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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Ireland

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Ireland --

1. In Ireland, there have been two main issues regarding the application of competition rules in television and broadcasting. The first issue relates to a case dealt with by the Irish Competition Authority (the “Authority”) regarding the scheme operated by the main public service television broadcaster, Raidió Teilifís Éireann (“RTÉ”), for the sale of television advertising airtime. The second issue relates to a State aid decision of the European Commission in respect of aids granted to the Irish public service broadcasters RTÉ and Teilifís na Gaeilge (“TG4”)¹.

1. Loyalty rebates for the sale of television advertising airtime

1.1 Introduction and summary

2. On 7 October 2011, the Authority entered into an Agreement and Undertakings with RTÉ following an investigation conducted by the Authority into the scheme operated by RTÉ for the sale of television advertising airtime. The Authority’s investigation focused, in particular, on the discounts granted by RTÉ to individual advertisers which depended, among other factors, on the percentage (or share) of each advertiser’s total television advertising budget committed to RTÉ. The scheme is hereinafter referred to as the “Share Deal”.

3. The Authority’s investigation was prompted by concerns that the Share Deal could amount to a breach of section 5 of the Competition Act, 2002 (the “Act”) and/or Article 102 of the Treaty on the Functioning of the European Union (“TFEU”).

4. Section 5 of the Act and Article 102 TFEU prohibit an abuse by one or more undertakings of a dominant position. Conditional rebates with loyalty-inducing effects granted by a dominant undertaking may amount to an abuse of a dominant position in breach of section 5 of the Act and/or Article 102 TFEU. The Authority’s investigation was initiated with the aim of forming a view on the following issues: (i) the relevant market, (ii) whether RTÉ held a dominant position in the relevant market, and (iii) whether the Share Deal amounted to an abuse of a dominant position.

5. Based on the information gathered during its investigation, the Authority was concerned that, given RTÉ’s market position, the Share Deal could amount to a conditional rebate likely to have loyalty-inducing effects and hence could be anti-competitive. The Authority communicated its preliminary concerns to RTÉ and, in response, RTÉ offered undertakings to the Authority. In the proposed undertakings, RTÉ agreed to commence immediately the process for implementing a new trading scheme which would exclude the share of budget element as of the date of formal acceptance of the undertakings by the Authority (with the new trading scheme being introduced no later than 1 July 2012)² As the

¹ E 4/2005 (ex NN 99/1999).

² RTÉ also informed the Authority that it had intended to review how it sold television advertising airtime and the possibility of introducing a new scheme designed, inter alia, to improve efficiencies.

undertakings offered by RTÉ addressed the Authority's concerns, it signed the Agreement and Undertakings with RTÉ and closed its file without reaching a final view on the application of section 5 and/or Article 102 to the Share Deal. The text of the Agreement and Undertakings is set out in the Annex to this submission.

6. This submission, first, deals with the Share Deal case, i.e. it (i) describes the main features of the Share Deal, (ii) summarises the procedural steps followed during the Authority's investigation, (iii) outlines the legal context relevant to this case, (iv) explains the Authority's preliminary legal and economic analysis of the Share Deal under section 5 of the Act and/or Article 102 TFEU and (v) summarises the proposal submitted by RTÉ to address the Authority's concerns regarding the competition implications of the Share Deal. Second, this submission deals with the State aid decision of the European Commission in respect of the Irish public service broadcasters RTÉ and TG4 and the commitments offered by the Irish Government to ensure the compatibility of public funding with State aid rules.

1.2 The Issues

1.2.1 The Complaint

7. On 20 March 2009, TV3 Television Network Limited ("TV3"), a private television broadcaster, submitted a complaint to the Authority alleging that RTÉ had engaged in anticompetitive behaviour in breach of Irish and European competition law. In its complaint, TV3 raised a number of issues concerning the alleged anticompetitive behaviour of RTÉ. The Authority's investigation focused on TV3's allegation concerning the Share Deal.

