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■ THE BROADCASTING ACT, 2009

The Broadcasting Act, 2009 (the “Act”) was signed by the President on Sunday 12th July, 2009. A large portion of the Act came into force on that date however, Section 5 of the Act provides for the Minister of Communications, Energy and Natural Resources (the “Minister”) to appoint, by order, an establishment day for the purposes of the Broadcasting Authority of Ireland (the “Authority”), certain provisions relating to the broadcasting fund and transitional provision relating to the dissolution of both the Broadcasting Commission of Ireland (the “BCI”) and the Broadcasting Complaints Commission (the “BCC”).

The Act represents a comprehensive consolidation of nearly 50 years of broadcasting and related legislation in Ireland, dating from the establishment of RTE under the Broadcasting Authority Act of 1960. The Act repeals the bulk of the Broadcasting Authority Acts, 1960 to 1993, in addition to the Radio and Television Act of 1988, establishing the Irish Radio and Television Commission (now known as the Broadcasting Commission of Ireland) and the Broadcasting Act of 2001, which purported to deal with the launch of digital television in Ireland and also established TG4.

The Act restates and expands on a number of key components of Irish broadcasting legislation including the regulation of the sector generally, the regulation of RTE (the Irish public service broadcaster), the launch of digital television in Ireland, analogue switch off, television licence fees and “major events” television coverage. We have set out below a summary of the 14 Parts of the Act.

Preliminary

Part 1 of the Act provides a range of definitions, many of which are taken directly from existing legislation while Section 3 repeals a significant amount of pre-existing legislation, the details of which are set out in Schedule 1 to the Act.

The Broadcasting Authority of Ireland

Part 2 of the Act establishes the Authority, the Contract Awards and Compliance Committees, provides for appointments to the Authority and the committees and their composition, the appointment of a chairperson and chief executive to the Authority and for the establishment of advisory committees, where necessary.

Sections 25 and 26 set out the objectives and functions of the Authority, which include ensuring that “the number and category of broadcasting services made available in Ireland best serve the needs of the people and uphold the democratic values enshrined in the Irish Constitution”. The principle functions of the Authority include the preparation of a strategy for the provision of broadcasting services in Ireland, the preparation of broadcasting codes and rules and making arrangements for proposals for the provision of additional broadcasting services and multiplex services. Sections 27 and 28 set out the functions of the Contract Awards and Compliance Committees respectively. Section 33 provides for the imposition of levies on all broadcasters, including public service broadcasters, payable to the Authority.

Duties, Codes and Rules for Broadcasters

Part 3 of the Act sets out and provides for various codes and rules relating to, in

particular, news broadcasts and the treatment of current affairs. Total daily times for advertisements are proscribed and restrictions are placed on advertisements directed towards a political end or industrial dispute, or which address the merits or otherwise of adhering to any religious faith or belief or becoming a member of any religion or religious organisation.

Under Section 42 the Authority is obliged to prepare a broadcasting code applicable to all broadcasters, the provisions of which would likely be similar to the existing codes and standards. Under Section 43 the Authority is obliged to prepare broadcasting rules, which will deal with advertising transmission times and include specific requirements in relation to broadcasting to those with hearing or sight impairments. Part 3 also provides for a consultation process, similar to that undertaken in relation to the existing Advertising Codes and Standards and Children's Advertising Codes implemented by the BCI in recent years.

Complaints

Part 4 of the Act sets out a code of practice for complaints handling, proscribes a process by which the Compliance Committee may investigate complaints and gives the Authority the power to apply to the High Court for such Orders as may be appropriate to ensure compliance with decisions of the Compliance Committee.

Enforcement

Part 5 of the Act provides for investigations into the affairs of contractors (a broadcasting or digital content contractor), provides for the termination or suspension of broadcasting contracts and the imposition of financial sanctions, not exceeding €250,000, in respect of the breach or failure to co-operate with any investigation.

Broadcasting Contracts and Content Provision Contracts for Commercial and Community Broadcasters

Part 6 relates to sound broadcasting contracts and television programme service contracts entered into under the Act and provides for the licensing of contractors by the communications regulator, ComReg. Sections 65 and 66 set out the provisions in relation to applications for sound broadcasting and television service contracts and the determination of applications for awards of such contracts, which are broadly similar to those currently in force however, they provide for cash payments on the award of contracts in addition to other periodic cash payments and cash payments determined by reference to certain unspecified variables.

