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Ireland

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1. LEGAL FRAMEWORK

1.1 AND 1.2 WHAT IS THE DESIGNATION AND LEGAL DEFINITION OF THE STATE MEDIA REGULATORY BODY (OR BODIES) AND LEGAL FRAMEWORK OF THE MEDIA REGULATORY ENTITIES?

The main regulatory bodies are the Broadcasting Authority of Ireland (BAI)¹ and the Commission for Communications Regulation (ComReg)².

BAI

The Broadcasting Act 2009, in s.7(1) provides that the Broadcasting Authority of Ireland (BAI) “is a body corporate with perpetual succession and the power to sue and be sued and to acquire, hold and dispose of land and other property”. A body corporate is a statutory corporation created under an Act of the Oireachtas (Parliament). It operates as a commercial company and does not have shareholders. A body corporate makes a surplus or deficit rather than a profit or loss.

The Broadcasting Authority of Ireland (BAI) is the body responsible for broadcasting in Ireland and regulates content across all broadcasting. The BAI regulates the independent commercial sector and the community sector. It also regulates public service broadcasting media, RTE³ and TG4⁴, in some respects, although both are established as corporations with their own Boards. In both cases, RTE and TG4, the Director-General (chief executive officer) reports directly to the Board, which is the governing body.

¹ www.bai.ie

² www.comreg.ie

³ www.rte.ie

⁴ www.tg4.ie TG4 is the Irish-language television broadcaster.

ComReg

The Commission for Communications Regulation (ComReg) was established by the Communications Regulation Act 2002, s.6(1). Like BAI, ComReg is a body corporate with perpetual succession and the power to sue and be sued and to acquire, hold and dispose of land and other property.

The Commission for Communications Regulation (ComReg) is the national regulatory authority responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector.⁵ It is referred to in the Broadcasting Act as the 'Communications Regulator'. It has a role in the granting of licences to BAI and also licences in respect of digital television, multiplexes, etc.

1.3 DOES THE LAW CLARIFY THE NATURE OF THE STATE MEDIA REGULATORY IN TERMS OF ITS INDEPENDENCE REGARDING THE GOVERNMENT OF THE DAY? IS IT FORMALLY AN 'INDEPENDENT' ENTITY/AUTHORITY OR, FOR EXAMPLE, AN ADMINISTRATIVE AGENCY OF THE GOVERNMENT?

Section 24 of the Broadcasting Act 2009 provides that the Broadcasting Authority and each of its statutory committees, i.e. the Compliance Committee and Contract Awards Committee) shall be independent in the performance of their functions. Members are appointed by Government, five of them on the nomination of the Minister and the other four following the advice of a joint Oireachtas (Parliament) committee (Broadcasting Act s.8). All members are to represent the public interest (s.9(2)). (See Dimension 5 for information on eligibility and dismissal procedures of the BAI which also safeguard the independence of the BAI.)

Section 11 of the Communications Regulations Act 2002 similarly provides that ComReg shall be independent in the exercise of its functions. Commissioners are appointed by the Minister but not unless the Civil Service and Local Appointments Commissioners, after holding a competition on behalf of the Commission, have selected him or her for appointment as a Commissioner (2002 Act s.15).

In both cases the Department of Communications sets overall policy but the regulators are independent in the implementing their statutory duties.

1.4 ARE THERE FORMAL LINKS WITH CO-REGULATORY AND SELF-REGULATORY MEDIA STRUCTURES?

The Broadcasting Act 2009 provides for formal links between itself and ComReg, both of which are statutory regulators. The Act makes no reference to bodies such as the self-regulatory Advertising Standards Authority of Ireland (ASAI), which has a role in respect of broadcast advertising (see further below). Indeed, the Act makes little or no reference to co-regulation or self-regulation (apart from s. 46(1) as set out below) or inclusion of schemes or procedures that might be regarded as either co-regulatory or self-regulatory in the sense in which these terms are generally understood.

Section 46 of the Broadcasting Act states:

“(1) In this section “self-regulatory system” means a system whereby the members

⁵ Information available at http://www.comreg.ie/about_us/roles_what_we_do.523.html

of a group of persons with a shared interest voluntarily adhere to rules or code of conduct established by that group.

(2) The Authority may co-operate with or give assistance to one or more persons (whether residing or having their principal place of business in the State or elsewhere) in

- the preparation by that person or those persons of standards, or
- the establishment and administration by that person or those persons of a self-regulatory system, in respect of broadcasting content or related electronic media.”

There is some provision, however, outside of the Broadcasting Act for formal links with self-regulatory bodies in relation to media advertising and on-demand services.

Self-regulation - ASAI

The Advertising Standards Authority of Ireland (ASAI), an independent self-regulatory body, operates an advertising code that relates to all media, including broadcasting.

ASAI's objective is to ensure that all commercial marketing communications are “legal, decent, honest and truthful”. Advertising standards are set out in the Code of Standards for Advertising, Promotional and Direct Marketing, which were drafted by the Board of ASAI in consultation with relevant interest groups including the public, advertisers, agencies and media, consumers' representatives and Government Departments.⁶ The ASAI system, as a self-regulatory system, is subordinate to and complements legislative controls on advertising.

ASAI also plays a role in the self-regulatory system that applies to the On-demand (non-linear) sector. The sector is subject to a voluntary code, the On-demand Audiovisual Services (ODAS) Code 2011.⁷ The code was developed in compliance with the European Communities (Audiovisual Media Services) Regulations 2010 (Statutory Instrument S.I. 258 of 2010), which required *inter alia* that providers of on-demand audiovisual media services develop codes of conduct (s.13(1)).