1.2.2 The Parties

8. RTÉ is a State-owned television and radio broadcaster in the State. RTÉ currently owns and operates two free-to-air national television channels (RTÉ One and RTÉ Two). RTÉ is financed from a combination of commercial and non-commercial revenues. Commercial revenues accrue from advertising, sponsorship, transmission fees and merchandising fees. Non-commercial revenue comes from TV licence fees which must be paid by all owners of television receiving sets.

9. TV3 is a private TV broadcaster in the State. TV3 owns and operates the national free-to-air channel TV3 and the pay-TV channel 3e. It also handles advertising sales for other TV channels - Living TV and Bubble Bits. TV3 is funded from a mixture of advertising sales, sponsorship and other sales.

1.2.3 The Practice Concerned

10. As indicated above, the object of the Authority's investigation was the Share Deal, i.e., a scheme under which the discounts granted to individual advertisers depended on, among other factors, the percentage (or share) of each advertiser's total television advertising budget committed to RTÉ.

11. Typically, contracts for the sale of television advertising airtime are negotiated between broadcasters and advertising agencies on an annual basis. Negotiations usually begin in the autumn prior to the start of each new advertising year in January. Apart from annual deals, RTÉ also offers special event deals, late bookings, and airtime special offers.

12. The share of the total television advertising budget that advertisers would commit to RTÉ was a central factor in the negotiations between RTÉ and advertisers/advertising agencies.

13. In simple terms, everything else being equal, the higher the share of total television advertising budget that an advertiser committed to RTÉ, the larger the discount RTÉ would typically offer to that

advertiser. In some cases, if the share of budget committed was very low, the advertiser might have received no discount at all, or might even have had to pay a premium. RTÉ used what it called the “reference share” of [60-70]%³ as a benchmark for negotiations. However, the Authority understands that RTÉ also negotiated deals below the “reference share”. Moreover, the Authority understands from its investigation that RTÉ sometimes offered a larger discount to a customer with a lower budget share commitment than to a customer with a higher budget share commitment. In other words, as well as the link with advertiser’s total budget, there were discriminatory elements in the way the discounts were calculated for different advertisers.

1.3 *Legal Context*

14. This section briefly outlines the relevant legal framework for the Authority’s assessment of RTÉ’s Share Deal.

15. At the point in its investigation when RTÉ offered a proposal to address the Authority’s concerns, the Authority was of the preliminary view that the Share Deal could amount to an infringement of section 5 of the Act and/or Article 102 TFEU.

16. Section 5 of the Act prohibits an abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State. Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between Member States.

17. To establish an infringement of Article 102 TFEU, it is therefore necessary to prove that the abuse “*may affect trade between Member States*”. According to settled case law, it is sufficient that the abuse is *capable* of affecting trade for Article 102 TFEU to apply⁴. Abuses that have an impact on the competitive structure in more than one Member State are by their very nature capable of affecting trade between Member States⁵. The effect on trade of the abuse must be appreciable. This will mainly be assessed by reference to the position of the undertaking(s) on the market for the product concerned⁶.

18. As many television broadcasters (actual and potential competitors of RTÉ) and many advertisers (actual and potential customers of RTÉ) are based outside the State⁷, the Authority was of the opinion that RTÉ’s Share Deal was capable of having a potential effect on the competitive structure of the market for television advertising in more than one Member State and therefore on trade between Member States. Based on the size of the market concerned and RTÉ’s position on that market, the Authority was of the preliminary view that the effect on trade would be appreciable.

19. Accordingly, the Authority was of the view that if the Share Deal amounted to an abuse of dominance by RTÉ, then this would involve an infringement of both Article 102 TFEU and section 5 of the Act.

³ Range only provided here for confidentiality reasons.

⁴ Joined Cases C-241/91 P and C-242/91 *RTÉ and ITP v Commission* [1995] ECR I-743, paragraph 69.

⁵ Joined Cases 6 and 7/73 *Commercial Solvents v Commission*, [1974] ECR 223; Case 6/72 *Continental Can* [1973] ECR 215.

⁶ Case 5/69 *Volk v Vervaecke* [1969] ECR 295.

⁷ i.e., the Republic of Ireland

1.4 *Economic and Legal Analysis conducted by the Authority*

1.4.1 *Introduction*

20. This section outlines the Authority's legal and economic analysis of the Share Deal under section 5 of the Act and/or Article 102 TFEU.

