review of Funding for Public Service Broadcasters, Appendix One.

²³ Indecon Economic Analysis of the Advertising Market in Ireland 2013.

4.2.4. Conclusion

- (56) The Commission assessed in the 2008 Decision the effectiveness of the Irish supervision system. On the basis of the review system subsequently established by Ireland, as described above, it is considered that the combination of periodic reporting by the BAI under Section 124 of the Broadcasting Act 2009 (including the annual and five-year funding reviews), with the possibility of interventions by the CCPC, the Commission for Communications Regulation – ComReg, the BAI itself, as well as the Minister, ensures effective supervision of RTÉ’s operations, including its commercial activities. The BAI has sought to establish whether RTÉ has attempted to maximise the potential for commercial revenue, in order to minimise the amount of public funding required to support its services. The independent consultants used by the BAI to date have not found any evidence that RTÉ has not done so.
- (57) In view of the fact that it is in the first place up to the Member States to establish and design a system of supervision, and in the absence of apparent failures of that system, the Commission has no reason to put into question that the commitments laid down in the 2008 Decision have been fully implemented and that Ireland ensures effective supervision and satisfies the requirement for adequate control.
- (58) Therefore, the Commission concludes that the commitments given by Ireland to establish effective supervision are met.

4.3. Overcompensation and the respect of market principles

4.3.1. Overcompensation by excessive public funding

- (59) The 2008 Decision recorded the commitments given by Ireland to ensure that the compensation granted to public service broadcasters will not exceed what is necessary for the fulfilment of the public services mission (i.e. limited to the net public service costs)²⁴. The Commission was satisfied with the control mechanism and safeguards against overcompensation proposed by Ireland²⁵.
- (60) Further to the 2008 Decision, the framework set out in the Broadcasting Act 2009 established a series of measures to ensure the net cost of services is identifiable at all times: (i) the use of public funding is limited to the fulfilment of the public service objects of the Public Service Broadcasters²⁶; (ii) surpluses generated in exploiting commercial opportunities are used to subsidise the attainment of the public service objects²⁷ and (iii) broadcasters must report annually on the use they have made of public funding²⁸.
- (61) Moreover, as described above, regulatory and financial oversight and sufficient controls are in place to address also the possibility of overcompensation. The reviews conducted by the BAI must consider, *inter alia*, whether a broadcaster has fulfilled the commitments set out in its annual statement²⁹ and make a recommendation as to whether there should be an adjustment to the level of

²⁴ Paragraph 156 and the following of the 2008 Decision.

²⁵ Paragraph 181 and the following of the 2008 Decision.

²⁶ Sections 114 and 118 of the Broadcasting Act 2009.

²⁷ Section 108(1)(b) of the Broadcasting Act 2009.

²⁸ Section 109(9)(a) of the Broadcasting Act 2009.

²⁹ Section 102 of the Broadcasting Act 2009.

public funding. In assessing whether there should be an adjustment, the BAI must consider whether any overcompensation has occurred, consistent with paragraph 158 of the 2008 Decision. Where a surplus is observed at the end of a licensing period, the Broadcasting Act 2009 provides for the BAI to recommend a reduction in public funding, in line with paragraph 126 of the 2008 Decision.