Firstly, the Code (Part 1, s.1(e)) provides that commercial communications shall comply with the relevant provisions of the ASAI Code, and any provisions of the voluntary industry code in place in relation to alcoholic beverages.⁸

A further role of ASAI in relation to the ODAS Code is to handle complaints relating to audiovisual commercial communications, using its normal complaint procedures. Audiovisual media service providers are required to abide by decisions and recommendations of the ASAI and to take appropriate action if required.

Self-regulation - CCCI

The Central Copy Clearance Ireland (CCCI), a self-regulatory body, which was developed by the drinks and advertising industries on an independent footing as a positive response to

⁶ See <http://www.asai.ie/about.asp>

⁷ The ODAS code is available at www.bai.ie/?page_id=2082

⁸ Other voluntary codes include the drinks' industry's MEAS code on the naming, packaging and promotion of alcoholic drinks: <http://www.meas.ie/code-of-practice>; and the voluntary codes agreed between the Department of Health and Children, the drinks industry and the media in relation to television, radio, cinema and outdoor/ambient media are the Alcohol Marketing, Communications and Sponsorship Codes of Practice of 2008, which were subject to review in 2010. These are voluntary codes, a collaboration between the Health Authorities, drinks industry and media. See http://www.dohc.ie/publications/alcohol_codes_practice.html

the concerns of the Department of Health and Children about the content of some advertising and its appeal to children, has pre-vetted all alcohol advertisements against the BAI regulations and the ASAI self-regulatory code since 2003. No alcohol advertisements can appear on the Irish media before pre-vetting and obtaining a certificate from CCCI.⁹

Co-regulation

The BAI has no role in relation to Part 1 of the ODAS On-demand Code (audiovisual commercial communications), for which the ASAI is the designated complaints body. However, the 2010 Regulations (S.I. 258 above) which required providers of on-demand audiovisual media services to develop codes of conduct, required them to do so *in co-operation with the BAI*, and other relevant bodies (s.13(1)).

S.13(3) goes further and requires BAI approval for codes of conduct:

Codes of conduct shall be prepared in co-operation with and *subject to approval by the BAI*.

The ODAS Code of Conduct that was developed on foot of the 2010 Regulations repeats the requirement and also states that service providers *are advised to take on board provisions of the BAI Code* in regard to children's advertising for foods and beverages.... (Code Part 1, s.1 (j), emphasis added)

The Code also makes provision for the Compliance Committee of the BAI to accept appeals against the resolution offered by the service provider with regard to breaches of sub-sections 1 & 2 of PART 2 of the Code (content, protection of minors, etc.) and make determinations on complaints (Code, Part 3, s.7).

Part 3, s.8 of the Code further provides that audiovisual media service providers are required to abide by decisions and recommendations of the ASAI and the BAI and to take appropriate action if required. ODAS¹⁰ will put in place a range of sanctions beyond the publicity associated with a ruling by the ASAI or BAI against the provider including:

- Requiring the provider to remedy the cause of the complaint; and/or,
- Require an assurance from the service provider regarding future behaviour; and/or,
- Require the service provider to reimburse service charges paid in connection with the matter giving rise to the complaint; and/or,
- Publicise the decision and identify the provider concerned; and/or,
- Suspend the service provider from the regulatory system.

Co-regulation – print media

The Press Council and Press Ombudsman system handles complaints against the print media. It operates on the basis of a Code of Practice. It is independent of the Government and essentially self-regulatory, having initially been set up by the print media industry on an independent basis. The members of the Council are appointed through an independent

⁹ See <http://www.ccci.ie/index.php>

¹⁰ ODAS is the On-Demand Audiovisual Services Group, the body that drew up this Code. See www.ibec.ie or http://www.bai.ie/?page_id=2082. The On-Demand Audiovisual Services (ODAS) group within IBEC's Audiovisual Federation (AF) and Telecommunications and Internet Federation (TIF), the Broadcasting Authority of Ireland (BAI) and the Advertising Standards Authority for Ireland (ASAI) jointly launched the code on 4th May 2011.

public process and the members then appoint a Press Ombudsman (PO). However, the Press Council (and Ombudsman) is now *recognised* under the Defamation Act 2009, which contains provisions about its composition, duties and procedures, as well as the general scope and purpose of the Code. The Council can be disbanded but only by a resolution of the Oireachtas (Parliament) if it fails to comply with the provisions of the Act. The system, therefore, can best be described as co-regulatory.

2. FUNCTIONS

2.1 WHAT MEDIA/NEW MEDIA SECTORS DOES IT COVER? HOW IS THE INTERNET MENTIONED?

The BAI regulates all broadcast media (linear) but has only a limited role in relation to on-demand (non-linear) services – see above in relation to the ODAS Code. It does not regulate the print media. In Ireland the print media are subject to the Press Council of Ireland (above).¹¹

The BAI is responsible for licensing matters and content. It has two Committees, the Contracts Committee (licensing) and the Compliance Committee (compliance with licences and with broadcasters' obligations set out in legislation and in BAI codes in relation to content). The BAI's remit extends to all linear broadcasting in Ireland in accordance with the Broadcasting Act 2009.

ComReg's remit includes the allocation of frequency and provision of licences for broadcasting transmitters to BAI (Broadcasting Act 2009, s.59) and licences to the public service broadcasters (s.121), including digital multiplex licences (s.132) to RTÉ and BAI. ComReg must also be consulted by BAI with regard to rules in respect of Electronic Programme Guides (EPGs) ((2009 Act, s.75).