21. Section 5 of the Act and Article 102 TFEU apply only to dominant undertakings. Normally, a finding of dominance involves a two step procedure. The first step is to determine the relevant market. The second step is to assess the firm's position on the relevant market.

22. If a firm has a dominant position in the relevant market, it is then necessary to consider whether the firm's conduct amounts to an abuse of its dominant position. In the RTÉ case, this involved assessing the likely exclusionary effect of the conduct, as well as any plausible objective justifications.

1.4.2 *Relevant Market*

23. For the purposes of assessing RTÉ's Share Deal, the Authority considered that the relevant market was likely to be the *market for television advertising airtime in the State*. The Authority did not reach a definitive view on the relevant market and took the view that further investigation and analysis of RTÉ's competitive constraints would have been required in order to do so.

24. In the Authority's preliminary view, the relevant product market was likely to be the *market for television advertising airtime*. The Authority considered the possibility of a wider product market definition (to include other media advertising) but did not find sufficient evidence during the course of its investigation to support the existence of a wider market. This preliminary view was supported by previous decisions of the Authority in the market for radio advertising⁸, and decisions of the European Commission (the "Commission")⁹, the UK Competition Commission¹⁰, the Bundeskartellamt¹¹, and OFCOM¹².

25. The Authority found that there was a degree of product differentiation within the market for television advertising airtime. However, the Authority also recognised there was a degree of substitution between impacts on different audience groups¹³ and impacts at different times of the day within each audience group. On balance the Authority, during the course of its investigation, did not consider there to be sufficient evidence to suggest that it should adopt a narrower product market definition.

26. In the Authority's preliminary view, the relevant geographic market was likely to be the State. However, the Authority recognised that advertisements broadcast on television channels outside the State

⁸ See for example, M/07/040 – Communicorp/Scottish Radio Holding and M/07/069 – UTV/FM104.

⁹ See for example, case M553 - RTL/Veronica/Endemol.

¹⁰ Competition Commission's final decision on ITV's CRR obligations issued on 19 January 2010 (www.competition-commission.org.uk/inquiries/ref2009/itv/provisional_decision_remedy.htm.)

¹¹ http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B06-094-10_endg.pdf

¹² Competition issues in the UK TV advertising airtime trading mechanism, OFCOM. See http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV_advertising_MIR.pdf

¹³ For instance, an advert for a beer product aimed at Men 18-34 may be placed at a programme that mainly delivers to the Men 18-34 audience category, or may be placed at a programme that delivers to the All Men audience category. There is a certain degree of inter-changeability between the All Men and Men 18-34 categories.

are also viewed in the State. This is known as the “spill-over” effect. On balance, the Authority was of the preliminary view that the spill-over effect was unlikely to materially affect the definition of the relevant geographic market.

1.4.3 Dominance

27. The Authority was of the preliminary view that RTÉ was likely to hold a dominant position in the market for television advertising airtime in the State.

28. The concept of dominance has been defined by the Court of Justice as a “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”¹⁴.

29. The Authority was of the preliminary view that it was likely that RTÉ was capable, to an appreciable extent, of acting independently of its competitors in the market for television advertising airtime in the State. In support of this, the Authority had regard to RTÉ’s substantial share of the relevant market, and other factors such as barriers to expansion, mainly resulting from RTÉ’s “unavoidable trading partner” status, insufficient countervailing buying power and possibly RTÉ’s dual-funded¹⁵ status.

30. As already mentioned, RTÉ disagreed with the Authority’s preliminary view on dominance. However, as the matter was settled when the Authority and RTÉ entered into the Agreement and Undertakings, the Authority did not have to reach a definitive view on this issue.

1.4.4 Abuse of Dominance

1.4.4.1 Overview of Loyalty Rebates

31. The granting of rebates and discounts¹⁶ is a common way in which suppliers compete on price and try to attract customers to themselves and away from competitors. However, according to the case law of the European Courts, the decisions of the Commission and the communication from the Commission entitled “*Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*”¹⁷ (the “Guidance Paper on Article 102”), loyalty discounts and rebates can be anti-competitive in certain circumstances. Specifically, conditional rebates with loyalty-inducing effects by a dominant undertaking may infringe Article 102 TFEU unless they are objectively justified.