- (62) It appears from the complaint that Newstalk is of the view that despite the RTÉ review system there would be overcompensation of RTÉ, on the basis of the following elements. The development of RTÉ's commercial income over the past years was not positive. In 2013, it had halved since 2007. This was offset by an increase of RTÉ's funding from licence fee sources. The complainant suggests that RTÉ's refusal to broadcast Newstalk advertisements was possible only because of the guaranteed income it receives each year as State-funded public broadcaster. The decrease in commercial income would not have brought about any change in RTÉ's competitive behaviour. There would have been little or no innovation or dynamic attempts to offer new products to advertisers when faced with difficult economic circumstances. This would be linked to RTÉ's reliance on the guaranteed income from the allocation of television licence fees.
- (63) The Commission stresses that overcompensation would mean that the combined revenues of RTÉ from commercial activities and from the licence fee would be substantially higher than its expenses. In this context, the annual accounts of RTÉ do not show overcompensation. Overall, RTÉ experienced, according to the Irish authorities, a decline of EUR 104 million in revenues between 2008 and 2012 (including a reduction of EUR 20 million in public funding allocated to RTÉ from the licence fee).
- (64) Also, the reviews to date have not found that RTÉ has been overcompensated. For example, the 2011 Report states that given RTÉ's deficit which amounted to 5% of revenues, "*there is no issue of surpluses and RTÉ complied with this EU requirement*" (i.e. the no overcompensation requirement).³⁰ The 2012 Report reads that despite RTÉ's achievements in terms of cost reduction, "*there was no issue of surpluses in 2012; therefore RTÉ complied with EU requirements relating to retaining no more than 10% of expenditure. RTÉ recorded a deficit in 2012.*"³¹
- (65) RTÉ's Annual Report for 2013 shows that RTÉ suffered further falls in commercial income in 2013. Despite this, RTÉ returned to break-even and reported a pre-tax surplus of EUR 1.1 million. The small surplus of EUR 1.1 million in 2013 remains far below the 10% of the annual budgeted expenses of EUR 307 million which a public service broadcaster may build up as reserve, according to paragraph 126 of the 2008 Decision.
- (66) In 2014, commercial revenue increased by 3% and despite a cut in public funding of EUR 5 million, RTÉ reported a modest net surplus before tax of EUR 0.9 million.
- (67) The Annual Report for 2015 reported a 4% growth in commercial revenue with a 5% increase in advertising income, despite a difficult and extremely competitive market. RTÉ returned an overall net deficit after tax of EUR 2.8 million in 2015³². That report also notes that RTÉ's radio revenues grew by 9% and

³⁰ Annual Review of Public Funding 2011, p. 106.

³¹ Annual Review of Public Funding 2012, p. 10.

³² RTÉ Annual Report and Group Financial Statements 2015, p. 10.

outperformed the market, a result underpinned by overall economic growth in Ireland. Consequently, also the 2015 annual review found that RTÉ was not overcompensated³³.

(68) From the above it cannot be concluded that RTÉ is being overcompensated.

4.3.2. *Alleged violation of the principle of revenue maximisation*

4.3.2.1. Violation of market principles on the advertising market

(69) In the 2008 Decision, the Commission assessed commitments given by Ireland in relation to the respect of market principles³⁴ and concluded that they contained the necessary safeguards to ensure that public service broadcasters carry out their commercial activities on market terms and that commercial activities are operated in an efficient manner so as to maximise revenues. In this respect, the Commission stated that the revenue maximisation maxim should be sufficient to ensure that RTÉ does not undercut prices for instance on the advertisement market. The Commission also recorded that compliance with market principles is subject to control by the BAI³⁵.

(70) The following provisions implemented the said commitments: Section 108 of the Broadcasting Act 2009 requires that RTÉ commercial activities shall be operated in an efficient manner so as to maximise revenues and be used to subsidise RTÉ's public service objects. All transactions must be made at arm's length and on commercial terms. Under Section 108 of the Broadcasting Act 2009, the Minister may direct the Compliance Committee of the BAI to prepare and submit a report on compliance with this section. Section 109(9) of the Broadcasting Act 2009 obliges RTÉ to send to the Minister a statement of the use it has made of the monies paid to it under Section 123 of the Broadcasting Act 2009 in that financial year, in pursuance of its public service objects, and a statement in respect of the total revenue and costs derived by the corporation in that financial year distinguishing between monies received or expended on (i) activities in pursuance of its public service objects, and (ii) activities in pursuance of its exploitation of commercial opportunities object. Furthermore, under Section 109(10) of the Broadcasting Act 2009 RTÉ must include a statement of the cost accounting principles and methods by which costs and revenues have been assigned to such activities. Section 114 (j) of the Broadcasting Act 2009 obliges RTÉ, in so far as is reasonably practicable, to exploit such commercial opportunities as may arise in pursuit of its objects.