ComReg has responsibility for all types of transmission networks including: traditional telephone wire; traditional television and radio; radio communications including fixed wireless; MMDS and deflector operators providing voice and data services; Licensing Framework for Satellite Services in Ireland; and postal delivery network.¹²

Internet

The Broadcasting Act 2009 expressly excludes audio and audiovisual services provided by means of the Internet in the definition of 'broadcasting service' but includes it in the definition of 'electronic communications network' (s.2). A content provision contract is required for the supply of a compilation of programme material *inter alia* over the Internet (s.71(2)). Among the public service broadcasters' duties is one to make available their broadcasting services *inter alia* by any form of electronic means, including over the Internet (RTÉ s.114(4) (r) and TG4 s.118(4)(r)).

Among the objectives of ComReg set out in the Communications Regulation Act 2002, s.12 is encouraging access to the internet at reasonable cost to users.

¹¹ <http://www.presscouncil.ie/>

¹² http://www.comreg.ie/about_us/roles_what_we_do.523.html

The monitoring of harmful Internet content is undertaken by the Office for Internet Safety (OIS) which was established as an Executive Office of the Department of Justice and Equality in 2008.¹³ The OIS is responsible for promoting Internet safety, particularly in relation to child pornography. The OIS also oversees the self-regulatory body the Internet Service Providers Association of Ireland (ISPAI)¹⁴ which was established in 1998 and operates on the basis of an Industry Code of Practice and Ethics. The Office for Internet Safety has primary oversight responsibility in respect to reviewing and ensuring the appropriate operation of the Code and the wider self-regulatory system. The ISPAI also operates and financially supports the Irish hotline (www.hotline.ie), the service for reporting illegal content on the internet.

Given the supervisory role of the OIS, established by Government, the system involving the self-regulatory ISPAI, could be regarded as co-regulatory.

2.2 IF THE REGULATORY BODY IS A CONVERGENT BODY (MEDIA & TELECOMS, ETC), WHEN DID IT ACQUIRE THE PRESENT-DAY FORMAT?

BAI, though not a converged regulator in the sense of becoming a single regulator, was established under the Broadcasting Act 2009 and took over the role of the former regulator, the Broadcasting Commission of Ireland (BCI), and the Broadcasting Complaints Commission (BCC). The 2009 Act also brought the public service broadcasters under the Authority in some respects, e.g. annual performance reports to go to BAI and Minister (s.102), and gave BAI a consultative role in respect of other activities of public service broadcasters, e.g. establishing total daily and maximum hourly limits on advertising (s.106(3)). The Act also established formal links between BAI and ComReg, while retaining them as separate bodies. However, the current Government (Dept of Public Expenditure and Reform) announced plans in 2011 for the rationalization of a number of bodies and for a merger between BAI and ComReg to be subject to critical review by the end of June 2012.¹⁵ It is understood that at the time of writing talks are ongoing.

ComReg, which replaced the Office of the Director of Communications Regulation (ODTR) in 2002 under the Communications Regulation Act of that year, became responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector.

2.3 WHAT ARE THE FUNCTIONS OF THE MEDIA REGULATORY ENTITY(IES) IS (ARE) EXPECTED TO PERFORM ACCORDING TO THE LAW?

BAI

The functions of the BAI are set out at s.26 of the 2009 Act and include the following:

- Prepare a strategy for the provision of broadcasting services in the State additional to those provided by RTE, TG4, the Houses of the Oireachtas Channel and the Irish

¹³ <http://www.internetsafety.ie/>

¹⁴ <http://www.ispai.ie/>

¹⁵ <http://reformplan.per.gov.ie/appendix-ii-rationalisation-of-state-agencies/>

Film Channel,¹⁶

- liaise and consult with the Communications Regulator (ComReg) in the preparation of the allocation plan for the frequency range dedicated to sound and television broadcasting,
- prepare or make broadcasting codes and rules,
- prepare a scheme for the exercise of the right of reply,
- direct the Contract Awards Committee to make arrangements and make recommendations to the Authority, which the Authority must follow, for the provision of:
 - ⌘ broadcasting services additional to any broadcasting services provided by RTE, TG4, the Houses of the Oireachtas Channel and the Irish Film Channel, and
 - ⌘ multiplex services additional to any multiplex services provided by RTE,
- prepare rules and enter into contracts in respect of electronic programme guides,
- prepare and issue guidance to RTE and TG4 as to the fulfilment of their obligations under the Act,
- make a report to the Minister under in respect of preparedness for analogue switch-off,
- provide information to the public on the availability of services by means of television multiplexes,
- prepare and implement schemes for the granting of funds such as the Sound and Vision scheme (as set out in Pt 10, s.154 of the 2009 Act).

The Authority has other ancillary functions including:

- Collect and disseminate information on the broadcasting sector in the State,
- monitor developments in broadcasting internationally,
- initiate, organise, facilitate and promote research relating to broadcasting matters and media literacy,
- co-operate with other bodies, including representative bodies within the broadcasting sector, to promote training activities in areas of skill shortages in the broadcasting sector, and co-operate with other bodies outside the State which perform similar functions to the Authority.