32. Rebates are generally of a conditional nature since they are aimed at rewarding customers for a particular purchasing behaviour. The Guidance Paper on Article 102 identifies target rebates as the usual type of a conditional rebate¹⁸. Target rebates are discounts conditional on the customer reaching or exceeding a *purchasing target* during a certain period (known as the “reference period”). The purchasing target may take different forms, such as a certain quantity or a percentage share of the customer’s requirements.

¹⁴ United Brands v. Commission, [1978] ECR 207, paragraph 65.

¹⁵ i.e., from both advertising revenue and licence fees payable by TV set owners.

¹⁶ In this Enforcement Decision, the terms rebates and discounts are used interchangeably.

¹⁷ OJ 2009/C45/02.

¹⁸ Paragraph 37.

33. Target rebates with loyalty-inducing effects when applied by a dominant undertaking are likely to amount to a breach of Article 102 TFEU. Case law has deemed the following factors to be of particular importance in determining whether a given system of target rebates is likely to have loyalty-inducing effects: (a) whether or not the target rebate is an “all-units” rebate - all-units rebates (also known as “retroactive” or “rollback” rebates) are those that apply to all the purchases made during the reference period and not only to those purchases made in excess of the purchasing target(s); (b) the progressive nature of the rebate and the magnitude of the level of discounts; (c) the individualised nature of the purchasing target; (d) the duration of the reference period; (e) the market shares of the competitors of the dominant undertaking; and, (f) the economic analysis of the potential foreclosure effect. Each of these factors will be examined below. It is important to note that it is not necessary that all of these factors are present for a target rebate scheme to have loyalty-inducing effects. But the likelihood of loyalty-inducing effects is higher where multiple factors are present.

34. The reason why rebates with loyalty-inducing effects have been found to infringe Article 102 TFEU is because they seek to tie customers to the dominant undertaking and, therefore, they are capable of foreclosing competitors. The case law has based the finding of abuse on the capability of loyalty rebates to induce incremental purchases by customers of the dominant undertaking and, therefore foreclose competitors¹⁹. It is not necessary to analyse any actual foreclosure effects of a loyalty rebate in the market for Article 102 to apply. In the recent *Tomra* case²⁰, the General Court confirmed existing case law and rejected the need to analyse any actual foreclosure effects, provided that the conduct in question is *capable* of foreclosing competition.

35. Paragraph 38 of the Guidance Paper on Article 102 also suggests this approach when stating that:

“[...] the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates is liable to result in anti-competitive foreclosure and, consequently, be part of the Commission’s enforcement priorities” (Emphasis added).

1.4.4.2 The loyalty-inducing effects of the Share Deal

36. The Authority’s preliminary view was that the Share Deal was likely to be a target rebate scheme with loyalty-inducing effects and therefore capable of foreclosing RTÉ’s competitors. The Share Deal could be classified as a target rebate because discounts were conditional on advertisers committing a specific share of their total television advertising budget with RTÉ (the “purchasing target”) during a reference period, which was normally of one year. The Authority was of the view that the Share Deal may have had loyalty-inducing effects and, therefore, may have been capable of foreclosing RTÉ’s competitors. The Authority’s view was supported by the factors relied upon by the European Courts and the European Commission to establish potential loyalty-inducing effects. However, as it proved unnecessary to pursue the investigation further, the Authority did not draw any final conclusions on whether the Share Deal was in fact loyalty-inducing and detrimental to competition.

37. During the investigation, RTÉ argued that the Authority’s application of the factors below to the Share Deal did not demonstrate a loyalty-inducing effect to the legal standard required by the case law.

A. All-units rebate

38. The Authority was of the preliminary view that the Share Deal was an all-units rebate scheme. At the point of the annual negotiation, an advertiser committed a given percentage share of its total television

¹⁹ See, for example, Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331 (paragraph 68).

