

competition in the economy  
 vigorous competition drives productivity growth, innovation and value for all  
 consumers  
 innovation  
 productivity  
 economy  
 growth  
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 consumers  
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productivity  
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 productivity

**Submission to the Joint Oireachtas  
 Committee on Communications, Marine  
 and Natural resources on the Draft  
 Broadcasting Bill 2006**

S/06/006

September 2006



## SUMMARY

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- 1.1 The legislation proposed by the Minister for Communications, Marine and Natural Resources would establish the Broadcasting Authority of Ireland (BAI), set out its functions, establish various Committees to assist the BAI, outline the various duties of broadcasters generally in line with EU rules, designate certain broadcasters as public service broadcasters (PSBs) and provide for their funding.
- 1.2 The Competition Authority welcomes the overall thrust of the current legislative proposals as an important step in ensuring that the public service remit is clearly defined and policed and that public service broadcasters are properly funded in a manner that minimises distortions of competition.
- 1.3 The Competition Authority has a number of concerns in connection with the proposals – briefly, the main ones are –
  - That the public service broadcasters will themselves define their own public service remit.
  - There does not appear to be a mechanism for punishing the PSBs if they systematically fail to meet their annual commitments. This is a potential recipe for underperformance and for complaints from third parties.
  - The PSBs must get Ministerial approval before entering into many different business areas. However, this does not appear to be the case in relation to national broadcast channels. That is, they can launch as many national TV channels as they wish. This has the potential to have a chilling effect on the incentive for commercial broadcasters to enter the Irish market as there remains a fear that their particular offering might be pre-empted by one of the PSBs.
  - The legislation attempts to ensure that PSBs compete with independent broadcasters on a level playing field. However, in attempting to achieve this, the proposal goes further than required by giving PSBs the duty to maximise revenues from their commercial activities. This could have unintended consequences and be used as a co-ordination device to raise prices to the consumers of these services.
  - The proposed legislation provides for a code of fair practice to cover the relationship between PSBs and independent producers. However, an over-advantageous code would impact on the ability of commercial broadcasters to contract with the independent sector. This could impair the ability of commercial broadcasters to compete with the PSBs.

- 1.4 The Authority makes a number of recommendations intended to address these concerns. The key recommendations are, in order of priority, –
- The guidelines on the public service remit produced by the BAI should become binding on the PSBs, who can only deviate when they clearly outline reasons for doing so. Consideration should be given to placing more guidance in the proposed legislation as this would bring greater legal certainty.
  - The legislation should make explicit provision for claw-back of public funding where systematic failure to meet annual commitments are identified.
  - Ministerial approval should be required before PSBs launch new national channels.
  - The PSBs should be given the duty not to sell commercial services below the costs of an efficient stand-alone operator. This is in line with the guidance given by the European Commission and yet gives the PSBs sufficient commercial freedom to ensure that problems do not arise on these markets.
  - The BAI's role in policing the code of fair practice should be extended to include that it does not unintentionally distort competition between PSBs and commercial broadcasters in their dealings with independent producers.

## BACKGROUND

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2.1 The European Commission published a "*Communication on the application of State aid rules to public service broadcasting*" in November 2001<sup>1</sup>. This Communication recognised the unique role that public service broadcasting plays–

*"there is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion."*

2.2 Moreover the unique role of public service broadcasting in promoting culture, providing educational programming, in objectively informing public opinion, in guaranteeing pluralism and in providing free-of-charge entertainment was noted.

2.3 While granting a large degree of latitude to Member States in relation to public service broadcasting, the Commission outlined measures that are required to ensure that there exists a level playing field between commercial broadcasters and public service broadcasters.

2.4 In 2005, as part of its investigation on the role and financing of public service broadcasters, the Commission made it clear that it no longer viewed the current financing system in Ireland as being compatible with the State aid provisions of the Treaty<sup>2</sup>. At the same time the Commission made clear that it would close the investigation if there were measures to:

- clearly define the public service remit;
- a proper separation of accounts (including adequate mechanisms to prevent over-compensation);
- ensure that commercial activities of the public service broadcasters were in line with market principles; and
- establish an independent authority to check compliance.

2.5 The proposed legislation attempts to deal with these concerns. In addition, it also transposes the restrictions placed on all broadcasters through provisions of the so-called *TV without Frontiers Directive*, which covers *inter alia* the protection of minors, incitement, the right to reply and limits on advertising<sup>3</sup>. This Directive is currently being revised to deal with new technologies and to rollback some regulation in relation to restrictions on advertising.

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<sup>1</sup> 2001/C 320/04

<sup>2</sup> Commission Press Release IP/05/250

<sup>3</sup> Directive 97/36/EC

## DETAILED COMMENTS

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- 3.1 The media world is on the cusp of a revolution brought about by convergence. More and more households in the EU receive their TV over the internet (using IPTV or TV using the internet protocol). At the same time technology allows households a much better opportunity to “time-shift” their watching of particular programmes. Households will increasingly become active consumers of media services - pulling down programmes on demand - rather than passive receivers. This will bring with it a large change in the manner in which consumers are able to watch TV broadcast services. Households will not be confined by geography in terms of the TV broadcasts that they watch. Against this background it is important that the proposed legislation ensures that it provides sufficient flexibility to be able to deal with these changes.
- 3.2 The Competition Authority is concerned with the existence of a narrow list of backgrounds that make a person eligible to serve on the BAI and its supporting Committees. Nonetheless, if it is considered appropriate to delineate exactly the background of persons who are eligible to serve on the BAI (and its supporting Committees), as Section 8 does, it would be sensible to also include persons who are experts in State aid cases, regulatory accounting and competition policy etc. as this will give additional credibility to the oversight role over the activities of the public service broadcasters. The BAI will also have a critical role in assisting ComReg in relation to the spectrum allocation plan, which will have important consequences for how the digital dividend (that will come about through digitisation) will be used. A thorough knowledge of the potential competitive effects of this would also greatly assist the BAI.