(71) However, the complainant alleges that RTÉ's commercial activities are not being carried out on market terms, contrary to the commitments given in the 2008 Decision. According to the complainant, RTÉ would refuse advertisements of its indirect competitors on arbitrary grounds and undercut the prices offered for similar radio advertising products. RTÉ would have deliberately reduced the value of the advertising market in Ireland although its licence fee revenue was also falling.

³³ Annual Review of Public Funding 2015, p. 153.

³⁴ Paragraph 161 and the following of the 2008 Decision.

³⁵ Paragraph 185 and the following of the 2008 Decision.

- (72) The Commission notes in this respect that in general, the various reports described above do not indicate that RTÉ's commercial behaviour would not follow commercial principles.
- (73) Regarding the efficiency and market conformity of the commercial activities of RTÉ, Indecon's 2011 Annual Review considered RTÉ's Advertising Revenue, Pricing and Trading System, noting that the discounts offered "*ensure more certainty for RTÉ in terms of their potential to raise commercial revenue*".³⁶
- (74) In 2012, Indecon compared advertising costs for 2012 and 2013. It did not find elements suggesting that the principle to maximise profits had been neglected. The review also analysed sources of revenue, considered economic factors and trends influencing these and took a closer look at the performance of RTÉ television compared to that of other competing broadcasters in the wider advertising market.³⁷
- (75) In its review for 2013, O&O considered in relation to commercial income that the fall in television revenue would be in line with wider market trends. Although commercial rivals became more effective at capturing share of radio advertising spending, RTÉ achieved its public service broadcaster objective of exploiting commercial opportunities³⁸.
- (76) The decline in RTÉ's commercial revenue was also analysed in Indecon's Review of the Advertising Market³⁹. It was considered to be the result of the economic downturn and the general decline in advertising expenditure in Ireland as well as of increasing competition in the advertising market with the growth in digital advertising. The analysis did not find evidence of RTÉ holding prices down artificially.
- (77) To sum up, the independent consultants commissioned by the BAI have not found evidence that RTÉ has not attempted to use the potential for commercial revenue in order to minimise the amount of public funding required to support it or that RTÉ is under-valuing its advertising rates. Having regard to the totality of the broadcasting advertising market, they rather attributed RTÉ's decrease in commercial revenues since 2008 to the general recession in the Irish economy and to changing trends in the advertising marketplace arising from media convergence, and to the decline in the broadcast advertising sector and specifically the sector for television advertising.
- (78) Otherwise the complainant did not provide evidence or facts supporting the allegation that RTÉ's behaviour on the advertising market violated in individual cases the profit maximisation principle. That conclusion concerns in particular the complainant's suggestion that a violation of market principles is evidenced by the refusal in 2013 and 2014 to run an advertisement for Newstalk with the key wording "*Move the Dial*", based on RTÉ's *Guidelines for the Acceptance on RTÉ Broadcasting Services of Advertising for Competing Radio and Television Services* ("the Competing Service Guidelines").
- (79) RTÉ is both entitled and required to protect its commercial interests. RTÉ published and applies the Competing Services Guidelines as a voluntary tool

³⁶ Annual Review of Public Funding 2011, p. 62.

³⁷ Annual Review of Public Funding 2012, p. 68.

³⁸ Annual Review of Public Funding 2013, p. 80.

³⁹ Indecon Economic Analysis of the Advertising Market in Ireland 2013.

establishing transparent and equal criteria regarding broadcasting advertisements for competing services. They state that "*advertisements should not implicitly or explicitly, either denigrate or claim superiority over any other broadcasting service nor should exhort viewers to switch radio channels*". It is not apparent how this would not constitute commercial behaviour or violate the requirement for all commercial activities to be carried out on market terms.