²⁰ Case T-155/06, *Tomra v Commission*, OJ C 288, 23.10.2010.

advertising budget with RTÉ for the relevant year. This was done on the understanding that the particular level of discount corresponding to that share of budget commitment would apply to **all** the purchases of television advertising airtime made by that advertiser from RTÉ during that year. A different (lower or higher) share of budget commitment would attract a different (lower or higher) level of discount applying to all the purchases of television advertising airtime made by that advertiser from RTÉ during that year. In the Authority's preliminary view, the Share Deal was likely to make it less attractive for advertisers to switch even small amounts of demand for television advertising airtime to RTÉ's competitors at the negotiation stage because of the 'pull' effect of RTÉ's discounts on all the purchases of television advertising airtime made from RTÉ. In addition, it was likely that television broadcasters, in order to compete effectively with RTÉ, would have had to compensate advertisers for the reduced discounts that would then be available from RTÉ.

B. The progressive nature and the magnitude of the level of discounts

39. While the Authority acknowledged that the level of the final discount given to an advertiser under the Share Deal did not exclusively depend on the level of share of budget committed to RTÉ, the investigation showed that it was a very important factor in establishing the final discount granted to an advertiser. In general terms, the larger the share of budget committed to RTÉ, the larger the level of discount RTÉ would offer.

40. Under the Share Deal, the discounts corresponding to high budget commitments were substantial. The Authority's investigation showed that the Share Deal was designed to work most effectively for shares of budget commitments ranging between 50% and 70%, which, according to RTÉ, is a realistic negotiated share range. RTÉ tried to negotiate the largest share of budget possible and used a "supporting share" of [60-70]% as a benchmark for negotiations with advertisers. In 2008 and 2009, advertisers on average met the "supporting share" commitment and received a [20-30]% discount.

41. During the course of the Authority's investigation, advertising customers of RTÉ suggested to the Authority that committing a substantial share of budget to RTÉ was, in some instances, necessary to make placing an advertisement with RTÉ economically viable. A reduction of the share of budget committed to RTÉ could lead to a substantial reduction of the level of discount to the extent that, in some instances, low levels of budget commitment made placing the advertisement prohibitively expensive. Advertisers were thus encouraged to commit a substantial share of budget with RTÉ in order to benefit from a "decent"²¹ level of discount.

C. The individualised nature of the target

42. The Authority was of the preliminary view that the Share Deal was likely to be an individualised rebate scheme. As indicated above, RTÉ's contracts with advertisers are on a line-by-line basis. In other words, RTÉ negotiates with advertising agencies (or directly with advertisers) specific terms of the contracts for each individual advertiser. Despite being an important factor, the share commitment was not the only factor to determine the total discount given to the advertisers. Other factors such as volume, deal history, target audience and optimisation potential also had a significant impact on the level of discount. All of these factors would be assessed by RTÉ during the course of the individual negotiations with the advertisers. Under the Share Deal, the final discount depended on the individual negotiations between RTÉ and each advertiser. This suggested that the Share Deal may have amounted to an individualised rebate system liable to have foreclosing effects in the market.

²¹ This is the term used by some of the advertisers contacted by the Authority.

D. The duration of the reference period

43. The Authority was of the preliminary view that the length of the reference period under which the Share Deal operated (i.e., one year) was substantial and thus likely to have a loyalty-inducing effect.

44. RTÉ disputed the Authority's apparent assumption that the length of the contract was driven by loyalty-inducing desires pointing to contextual factors such as (a) RTÉ's programme planning and commissioning, which is a long term process (6-9 months) and (b) TV advertisers planning of their spending by reference to their fiscal year.

E. The market shares of competitors

45. The information obtained during the Authority's investigation suggested that RTÉ held a much larger market share than its competitors. The Authority was of the preliminary view that the position of RTÉ in the market enhanced the likely loyalty-inducing effects of the Share Deal. As already noted, RTÉ disputed the Authority's preliminary views on the relevant market and its position in that market²².

F. Economic analysis of the potential foreclosure effect

46. The Guidance Paper on Article 102²³ outlines an additional factor or test which may indicate that a conditional rebate is capable of foreclosing competition. In relation to the assessment of price-based exclusionary conduct, such as conditional rebate schemes, the Guidance Paper on Article 102, outlines an "as efficient competitor test"²⁴.