### **Recommendation 1**

Include persons who are experts in State aid cases, regulatory accounting and competition policy on the BAI.

- 3.3 The process for the appointment of the first CEO should be made as open and transparent as possible and in line with how the CEOs of equivalent public bodies are selected.
- 3.4 The Competition Authority welcomes the proposal to give the BAI strong enforcement powers. It notes that one possibility that is being “actively considered” is a power for the BAI to levy administrative fines in a timely fashion and in amounts that ensure compliance. This is an issue that is common to many regulatory authorities, and its realisation is one of the critical challenges of regulation in the Irish context.

- 3.5 The Minister intends to continue funding PSBs via the licence fee<sup>4</sup>. In view of the likely additional costs of this, it is important that the contract for the collection of the licence fee is itself put out to tender. In this way, the costs of collecting the funds for the public sector broadcasters should be minimised and compliance increased. In addition, the Minister will act as guarantor. It is important that this is not an open ended guarantee, as this could itself be construed as State aid.<sup>5</sup>

#### **Recommendation 2**

The contract for the collection of the licence fee should be put out to tender.

- 3.6 While Ministerial controls on the PSBs entering into certain broadcast activities are proposed (for example, regional broadcasting), there does not appear to be such a control on the PSBs setting up extra national broadcast channels. This is likely to have a chilling effect on potential new commercial national broadcasters. There will remain a fear that, if a potential entrant tries to become a national broadcaster, one of the PSBs will be able to beat it to market or otherwise greatly inhibit its likelihood of success. For this reason, it should be made clear that the PSBs may only launch additional national channels on the same basis as they can launch regional channels. The BAI can, of course, have an indirect impact via its interactions with ComReg in relation to the spectrum allocation plan.

#### **Recommendation 3**

Ministerial approval should be required before PSBs launch new national channels

- 3.7 The European Commission's Communication allows Member States to preserve a certain level of audience to the PSBs. The Minister has wisely chosen not to go down this route. However, the Competition Authority recommends that the Minister go further, and specifically exclude this as a goal. This would create an even greater degree of regulatory certainty to firms that are contemplating entering the Irish broadcast market. At the same time, the Minister could demand of the PSBs that they attain a certain level of viewership and hold them to account if they do not meet this target.
- 3.8 The proposed legislation is designed to ensure that the PSBs do not sell advertising below commercial rates and hence weaken the position of commercial broadcasters. The Commission insists that the fees for advertising must be at least as high as those of a standalone efficient operator. However, the proposed legislation goes much further and gives PSBs an obligation to maximise revenues from non-PSB commercial activities (including advertising). This sets a much higher standard and may have the unintended consequence of acting as a facilitating device for anti-competitive behaviour. If another seller of such services wanted to raise prices it could argue that this provision was not being adhered to. This could result in (or send a signal to the PSBs) that higher advertising rates should be introduced. It would be better to state that all such activities should be conducted in a commercial manner but at the same time ensure that prices are not driven below those of an efficient

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<sup>4</sup> The Minister intends to designate RTÉ and TnG as public service broadcasters.

<sup>5</sup> See Commission press release IP/02/458.

standalone operator. This should also apply to advertisements broadcast in Irish, which the proposed legislation provides must include variations benefiting advertisers using the Irish language.

#### **Recommendation 4**

The PSBs should be given the duty not to sell commercial services below the costs of an efficient standalone operator.

- 3.9 One of the Competition Authority's major concerns is the definition of what constitutes public service broadcasting. One of the key points demanded by the European Commission is that *public service remit* is clearly defined. It appears that this duty has been given to the PSBs themselves who are to draw up a charter using guidelines from the BAI. It is not clear what legal status such guidance would have; this leaves open whether the PSBs can themselves define what their public service remit is (subject to approval by the Minister). The Competition Authority recommends that more guidance is given in the primary legislation or that the PSBs can only deviate from the guidance of the BAI on the basis of clearly outlined reasons (which would then have to be cleared by the Minister).

#### **Recommendation 5**

The guidelines on the public service remit produced by the BAI should become binding on the PSBs, who can only deviate when they clearly outline reasons for doing so.

- 3.10 In line with best practice, the PSBs have to set out an annual statement of commitments and will be answerable to the Minister and the BAI in this regard. While it can be expected that from time to time these will not be met, the Competition Authority recommends that the Minister should have the power to vary the funding of the PSBs in line with systematic failure to reach commitments. Having such a claw-back mechanism would give the PSBs the correct incentives to make realistic targets and to ensure that they are generally fulfilled.

#### **Recommendation 6**

The legislation should make explicit provision for claw-back of public funding where systematic failure to meet annual commitments are identified.

- 3.11 The proposed legislation provides for a code of fair practice that covers the relationship between independent producers and the PSBs. This attempts to temper the buyer power inherent in being a PSB company. At the same time, such a provision should not distort competition between the PSBs and other commercial broadcasters as they compete for the services of independent producers. This could occur if the PSB draws up a code that is unnecessarily advantageous to independent producers, which it can pay for using its public service funding. This would have the effect of raising the cost of using such services to commercial broadcasters. The BAI's role in policing the code should be extended to ensure that the code protects the interests of independent producers without distorting competition between the different classes of broadcasters.

**Recommendation 7**

The BAI's role in policing the code of fair practice should be extended to include that it does not unintentionally distort competition between PSBs and commercial broadcasters in their dealings with independent producers.