ComReg

ComReg's functions are set out under section 10 of the Communications Regulations Act 2002, as amended by the Communications Regulation (Amendment) Act 2007, s.5. They are

- a) to ensure compliance by undertakings with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks,
- b) to manage the radio frequency spectrum and the national numbering resource, in accordance with a direction under *section 13*,
- c) to ensure compliance by providers of postal services with obligations in relation to the provision of postal services,

¹⁶ The Houses of the Oireachtas Channel and the Irish Film Channel are new channels which are not yet in existence.

- d) to investigate complaints from undertakings and consumers regarding the supply of and access to electronic communications services, electronic communications networks and associated facilities and transmission of such services on such networks, and
- e) to ensure compliance, as appropriate, by persons in relation to the placing on the market of communications equipment and the placing on the market and putting into service of radio equipment.

Its objectives are set out in s.12 of the 2002 Act. They are:

- a) to promote competition,
- b) to contribute to the development of the internal market, and
- c) to promote the interests of users within the Community,
- d) to ensure the efficient management and use of the radio frequency spectrum and numbers from the national numbering scheme in the State in accordance with a direction under *section 13*, and
- e) to promote the development of the postal sector and in particular the availability of a universal postal service within, to and from the State at an affordable price for the benefit of all users.

2.4 DOES MEDIA CONTENT REGULATION COVER ADVERTISING?

Yes. Section 42 of the Broadcasting Act, 2009, provides that:

1. The Authority (BAI) shall prepare, and from time to time as occasion requires, revise, in accordance with this section, a code or codes governing standards and practice (“broadcasting code”) to be observed by broadcasters.
2. Broadcasting codes shall provide –
 - ⌘ that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service, in particular advertising and other such activities which relate to matters likely to be of direct or indirect interest to children, protect the interests of children having particular regard to the general public health interests of children,
 - ⌘ that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service, other than advertising and other activities as aforesaid falling within paragraph (g), protect the interests of the audience.

The General Commercial Communications Code (“the Code”) and the Children’s Commercial Communications Code have been developed by the Broadcasting Authority of Ireland in accordance with its statutory obligations.¹⁷

(See also above at 1.4)

¹⁷ See <http://www.bai.ie/wordpress/wp-content/uploads/General-Commercial-Communications-Code.pdf> and <http://www.bai.ie/wordpress/wp-content/uploads/Childrens-Commercial-Communications-Code.pdf>

2.5 *IS MEDIA EDUCATION/DIGITAL LITERACY INCLUDED IN THE EXPLICIT (OR IMPLICIT) FUNCTIONS?*

Yes. Media education/digital literacy is explicitly included in the functions of the BAI.

Section 26(2)(g) of the Broadcasting Act 2009 expressly includes the promotion of media literacy in the ancillary functions of the BAI. Section 26(2)(g) provides that the ancillary functions of the BAI include *inter alia*,

“to undertake, encourage and foster research, measures and activities which are directed towards the promotion of media literacy, including co-operation with broadcasters, educationalists and other relevant persons.”

Media literacy is also included in the types of programme to which BAI may award funding under s.154 of the 2009 Act:

The Authority shall prepare and submit to the Minister for his or her approval a scheme or a number of schemes for the granting of funds to support all or any of the following - new television or sound broadcasting programmes to improve adult or media literacy,

2.6 *WHAT ARE THE FUNCTIONS THE MEDIA REGULATORY ENTITY IS EXPECTED TO PERFORM ACCORDING TO OTHER SOCIAL ACTORS? (THIS IS PARTICULARLY RELEVANT IF THERE ARE SOCIAL DEBATES ABOUT ABSENCE OF REGULATION ON SOME SECTORS/AREAS).*

There is public debate about the lack of specific provisions in current legislation in relation to the Internet. BAI has no role in relation to Internet services except as detailed above in paras 1.4 and 2.1. The role of ComReg is also referred to in para. 2.1 above. Its role in promoting competition involves enabling maximum competition in Broadband, Voice and Voice over Internet Protocol through a range of measures, including LLU, bitstream, wireless broadband (including mobile wireless broadband), cable and alternative infrastructure. It also includes promoting enhanced competition in mobile via MVNO entrants, reviewing and (where appropriate) making adjustments in the fixed network wholesale pricing regime, and overseeing operators' compliance with obligations under the regulatory frameworks for telecoms and spectrum. ComReg does not regulate content.

2.7 *IS THERE A FUNCTIONAL DISTINCTION BETWEEN STATE, SELF AND CO-REGULATORY MECHANISMS?*

BAI is the principal content regulator, comprising also a Contracts Committee and Compliance Committee. ComReg, the other statutory body, has responsibility for the infrastructure and licensing processes but does not regulate content.

The co-regulatory measures regarding on-demand services involve BAI in a residual or back-stop capacity (para. 1.4 above). As on-demand services are non-linear and subject to a lower level of regulation under AVMSD, the BAI role is only in relation to appeals concerning protection of minors and hate speech. The system for Internet regulation involves the operation of the self-regulatory ISPAI on the basis of a code, which is overseen by the OIS, established by Government (para. 2.1 above). The ISPAI, as an industry self-regulatory body is concerned with other industry issues as well as Internet content.¹⁸

ASAI, a self-regulatory body deals only with commercial communications but across all media, including broadcasting and the Internet.

¹⁸ See <http://www.ispai.ie/mission.htm>

The Press Council of Ireland (see above para. 2.1) handles complaints against member newspapers and magazines. Its main objects under the Defamation Act 2009 are to ensure the protection of freedom of expression of the press; protect the public interest by ensuring ethical, accurate and truthful reporting by the press; maintain certain minimum ethical and professional standards among the press; and ensure that the privacy and dignity of the individual is protected. It operates on the basis of a Code of Practice, which contains provisions on these issues.