47. With price-based exclusionary conduct, an "as efficient competitor test" attempts to establish whether a hypothetical competitor, as efficient as the dominant firm, could effectively compete, given the pricing conduct of the dominant firm. This is done by comparing "the price" charged by the dominant firm with an appropriate measure of cost. The lower the price, the more likely it is that the conduct has a foreclosing effect.

48. The Authority did not carry out an "as efficient competitor test" in this case. However, as suggested in the Guidance Paper on Article 102, the Authority did attempt to make a comparison between the effective price and the average price. The estimation of the effective price conducted by the Authority was based on what a competitor would have to offer to attract 1% of an advertiser's budget away from RTÉ. The Authority found evidence that the effective price was low relative to the average price. In the Authority's preliminary view, the Share Deal, therefore, could amount to a conditional rebate scheme with a loyalty-inducing effect.

1.4.5 *Objective justification*

49. In the enforcement of section 5 of the Act and/or Article 102 TFEU, the Authority will also take into account submissions made by a dominant undertaking that its conduct is justified²⁵. According to the

²² In particular, RTÉ argued that the available market share data did not reflect the recent increase in advertising minutage for RTÉ's competitors (an increase from 10 to 12 minutes per hour).

²³ OJ 2009/C45/02.

²⁴ Paragraphs 41 to 45.

²⁵ Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 184; Case 311/84 *Centre Belge d'études de marché — Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261, paragraph 27; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraphs 102 to 119; Case T-83/91 *Tetra Pak International v Commission* (Tetra

Guidance Paper on Article 102, a dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers²⁶. In this context, it is necessary to assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

50. The question as to whether the conduct is objectively necessary must be determined on the basis of factors external to the dominant undertaking (such as health and safety reasons)²⁷. In order to determine whether the conduct results in substantial efficiencies that outweigh any anticompetitive effects requires evidence that the following cumulative conditions are fulfilled: (i) the efficiencies have been, or are likely to be, realised as a result of the conduct; (ii) the conduct is indispensable to the realisation of those efficiencies; (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare; and, (iv) the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition²⁸.

51. It is incumbent upon the dominant undertaking to prove any objective justification and to support it with arguments and evidence. In this regard, it is not sufficient for the dominant undertaking to put forward “*vague, general and theoretical arguments*” in support of its objective justification²⁹.

52. During the investigation, RTÉ submitted that the Share Deal was objectively justified mainly for the following reasons:

- i. The Share Deal is required to sell advertising airtime in an efficient manner.
- ii. Discounts based on volume would not be appropriate.
- iii. The annual reference period under the Share Deal ensures efficient negotiations from the perspective of both RTÉ and advertisers.

53. The Authority took the preliminary view that RTÉ did not present full and precise evidence of any objective justification or substantial efficiencies that would outweigh any anticompetitive effects with the precision required by the Guidance Paper on Article 102. However, as stated earlier, at the point when the investigation was closed, the Authority had not come to a final view as to whether the Share Deal amounted to an abuse of a dominant position. Consequently, the Authority did not require RTÉ to substantiate any objective justification or efficiencies that would outweigh any anticompetitive effects.

1.4.6 Conclusion on abuse of dominance

54. At the time that RTÉ entered into the Agreement and Undertakings with the Authority, the Authority was of the preliminary view that the operation of the Share Deal was likely to have loyalty-inducing effects which could amount to unlawful conduct by RTÉ in the market for television advertising airtime in the State contrary to section 5 of the Act and/or Article 102 TFEU.

Pak II) [1994] ECR II-755, paragraphs 136 and 207; Case C-95/04 P British Airways v Commission [2007] ECR I-2331, paragraphs 69 and 86.

²⁶ The Guidance Paper on Article 102, paragraph 27

²⁷ The Guidance Paper on Article 102, paragraph 29.

²⁸ The Guidance Paper on Article 102, paragraph 30.

²⁹ Case T-201/04 Microsoft Corpn v Commission [2007] ECR II-000, paragraph 698.