- (80) The Irish authorities emphasise that RTÉ applied the Competing Services Guidelines reasonably, requiring that Newstalk's advertisements do not carry a term that expressly invited consumers to change radio stations. The Competing Services Guidelines are applied in a uniform manner to all competing broadcasters and RTÉ has previously requested amendments to advertisements submitted by other broadcasters.
- (81) Finally, the Irish authorities highlight that the Competing Services Guidelines allow competitors to broadcast advertisements on RTÉ which promote their services and the attributes of those services in a positive manner. RTÉ has indeed run advertising for its competitors, including Newstalk. There would be a long standing business relationship of Newstalk advertising on RTÉ. In particular, RTÉ has broadcast advertising spots for Newstalk in 2002, 2006, 2007, 2013 and 2014.
- (82) Consequently, it appears that the Competing Service Guidelines are drafted to guide advertisers as to what RTÉ considers an acceptable standard of content required for broadcast and to ensure that advertising content meets the expectations of RTÉ's audience. The limitation in the Competing Services Guidelines is therefore intended to protect RTÉ's own commercial interest, which in itself is meant to maximise profit. RTÉ's actions are those that one would expect from any commercial broadcaster engaged in selling advertising to another competing broadcaster. It is inconceivable that any broadcaster, acting on market terms, would permit advertisements on its own services which specifically and overtly enticed viewers or listeners to switch to the competing broadcaster, thereby adversely affecting its market position and ability to earn revenue.
- (83) As the complainant observes itself, the Competing Service Guidelines serve the purpose to protect the market shares of the RTÉ Group and its divisions. The attempt to keep market shares is obviously a commercial objective. It is also within that logic that the Competing Service Guidelines do not apply to RTÉ's own radio stations or other divisions of RTÉ seeking to advertise on RTÉ television.
- (84) Therefore, there is no indication of a violation of the principle of market behaviour by RTÉ by the refusal to run a certain type of advertising competitors. This behaviour is therefore also not a violation of a revenue maximisation principle, even if it should exist under the State aid rules.
- (85) As another element of evidence for below market price advertising the complainant indicates that RTÉ Radio offered to a client an advertising campaign, including advertisements supplied entirely free of charge. The same client had previously used Newstalk for a high-profile advertising campaign in 2010 and noted a considerable increase in its expenditure in 2013 and 2014.
- (86) The complainant assumes that RTÉ knew of its client's longstanding relationship with Newstalk and clearly targeted it as a customer that could be tempted to switch outlets. The complainant claims that by selecting this customer specifically, RTÉ consciously chose to deny Newstalk a customer and decrease

its rival's income, even though this meant that they themselves incurred costs. The complainant maintains that, given RTÉ's consistently decreasing commercial revenue, any discount it offers is only possible due to its ability to rely on the RTÉ Group's substantial overall assets and, most notably, the steady income from TV licence fees.

- (87) Likewise, the complainant criticises as non-market conform the share deal rebate system used by RTÉ for selling its advertising time. That is addressed in the 2011 Review in a section entitled "RTÉ Advertising Revenue, Pricing and Trading System". That review notes that "*New discounts are offered for pre-arranged annual expenditure levels. These discounts ensure more certainty for RTÉ in terms of their potential to raise commercial revenue*"⁴⁰. The Share Deal investigation is also referenced in Crowe Horwath's Five Year Review⁴¹ and Indecon's Review of the Advertising Market⁴².
- (88) The complainant however does not demonstrate that strategies for the acquisition of important advertising clients would depart from practices also applied by commercial broadcasters. The practise of offering temporary introductory advertising fee rebates appears to be a common practice not just in the radio industry but across the wider media and commercial landscape. The Irish authorities explain that radio stations temporarily offer free airtime across a range of different and competing stations to influence large clients' buying behaviour and persuade them of the effectiveness of the medium of radio⁴³. The Irish authorities further clarify that this practice is particularly used during summer when there is less demand for advertising slots.
- (89) In addition, the Commission notes in this context that the allegation of predatory pricing has been the subject to the Competition Authority's investigation, which was closed without adverse findings against RTÉ⁴⁴.
- (90) As another example for non-market conform behaviour with an effect on the advertising market the complainant suggests in the letter of 1 July 2016 that the reduction by RTÉ in its commissioned programme costs is part of 'a deliberate strategy by RTÉ to shift its emphasis to low-budget broadcasting and low-cost advertising.' The level of home-produced programming by RTÉ has been considered in detail in the context of the annual reviews of funding and has been the subject of recommendations from the BAI to the Minister in the context of the Five Year Review.
- (91) Indeed, RTÉ's direct expenditure on commissioned programmes has fallen from 2007 to 2015. However, this decrease in RTÉ's expenditure on the independent production sector must be seen in the context of the considerable cost reduction measures the corporation has had to undertake across all its business divisions. The BAI's reviews of public funding have attributed the decline in independent productions to the decline in revenue and resulting reductions in RTÉ's cost base.