All of these bodies therefore have distinct functions and clear roles.

3. LEGITIMIZING / UNDERLYING VALUES

3.1 WHAT ARE THE VALUES THAT JUSTIFY MEDIA STATE REGULATION? WHERE CAN THIS 'NORMATIVE THEORY' BE FOUND (E.G. LAW, AGREEMENTS, PROTOCOLS, POLITICAL DISCOURSES, OTHERS?)

Is it identifiable a hierarchy of values? (e.g. freedom of speech/press, independence, pluralism/diversity, protection of fundamental human rights, quality, empowerment, others).

The values defended by state media regulatory structures are similar to those safeguarded by self-regulation and co-regulation?

Values

The basic values that justify media state regulation are to be found in the Irish Constitution (Bunreacht na hEireann)¹⁹. The Irish Constitution specifically mentions the media in Article 40.6.1, which provides for freedom of expression. This freedom is subject to restrictions *inter alia* in order to protect public order and morality.

Article 40.6.1 provides *inter alia* that:

“The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.”

Article 40.6.1 also outlaws the publication or utterance of blasphemous, seditious or indecent matter.

Elsewhere the Constitution protects the right to one's good name (Article 40.3.2), the right to privacy (an unspecified right recognised by the courts as coming under Article 40.3.1), the right to communicate (also an unspecified right recognised by the courts as coming under Article 40.3.1) and the right to a fair trial (Article 38). All such rights guaranteed by the Constitution provide justification for regulation of the media.

Hierarchy

Freedom of expression is a fundamental right protected by the Irish Constitution, as are the right to good name etc. The Supreme Court has stated that where there is a conflict

¹⁹ <http://www.constitution.ie/constitution-of-ireland/default.asp>

of rights it strives for a mutually harmonious application of constitutional rights and it is only where that is not possible that it resorts to a hierarchy of rights, both as between the conflicting rights and the general welfare of society.²⁰

The basic right to freedom of expression is the central right applicable to the media. Media issues, such as independence, pluralism and diversity are addressed mainly by legislation. For example, s.25 of the Broadcasting Act 2009 provides as follows:

25.—(1) The Authority and the statutory committees, in performing their functions, shall endeavour to ensure—

- that the number and categories of broadcasting services made available in the State by virtue of this Act best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity,
- that the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, are upheld, and
- the provision of open and pluralistic broadcasting services.

The broadcast regulator, BAI, implements these and other such objectives through codes, policy statements, etc.

Values similar?

The fundamental values and principles defended by state media regulatory structures are similar to those safeguarded by self-regulation and co-regulation. All are concerned with freedom of expression, democratic values and media standards in the interests of audiences and consumers, within their various remits.

4. PERFORMANCE

4.1 WHAT ARE THE TASKS THAT THE REGULATORY ENTITY(IES) ACTUALLY PERFORM IN ITS/THEIR DAILY ACTIVITY? (THIS IS PARTICULARLY RELEVANT TO MENTION DISCREPANCIES BETWEEN LEGAL DUTIES AND ACTUAL PERFORMANCE).

BAI's daily tasks include the drafting of codes, development of policies, liaison with the Department of Communications, licensing new stations and reviewing licences of existing stations, and administering various funding and other schemes aimed at developing and supporting the broadcasting sector in Ireland. A recent major issue has been the development of multiplexes and preparation for the digital switch-over. BAI has been very efficient in carrying out its tasks, which are extensive and onerous under the Broadcasting Act 2009, although it is hampered somewhat by the inability to fill staff vacancies due to limits imposed on public service recruitment as a result of Ireland's economic recession.

²⁰ *Irish Times Ltd v Judge Murphy* [1998] 1 I.R. 359, [1998] 2 I.L.R.M. 161

4.2 IN DAILY ACTIVITY, THE STATE REGULATORY BODY(IES) COMPLEMENT AND/OR CLASH WITH THE ACTIVITIES OF SELF-REGULATION AND CO-REGULATION ENTITIES?

The various bodies either deal with separate sectors of the media or complement each other.

4.3 WHEN CITIZENS, MEDIA COMPANIES OR OTHER ACTORS DISAGREE WITH MEDIA REGULATORY DECISIONS/ PERFORMANCE, ARE THERE APPEAL MECHANISMS? CAN COURTS OVERTURN A PARTICULAR DECISION TAKEN BY THE MEDIA REGULATORY BODY?

A decision of BAI can be judicially reviewed in the High Court and its decision further appealed to the Supreme Court. Judicial review is confined to consideration of the fairness of the process by which the decision was reached. A decision to terminate or suspend a broadcaster's contract by the Authority under any provision of the Broadcasting Act or a provision of the contract, may be appealed by the holder of the contract to the High Court (s.51(4)), as can a decision to impose a financial sanction (s.55(5)).

A decision of ComReg can also be judicially reviewed or appealed.

In relation to the print media, there is an appeal from decisions of the Press Ombudsman to the Press Council and complainants who use the Press Council process are also entitled to proceed to court if they have a cause of action.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

5.1 WHAT ARE THE LEGAL MECHANISMS TO ENSURE COMPLIANCE WITH THE MEDIA REGULATORY BODY(IES)' DECISIONS?

BAI has a monitoring and enforcement role under the Broadcasting Act 2009, including in some instances power to terminate or suspend a contract (s.51), for example where the broadcaster has supplied misleading information or has failed to comply with the term(s) of the contract. The Act also provides the BAI with investigatory powers (s.50, s.53) and the power to recommend the imposition of financial sanctions in certain circumstances, including breach of a broadcasting code or rule (s. 54(4)). Financial sanctions of up to €250,000 can be imposed but only by a court on the recommendation of BAI, unless the broadcaster concerned opts to allow the BAI to decide.