1.5 The Proposal

55. On 26 August 2011, RTÉ submitted a proposal to the Authority. In its proposal, RTÉ undertook to modify its conduct in respect of the sale of television advertising airtime. In particular, RTÉ proposed that “... it will continue to trade using share of TV revenue as a component up until the 30th of June 2012 only. RTÉ proposes that after this period the revenue share deal component will be abolished and will no longer feature as a component of selling airtime”. In effect, RTÉ proposed to abolish the Share Deal from 1 July 2012.

56. RTÉ’s proposal forms the basis of the Agreement and Undertakings included as an Annex to this submission.

2. State Aid

57. On 27 February 2008, the European Commission issued a decision concerning the State financing of RTÉ and Teilifís na Gaeilge (“TG4”).

2.1 Background

58. According to the Wireless Telegraphy Act 1926, every person or undertaking that has television equipment capable of receiving a television signal must pay a television license fee. Each year, the Irish Government allocates almost the totality of revenues from the license fee to RTÉ. The license fee is intended to finance the activities of RTÉ and TG4 as public service broadcasters, a service in the general interest.

59. In March 1999, the Irish television broadcaster TV3 Television Network Limited (“TV3”) submitted a complaint to the European Commission alleging the incompatibility of the licence fee financing of RTÉ with State Aid rules. According to TV3, RTÉ is not properly entrusted with public service obligations and the use of public funds lacks the transparency needed to verify that the public funds are proportionate and not used for other than public service activities.

2.2 State aid under Article 87(1)

60. For a measure to be characterised as State aid within the meaning of Article 87(1), the following conditions must be fulfilled: (a) there must be a transfer of State resources; (b) the measure in question must involve an economic advantage to the recipient and (c) the measure must distort, or threaten to distort competition and affect trade between Member States.

61. The Commission was of the view that the license fee revenue used to finance public service broadcasting in Ireland constituted State resources within the meaning of Article 87(1). The Commission also was of the view that the financing from license fee revenue reduced the operating costs that RTÉ and TG4 would normally have to bear and provided RTÉ and TG4 with an economic advantage compared to other broadcasters which finance their activities based on commercial revenues only. Finally, the Commission was of the view that the financial advantages granted to RTÉ and TG4 distorted competition and affected trade between Member States within the meaning of Article 87(1).

2.3 Compatibility of the aid under Article 86(2) TFEU

62. The compatibility of State aid measures has to be assessed under Article 86(2) TFEU. In accordance with the case law, the following conditions must be fulfilled in order for an aid to be declared compatible with Article 86(2): (i) the service in question must be a service of general economic interest clearly defined as such by the Member State; (ii) the undertaking in question must be explicitly entrusted

by the Member State with the provision of that service; and (iii) it must be clear that the application of the competition rules of the Treaty must obstruct the performance of the particular tasks assigned to the undertaking and that the exemption from such rules does not affect the development of trade to an extent that would be contrary to the interests of the European Union.

63. In light of the above, in this case the Commission had to assess whether: (i) RTÉ and TG4's public service broadcasting activities were clearly and precisely defined by the Irish State as a service of general economic interest; (ii) RTÉ and TG4 were explicitly entrusted by the Member State with the provision of that service and subject to supervision as to the fulfilment of its tasks; and (iii) the funding was proportionate to the net cost of providing the public service.

64. The Commission was of the view that the legal provisions existing at the time 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 was also of the view that there was no satisfactory and independent ex-post control mechanisms to verify whether State funding exceeded the net public service cost (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).

2.4 *Appropriate measures to ensure compatibility of the financing regime*

65. To address the concerns identified above, the Commission recommended appropriate measures to ensure the compatibility of the financing regime with State aid rules. Some of these measures included amendments to the draft Broadcasting Act (the "Draft Act"). With the submission of commitments, Ireland agreed to implement these measures so as to ensure future compatibility of the Irish regime with the State aid rules. The commitments provided by the Irish Government are summarised below.

66. The Irish Government 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 objectives and duties. The Draft Act included provisions laying down the exact scope of the public service broadcaster's remit.