No direction is given in relation to the number of sound or television contracts which an individual contractor may hold however, it is to be assumed that the current

ownership and control policies of the BCI will stand for the time being. Section 69 sets out certain terms and conditions to be included in broadcasting contracts. Sections 70 and 71 provide for the award of television programme service contracts and content provision contracts, respectively. Section 74 sets out provision relating to electronic programme guide contracts, while Section 77 sets out various provisions in relation to "must carry" and "must offer" obligations for particular electronic communications networks used for the distribution or transmission of broadcasting services to the public.

Public Service Broadcasting

Part 7 sets out various provisions, which effectively replace the Broadcasting Authority Acts from 1960 onwards.

Boards of the Corporations

Section 81 provides for the appointment of the board of the corporations (RTE and TG4), formerly known as the Authority, including the appointment of a staff member and the terms under which such members may be appointed and removed. Section 85 provides for the appointment of a chairperson and Sections 87 and 88 set out the duties of the board members and their obligations as to meetings. Sections 93 and 94 deal with the disclosure by members of the corporation and by staff and contractors of the corporation of certain interests, which would include any interests in any contract, agreement or arrangement or any proposed contract, agreement or arrangement to which a corporation is or is proposed to be a party. Section 96 provides for the establishment of an audience counsel and Section 98, subject to the requirements of the Act, provides that each corporation shall be independent in the pursuance of its objects.

New Services

Section 103 sets out the criteria for ministerial consent for any new services to be provided by a corporation and variations in channels, including the requirement of the consent of the Minister for a corporation to undertake any "ancillary services".

Advertising

Section 106 relates to advertisements by RTE and TG4 and provides, subject to the requirements of Section 41(2) (total daily times for broadcasting advertisement not to exceed maximum of 15% of total daily broadcasting time and the maximum time given to advertisements not to exceed maximum of 10 minutes) and the approval of the Minister, following consultation with the Authority, for the fixing of the total daily time for broadcasting advertisements and the maximum periods given to advertisements in any hour, which would suggest that public service broadcasters may have greater restrictions in this regard imposed on them than the holders of television service contracts.

Sections 109 and 110 relate to the accounting and auditing obligations of RTE and TG4 and their related reporting obligations.

Public Archive

Section 111 provides that each corporation shall make reasonable arrangements itself, or with such persons as it chooses, for public access to an archive or library established or maintained, with or without charge, which shall not encompass copying or re-use of material contained in such archive or library. Each corporation is also obliged to prepare a scheme for the licensing of the use and exploitation by third parties of sound and television recordings over which the corporations hold copyright and related rights and which schemes shall provide separate terms and conditions of licensing for non-commercial educational research purposes, commercial purposes and other purposes.

Sections 113 to 116 set out certain specific provisions relating to RTE, which include the renaming of “Radio Telefís Éireann” as “Raidió Teilifís Éireann”. Section 114 sets out the principle objects and associated powers of RTE, which essentially are to establish, maintain and operate a national television and sound broadcasting service as a public free to air service available to the whole community on the island of Ireland and to establish other related services.

Independent Program Account

Section 116 obliges RTE to set up and maintain an account to be used for the commissioning of independent television or sound broadcasting programmes. In each financial year RTE is obliged to place approximately €40 million in the account, which may also be used for procuring the formulation of proposals relating to the commissioning of programmes and assisting in the completion of independent television or sound broadcasting programmes, the making of which is not being commissioned by RTE and which fund may be used for no other purpose. It should be noted that the Minister has the power to vary the amount required to be kept on account in the context of the current and prospective financial liabilities of RTE, the recruitment of staff and the performance of its obligations.

Sections 117 to 122 set out certain provisions specific to TG4 and include an obligation on RTE to provide the equivalent of one hour of Irish language programming to TG4 on a daily basis.

Licence Fees

Sections 123 and 124 relate to the allocation of public funding to RTE and TG4 through the television licence fees, of which the Minister will retain a percentage and from which RTE must pay the levy to the Authority required under Section 33.

New Channels

Section 125 provides for the establishment and broadcast of a “Houses of the Oireachtas Channel”.

Sections 127 and 128 deal with the establishment, by the Irish Film Board, of the Irish Film Channel, which is to be a public free to air service, which will have, as its principle purpose, the provision of programme material consisting of Irish, European and World films

and cinema works including, as far as practicable, film and cinema works in the Irish language. The Irish Film Board is free to enter into such contracts as are necessary to establish and maintain the Irish Film Channel and may broadcast advertisements and acknowledge sponsorships. Subsection 7 provides that film and cinema works broadcast by the Irish Film Channel should be broadcast uninterrupted by advertisement or acknowledgements of sponsorship.