The Compliance Committee handles complaints from the public of breaches by broadcasters of their statutory obligations or provisions of the codes. Its decisions are published on its website.²¹ Where a complaint against a broadcaster is upheld in whole or in part, the broadcaster is required to broadcast the Committee's decision (s.48(11)).

ComReg, in accordance with the Communications Regulations Act 2002, can ensure compliance with their decisions under Part 3 of the Act through the use *inter alia* of authorised inspections, search warrants and monetary fines. ComReg can also issue notices requiring the production of evidence or documents (2007 Act, s.10) and it is an offence not to

²¹ http://www.bai.ie/?page_id=183

appear before the Commission without reasonable excuse or to refuse to be sworn in or to answer a question or produce a document (s.10). ComReg can prosecute summary offences.

In the case of the Press Council/ Press Ombudsman system, remedial action may consist of a number of remedies as set out under s.44 of the Defamation Act 2009, including the publication of the Press Ombudsman's decision in the offending publication, the publication of a correction in due prominence, the publication of a retraction or such other action as the Ombudsman may, in the circumstances deem appropriate.

5.2 ARE THESE LEGAL ENFORCEMENT MECHANISMS USED AND HOW?

Court cases do result but rarely and in most cases to date the decisions of BAI's predecessors have been upheld. Suspension or withdrawal of licences is extremely rare. The termination of the licence of Radio Limerick One was upheld by the Supreme Court in 1997, while the licence of TV3 in 1992 was eventually reinstated following a court judgment quashing the regulator's decision on the grounds of natural justice.

An example of the BAI's use of its enforcement mechanisms can be seen in its recent investigation into a breach of the Broadcasting Act by the state public service broadcaster, RTE. In May 2011, a television programme entitled "Prime Time Investigates- Mission to Prey" was broadcast by RTE. The Compliance Committee decided to launch an investigation into apparent breaches of the Broadcasting Act under s.39(1). An investigating officer was appointed. The officer notified RTE, who submitted a detailed response. RTE were found to be in serious breach of s.39(1)(b) and (e) of the Broadcasting Act and the BAI imposed a financial sanction of €200,000 on RTE.²² This was a very serious and very exceptional case which also resulted in a court action for defamation, which was settled for a sum believed to be in the region of €1 million.

Comreg, whose enforcement powers were increased in the 2007 Amendment Act, has taken a number of court cases against mobile operators, the postal service and other operators under its remit. For example, as a result of a court case taken against it by ComReg in 2007, Eircom formally delivered its market requirement document to ComReg in relation to local loop unbundling.²³

5.3 HOW RELEVANT ARE NON-BINDING GUIDELINES AND REGULATORY DOCTRINES?

Guidelines are useful for understanding how certain policies and regulatory processes operate. They provide transparency and are built into the regulatory systems. For instance, BAI's guidelines or guidance notes on issues such as referenda and election coverage, the complaints' process and access rules have been particularly useful.

ComReg's guidelines can also be a useful aid to understanding technical issues.

The open consultation process is also an important part of the regulatory processes of both bodies.

²² See http://www.bai.ie/wordpress/wp-content/uploads/20120504_StatementofFindings_VFINAL_SO.pdf

²³ <http://www.rte.ie/news/2005/1024/comreg-business.html>

5.4 WHOM IS/ARE THE MEDIA REGULATORY ENTITY(IES) ACCOUNTABLE TO?

BAI is accountable to the Minister for Communications in so far as it must submit annual reports to the Minister (Broadcasting Act 2009, s.38(1)), as well as the strategic plan (s.29). Broadcasting codes and rules must also be presented to the Minister (s.45). A copy of any agreement or arrangement regarding broadcasting rights to major events must be given to the Minister (s.171). The Minister may by order remove a member of the BAI or its statutory committees for stated reasons but a copy of the order must be laid before the Oireachtas (s.10(8)).

BAI accounts must be submitted annually to the Comptroller and Auditor General, an office established in accordance with Article 33 of the Constitution to control on behalf of the State all disbursements and to audit all accounts of moneys administered by or under the authority of the Oireachtas.

BAI is also accountable in various other ways to the public. For instance, every broadcasting licence and contract shall be open to inspection by the public (s.59(4) and s.69(5) of the 2009 Act), as must every draft code and rule (s.44). BAI must also provide means of redress for anyone making a written complaint in good faith that comes within the areas set out in s.48 (s.47).

The Chief Executive of BAI and the Chief Executive and chairman of the public service broadcasters' boards are accountable to specified Oireachtas (Parliament) Committees (2009 Act, s.19, 20).

ComReg is also accountable to the Minister and public. For example, it must submit an annual action plan to the Minister and arrange for a copy of it to be placed before the Houses of the Oireachtas (2007 Act, s.9). It must then make it available to the public.

5.5 ARE THE MEDIA REGULATORY BOARD MEMBERS SUBJECT TO ANY INCOMPATIBILITY REGIME TO SAFEGUARD THEIR INDEPENDENCE OR TO PROTECT OTHER VALUES CONSIDERED RELEVANT?

See above at 1.3.