67. The Irish Government committed to the establishment of a new independent content regulator, the Broadcasting Authority of Ireland (BAI), which would assist and advise the Minister in the monitoring of RTÉ and TG4's performance against their public service remits. The Draft Act provided for the establishment of the BAI as an independent body which would ensure that broadcasting services meet the needs of the people of Ireland.

68. The Irish Government committed 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 those entered into in pursuit of commercial opportunities. RTÉ and TG4 were required to prepare statements of revenues and costs distinguishing between their respective public service and commercial activities

69. The Irish Government committed that the public funds would only be granted in relation to public service tasks to ensure that the compensation granted to the public service broadcasters would not exceed what is necessary for the fulfilment of the public service tasks (i.e. limited to the net public service costs).

70. The Irish Government committed to introduce a requirement for the public service broadcasters to report to the BAI on an annual basis on the use they have made of the public funding they had received, based on separate accounts for their public service and commercial activities.

71. The Irish Government committed to introduce a number of mechanisms to ensure that 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. Such measures include: (i) a statutory requirement for transactions and arrangements entered into by public service broadcasters to distinguish, on an arms-length basis between, on the one hand, the public service objects and activities, and on the other hand, the pursuit of commercial opportunities; (ii) a requirement that public service broadcasters report 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 and (iii) a requirement 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 utilised to subsidise public service broadcasting activities.

72. The Irish Government implemented the above commitments though the enactment of the Broadcasting Act 2009.

ANNEX - AGREEMENT AND UNDERTAKINGS

The Competition Authority

-and-

Raidió Teilifís Éireann

AGREEMENT AND UNDERTAKINGS

This Agreement and Undertakings is made by and between the Competition Authority (the “Authority”) and Raidió Teilifís Éireann (“RTÉ”) on the date set forth below. The Authority and RTÉ are referred to collectively herein as the “Parties”.

WHEREAS:

1. The Authority has been investigating allegations that RTÉ was operating an anticompetitive discount scheme (share deal) contrary to section 5 of the Competition Act 2002 (the ‘Act’). RTÉ cooperated fully with the Authority’s investigation and responded to all queries arising from the aforementioned allegations.
2. Section 5 of the Act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State.
3. The Authority’s investigation identified concerns that the Authority has in respect of certain types of arrangements used by RTÉ for trading television advertising airtime. In particular, the Authority was concerned that RTÉ’s scheme for the sale of television advertising airtime under which the discounts given to advertisers depend, among other things, on the percentage (i.e. share) of the advertiser’s total television advertising budget committed with RTÉ may give rise to an infringement of section 5 of the Act.
4. The Authority notes that RTÉ indicated to it that quite separate to the concerns raised by the Authority that RTÉ intended a fundamental review of how it sells airtime along with the planned introduction of a new scheme in order to *inter alia* improve efficiencies within RTÉ.
5. The Authority informed RTÉ that this Agreement and Undertakings resolves the concerns of the Authority.

Undertakings

6. RTÉ undertakes that, from 1 July 2012, the share of budget element of their scheme for the sale of television advertising airtime shall be discontinued and abolished and shall no longer feature as a component of RTÉ's trading scheme. Under the new trading scheme, discounts given to advertisers shall not depend on the share of the advertiser's total television advertising budget committed with RTÉ.
7. RTÉ undertakes that it shall start the process for implementing the new trading scheme (excluding the share of budget element) as at the date of formal acceptance of the Undertakings by the Authority, such new trading scheme to be implemented no later than 1 July 2012.
8. On the execution of this Agreement and Undertakings, the Authority undertakes that it shall conclude its investigation in this matter and shall refrain from instituting proceedings against RTÉ in relation to the operation of the share deal scheme for so long as RTÉ remains in compliance with the undertakings set out in paragraphs 6 and 7 above.
9. This Agreement and Undertakings shall be and is intended by the Parties to be a binding and enforceable agreement which may be enforced by the Parties by an action in any court of competent jurisdiction in the State.
10. This Agreement and Undertakings shall be binding on both RTÉ and on any organisation which in the future carries on business which is the same or materially similar to the business of RTÉ.