⁴⁰ Annual Review of Public Funding 2011, p. 62.

⁴¹ Crowe Horwath, Review of Funding for Public Service Broadcasters, 23 May 2013, Appendix 4, p. 10-11.

⁴² Indecon Economic Analysis of the Advertising Market 2013, p. 23.

⁴³ See for example, Choose Radio campaign (<http://www.chooseradio.ie/>) run by RTÉ and IBI stations (including Newstalk). The aim of the campaign was to try to attract businesses towards radio by running a series of 60 second ads highlighting the 'power of radio' with a prize of a free advertising campaign.

⁴⁴ In addition, the Irish authorities informed the Commission that the CCPC has also rejected a complaint against RTÉ radio relating to the operation of a 'Summer Advertising Offer' by RTÉ and submitted by the Independent Broadcasters of Ireland (IBI), which represents commercial radio stations, including Newstalk.

- (92) It is a matter for Member States to determine and assess to what extent programming should include domestic productions and to what extent it may use public funding to finance the purchasing of programming content from abroad.
- (93) It remains unclear how any such cost cutting strategy could lead to increased distortions of competition on the advertising market as long as this does not lead to cross-subsidisation of commercial activities.
- (94) It is also understood that all broadcasters in Ireland have operated in a difficult market. The Irish authorities pointed out that the decline began in 2008 due to the economic slowdown, which strongly impacted the broadcasting sector. Depressed prices of advertising in Ireland are thus caused by very strong competition on the market. Therefore, a decrease of RTÉ's advertising revenue in line with the general trend of a general downturn in advertising prices in Ireland is not a conclusive sign of an undercutting of prices by RTÉ.
- (95) The complainant does not provide any specific argument in reply to the observation by the Irish authorities that the decline in commercial revenue for RTÉ and all other Irish broadcasters is primarily attributable to two key factors: the recession and changing trends in the advertising marketplace arising from media convergence and the resulting shift to digital advertising.
- (96) Furthermore, the complainant mentions itself that the pricing strategy of RTÉ radio did not alter when Newstalk entered the national radio market and that RTÉ is known for not offering discounts comparable to those of its commercial competitors.
- (97) The complainant finally has concerns regarding the online advertising market. In particular, it alleges in a general way that RTÉ Group has an overall strategy to use public resources and large deficits to fund unsustainable low pricing strategies and that this strategy is replicated in the online/digital advertising sector. The complainant also holds that RTÉ leverages its programming, newsgathering and broadcasting capacity in order to expand into the digital and online sectors by using support from licence fees.
- (98) In this respect, it is recalled that the public broadcasters are allowed to extend – with public financial support – their activities on the internet and provide audio-visual services on new distribution platforms beyond classical radio and TV broadcasting. In line with that, the Broadcasting Act 2009 provides as an object of RTÉ to establish and maintain non-broadcast non-linear audio-visual media services and websites. RTÉ has therefore been mandated to pursue commercial opportunities and to engage in online activity.
- (99) Regarding the assertions, unsupported by evidence, that online advertising revenues are being deliberately kept at a low level by RTÉ, the difficult conditions that all advertising sectors have faced in Ireland over past years should firstly be taken into account, as it was discussed in paragraph (77) and following.
- (100) Secondly, the Irish authorities explain that the costs of the RTÉ's website are partially met by commercial activities on the website itself, such as advertising, sponsorship, affiliations and e-commerce. The remainder of the cost of providing of the online services is met by the proceeds from other commercial activities in the RTÉ publishing division and its telecoms activity, together with some support from RTÉ's wider commercial activities apart from publishing. The Irish authorities further explain that a relatively small proportion of the overall amount spent in online advertising in Ireland received by RTÉ per annum in online advertising revenue needs to be viewed in context. This refers especially to the