The eligibility criteria for members of the BAI are set out in s.8 of the Broadcasting Act 2009. In accordance with s.8, there shall be 9 members of the Authority, 5 to be appointed by Government on the nomination of the Minister and 4 to be appointed by Government on the nomination of the Joint Oireachtas (Parliament) Committee. In order to be eligible for appointment as a member of the Authority or a statutory committee, a person must have or have had experience of or shown capacity in one or more of the areas of expertise set out in s.9, such as experience of media, broadcasting or legal or regulatory affairs.

In accordance with s.9(2), each member of the Authority and a statutory committee shall be appointed for a period not exceeding 5 years and shall represent the public interest in respect of broadcasting matters. S.9(5) further stipulates that members cannot serve more than 2 consecutive terms of office.

In order to safeguard the independence of the BAI, section 12(1) of the Broadcasting Act 2009 sets out exclusions from membership of the BAI and its statutory committees:

Where a member of the Authority or a statutory committee is nominated as a candidate for election to the European Parliament, or to either House of the Oireachtas, he or she shall thereupon stand suspended from membership of the Authority or the statutory committee.

There are similar restrictions placed on members of the Board of the public service broadcasters (s.86).

Members and staff of the Authority or a statutory committee must disclose any interest in any body or concern with which the Authority has made a contract or proposes to make a contract, or any interest in any contract which the Authority has made or proposes to make (Broadcasting Act 2009, s. 21, 22). They must also abide by a code of conduct (s.23).

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

The membership of the Broadcasting Authority of Ireland is nine. At least four of the nine members of the Authority must be men and four must be women (s.8).

The Contract Awards Committee comprises eight members, four of whom are appointed by the Government on the nomination of the Minister and the other four are appointed by the Authority itself, two of them being members of the Authority and two being members of staff of the Authority. As far as practicable the Minister and Authority must endeavour to have an equal number of men and women. The membership requirements for the Compliance Committee are the same (s.8) but no person can serve on both committees (s.12 (8) and 12(9)). The Government, on the nomination of the Minister, also appoints a Chairperson for the Authority and each of the Committees (s.11). The Authority itself may establish advisory committees to advise and assist it or a statutory committee in the performance of its functions (s.17).

The functions of the Authority are as set out above at 2.3. Members must have experience in one or more of a wide range of areas of media or legal or regulatory affairs (see above) and must represent the public interest. They are appointed for a term of five years – see above 5.5.

A Chief Executive Officer to the Authority is appointed, by means of a public competition, by the Authority with the consent of the Minister (s.14). BAI had an Executive staff of 40 (as at December 2009). Since then, staffing levels have fallen due to an embargo on recruitment in the public service and on replacing staff who leave. This is due to the recession being experienced in Ireland. The Department of Communications lists the staff of BAI as 33, while the answer given to a parliamentary question on 28 June 2011 was that BAI's staff numbered 32.²⁴ Staff are employed in the main divisions of BAI's work, i.e. licensing, codes and standards, funding and development, broadcasting complaints and the corporate functions. BAI has also had additional functions conferred on it since 2009, for example, in connection with DTT (digital terrestrial television), e.g. Statutory Instrument (S.I. 67 of 2011 in relation to the provision of broadcasting services on the RTÉ multiplexes).

ComReg is currently headed by two Commissioners, one of whom is appointed Chairperson by the Minister, and is organised in a number of divisions: corporate services,

²⁴ Dáil Éireann Debates Volume 736 No.4, 28 June 2011, available at <http://debates.oireachtas.ie/dail/2011/06/28/00193.asp>. A later written answer of 16 November 2011 gave the staff number as 33 as of 30 September 2011: <http://debates.oireachtas.ie/dail/2011/11/16/00155.asp>

general counsel, market framework, retail and consumer services, wholesale, and also has a senior economic advisor. The structure is based on cross-functional teams operating in a multi-disciplinary environment. The total number of staff in 2010 was 117 but ComReg, like BAI, is affected by restrictions on public service recruitment.²⁵

Each Commissioner is appointed by the Minister, but only when the Civil Service and Local Appointments Commissioners, after holding a competition on behalf of the Commission, have selected him or her for appointment as a Commissioner. Commissioners are appointed on a full-time basis for a period of not less than 3 years and not more than 5 years and will normally not serve more than two terms (2002 Act, s.15).

ComReg's functions are set out above.

7. DIMENSION: FUNDING

7.1 HOW IS/ ARE THE MEDIA REGULATORY BODY(IES) FUNDED? WHAT IS THE PROPORTION OF REVENUES (STATE BUDGET, LICENSES, FEES, FINES, ETC.). WHAT ARE THE EXPENSES/REVENUES (TOTALS) PER YEAR? IS THERE ANY YEARLY FINANCIAL REPORT? IS IT PUBLIC?

The BAI is funded by means of a levy imposed on broadcasters (see Broadcasting Act 2009, section 33). The Authority can charge for services or facilities it provides under s.36(2). Section 34 of the Act also provides that in exceptional circumstances, the Government may contribute funding to the BAI. According to section 37, the BAI must prepare an annual financial report to be laid before the Houses of the Oireachtas. Details are included in BAI's Annual Reports and Accounts.²⁶

The precise terms attaching to the levy, including the method of computation and payment terms, are set out in a levy order made by the BAI: Broadcasting Act 2009 (Section 33) Levy Order 2010, Statutory Instrument No 007 of 2010, which was laid before both Houses of the Oireachtas on 19 January 2010, as required by the 2009 Act.