Under Section 128 the Irish Film Board is obliged to prepare, prior to provision of a broadcasting service, and every five years thereafter, a public service statement setting out the principles to be observed and activities to be undertaken by the Irish Film Channel. The Authority is obliged, in a period of not more than five years after the passing of the Act, and every five years thereafter to carry out a review of the adequacy or otherwise of public funding to enable the fulfilment of the functions of the Houses of the Oireachtas Channel and the Irish Film Channel. It is not clear how the Irish Film Channel is to be funded initially, other than through advertising.

Digital Broadcasting and Analogue Switch Off

Part 8 of the Act provides for digital broadcasting in Ireland and the related establishment of multiplexes and, in addition, refers to analogue switch off. Section 130 sets out additional functions of RTE relating to the establishment of a national television multiplex, to be maintained and operated by RTE and to provide for the broadcasting, by digital means, of RTE1, RTE2, TG4, the Houses of the Oireachtas Channel, the Irish Film Channel and such other services as may be designated by the Minister.

Section 131 obliges the Authority to arrange for the establishment, maintenance and operation of multiplexes, including national multiplexes, in addition to those established and maintained by RTE and provides that the Authority shall enter into multiplex contracts, under which contractors will have the right and duty to establish, maintain and operate a multiplex in accordance with the terms of a contract with the Authority.

Under Sections 132 and 133 ComReg is obliged to issue licences in respect of digital, terrestrial, television and sound broadcasting multiplexes.

Section 136 sets out the application procedures for multiplex contracts. Section 137 sets out the determining factors in the award of multiplex contracts, while Section 138 sets out some indicative terms and conditions applicable to multiplex contracts.

Section 139 sets out provisions relating to the consideration of analogue switch off and proposes certain obligations on ComReg, RTE and the Authority in relation to analogue switch off, but does not specify a particular date, other than to oblige the Authority and RTE to report every six months from the passing of the Act up to 31 December 2012, on the availability of multiplexes in the State and availability in the State by digital means of the relevant services.

Television Licences

Part 9 of the Act deals with the television licensing regime, including the definition of a “television set” as “any electronic apparatus capable of receiving and exhibiting television broadcasting services broadcast for general reception and any software or assembly comprising such apparatus”. “Broadcast” is defined as the “means of transmission, relaying or distribution by electronic communications networks of communications, sound, signs, visual images or signals intended for direct reception by the general public”. “Electronic communications network” means “transmission systems including where applicable switching equipment, routing equipment or other resources which remit the conveyance of signals by wire, radio, optical or other electromagnetic means including satellite networks, electricity cable systems, fixed terrestrial networks, including the internet, mobile terrestrial networks, networks used for either or both sound and television broadcasting and cable television and internet protocol television networks”.

Section 142 provides that a person shall not keep or have in his possession a television set (which would appear to include a laptop, PC, mobile phone or similar) save insofar as is authorised under a television licence however, subsection 3 provides that this section will not apply to a television set which is of a class or description for the time being declared by an Order of the Minister to be a class or description of a television set to which this section is not to apply. It remains to be seen which “classes or descriptions of television sets” are excluded. Section 146 onwards set out provisions relating to requests to produce television licences and the fines and penalties for not having a television licence.

Section 152 provides that Section 9 of the 1988 Act is amended, although Section 2 of this Act provides that it has been repealed in its entirety.

Broadcasting Fund

Part 10 of the Act provides for the establishment by the Authority of a number of schemes for the granting of funds to support certain “public service” type programming. This is to be funded by an amount equal to 7% of the net receipts in that year of the television licence fees. These provisions replace the existing provisions of the broadcasting fund, administered by the BCI.

Major Events Television Coverage

Part 11 of the Act replaces the Broadcasting (Major Events Television Coverage) Act 1999 (as amended) which gives the Minister the power, by Order, to designate certain events as events of major importance and to decide if it is the right of a qualifying broadcaster to provide coverage and whether a free television service should be provided in the public interest. These provisions set out the broadcasters’ duties with respect to designated events and with respect to designated events in other Member States, provide for the payment of reasonable market rates in respect of the acquisition of the relevant events, establish criteria for determining those reasonable market rates and arbitration and High Court procedures relating to disputes.

Transitional Provisions

Part 12 of the Act deals with the dissolution of the BCI and the BCC and provides for the vesting of all property of the BCI and the BCC in the Authority on the establishment day.

Wireless Telegraphy

Part 13 of the Act sets out a number of amendments to the Wireless Telegraphy Acts, primarily relating to the resetting of various fines and penalties on convictions for offences under those acts.

Miscellaneous

Part 14 of the Act provides for certain amendments to definitions in the Copyright and Related Rights Act, 2000, the Minister’s functions in relation to electronic communications networks and services and provisions relating to advertisements by the Referendum Commission.

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