fact that the vast majority of online revenue is accumulated by companies who are not traditional media players, and who often produce relatively little content in their own right.

- (101) Finally, the various reports described above do not indicate that RTÉ undervalues prices of advertising on its online offerings or that RTÉ's commercial behaviour would not follow commercial principles or that the principle to maximise profits had been neglected.

4.3.2.2. Violation of market principles in other respects

- (102) There is no other evidence for the neglect of market principles by RTÉ. Contrary to the allegations of complainant, the existing reports show that there is no breach of market principles. In this respect, it is important to note that the wording "*commitment not achieved*" used in RTÉ's 2011 and 2012 annual reports refers to specific monetary targets set for the respective year and does not refer to a principle of revenue maximisation, as the complainant suggests⁴⁵.
- (103) The complainant suggests that the relative stability of the licence fee income is the basis of RTÉ's financial survival over the past number of years when its commercial revenues have been in steady decline. The complainant claims that RTÉ uses its licence fee income to balance the reduced revenues from its commercial activities. The complainant considers that that allows RTÉ to ignore the principle of profit maximisation and its obligation to carry out its commercial activities under market conditions and to operate in an efficient manner.
- (104) However, the fact that for example a decrease in commercial income attracted by RTÉ Radio has led to an increase in the proportion of RTÉ Radio's support from public funds can be seen as a reflection of the Irish government's determination to ensure the financing of RTÉ's public service mission.
- (105) It is not required that a certain proportion of a broadcaster's budget is funded by advertisements, or that advertisements have to contribute at all to the revenues of a public broadcaster. Independence from commercial revenue sources is one of the core characteristics of an independent public broadcaster. The principle of financing public service broadcasting by ensuring that their net costs are covered entails that the State may guarantee the public broadcaster that all its net costs necessary for the fulfilment of its mandate are covered, irrespective of the amount of revenues from other sources⁴⁶.
- (106) The complainant also states that it misses ambition and a more detailed strategy of RTÉ for its digital services. However, it remains open in what way that should support a finding that RTÉ undervalues prices or of overcompensation.
- (107) Finally, as a result of the Five Year Review recommendations, RTÉ developed a Fair Trading Policy, published on 29 February 2016 on its website. Henceforth, there will be a report on Fair Trading Policy in the RTÉ Annual Report.
- (108) In view of the above, the Commission considers that the fact that commercial income has decreased in recent years does not demonstrate anticompetitive behaviour. In the same way, the fact that RTÉ is having a deficit in several of the

⁴⁵ In point 5.3, page 3 of the submission of 28 October 2015 the complainant states that RTÉ would "*openly acknowledge that its commitment to 'Maximise the exploitation of all revenue streams both traditional and new' was not achieved*".

⁴⁶ Case T-151/11 *Telefónica de España, SA and Telefónica Móviles España, SA v Commission*, EU:T:2014:631, paragraphs 184 and 185.

past years would also suggest that it has all interest to increase its commercial income. It is also not obvious that RTÉ would easily obtain higher public funding to offset the lower commercial revenues. Consequently, the Commission does not see any evidence that RTÉ has engaged in anti-competitive behaviour in commercial markets which would lead to an increased State funding. There are no signs that overcompensation took place.

5. CONCLUSION

The Commission considers that there are no grounds to consider that the way the measure has been implemented by the Irish authorities constitutes a breach of the terms and conditions of the 2008 Decision. Accordingly, the Commission concludes that Ireland has complied with the 2008 Decision and the commitments contained therein.

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, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