The BAI levy model is cost-recovery in nature, i.e. the baseline levy percentage is set at a level to ensure full recovery of the costs properly incurred by the Authority and its constituent committees. As a result, the levy computation must have full regard to the qualifying incomes of public service broadcasters and broadcasting contractors required to pay the levy as well as to the operating costs of the Authority for the relevant period.

An additional feature of the BAI levy model is a sliding scale element, whereby the levy amount paid (expressed as a percentage of total qualifying income) falls as the value of qualifying income rises. This feature is intended to reflect the fact that, other things being equal, the minimum or fixed costs of regulation are smaller as a proportion of total qualifying incomes for larger entities. All broadcasters must pay something.²⁷

ComReg is funded by levies imposed on providers of electronic communications services (Communications Regulations Act 2002, s. 30(1)(b)) and by providers of postal

²⁵ Annual Report 2010, p.58, available at http://www.comreg.ie/_fileupload/publications/COMREG_AR_2010_ENGLISH.PDF

²⁶ See http://www.bai.ie/wordpress/wp-content/uploads/BAI_AR_2010_English.pdf

²⁷ See www.bai.ie. S.I. 7 of 2010 (levy order) is available at: <http://www.bai.ie/wordpress/wp-content/uploads/SI-07-20101.pdf>

services (s. 30(2)). Income is also generated from the issue and renewal of wireless telegraphy licences and fees for the use of spectrum.²⁸ A detailed financial statement is included in annual reports. In accordance with s. 32 of the Act, ComReg must prepare an annual financial report to be laid before the Houses of the Oireachtas, thereby becoming a public document.

The Press Council is entirely funded from subscriptions paid by members of the Press Council in accordance with section 44(7)(1) of the Defamation Act 2009. The PCI's financial accounts are included in its annual reports which are publicly accessible.

The ASAI system is financed entirely by the advertising industry. The main income source is an annual subscription from advertiser members, collected and remitted by their advertising agencies or media-buying companies by means of a levy of 0.2% (€2 per €1000) of media spend. Audited accounts of the ASAI are published with the Annual Report, copies of which are available on request and on the ASAI website.²⁹

ISPAL is a not-for-profit activity, which is completely funded by the industry on a cost-sharing basis. It funds and operates the www.hotline.ie service which permits members of the public to report suspected child pornography or other illegal content they may encounter on the Internet. The Hotline currently receives part-funding of its operations from the European Commission's Safer Internet Programme.

8. REGULATION IN CONTEXT

8.1 GENERAL BRIEF DESCRIPTION OF THE NATIONAL MEDIA SYSTEM WHERE THE MEDIA REGULATORY BODY IS INSCRIBED (LEVEL OF MARKET CONCENTRATION, PSB (YES OR NO), NO OF CHANNELS, NO OF RADIO STATIONS, DELIVERY SYSTEMS, INTERNET PENETRATION, ETC.)

Ireland is a small country with a small media market compared to its nearest neighbour, the U.K. Print and broadcast media from the U.K. are widely available in Ireland. BBC1, UTV, S4C, BBC2, and Sky 1 had a combined share of 15.1% of the Irish market in 2010, while the UK satellite packager BSkyB, for example, had over 600,000 Irish subscribers at the end of 2010.

The BAI licenses 14 television and 60 radio services and regulates the 3 national TV and 4 national radio services. It also licenses 3 satellite content television services (Setanta Sports Channel Ireland, Setanta Sports 1 and Setanta Sports North America), 7 Cable/MMD (multichannel multipoint distribution) content television services (3e, UPC, City Channel Dublin, City Channel Waterford/South East, City Channel Galway, Munster, Hungary) and 3 community content television services (DCTV, P5TV and Cork Community TV CCTV). RTE and TG4 are public service broadcasters but public service obligations are imposed on all broadcasters licensed by BAI, except as permitted by the Broadcasting Act, e.g. derogations in certain circumstances (s.39).

²⁸ See annual report 2010, available at http://www.comreg.ie/_fileupload/publications/COMREG_AR_2010_ENGLISH.PDF

²⁹ See <http://www.asai.ie/selfregulation/funding.asp#funding>

Athena Media³⁰ reported in 2010 that while the majority of viewers have significant digital choice (nearly 80% of satellite or cable viewers have access to digital services, with less than 22% relying on terrestrial analogue), over half of what Irish audiences watch is confined to RTÉ and TV3. RTÉ One is the most popular station followed by TV3. Irish audiences have a potential choice of over 558 channels but in reality, core viewing is spread across 20-25 services with domestic channels performing extremely well. The date for analogue switch-off has been set by the Government for 24th October 2012. RTE has already established a number of digital channels. The channels and services to be made available on SAORVIEW (digital) are: RTÉ One, RTÉ Two HD, TV3, TG4, RTÉ News Now, 3e, RTÉjr, RTÉ One + 1 and RTÉ Digital Aertel.

Athena Media says in its report that while most cable and satellite subscribers are moving to digital platforms, there has been little development in the IPTV and mobile television markets. There are three operators (Magnet networks, 3Play Plus, and Smart Telecom) in the IPTV market, but the number of subscribers is still relatively low (less than 20,000 households in 2011 according to ComReg). The mobile television market is still in its early stages.

There are 7 national daily newspapers, 1 evening, 6 Sundays and over 40 audited regional newspapers. While there is considerable choice in the market, as many British newspapers also produce Irish editions, issues have arisen in the past about the dominant position enjoyed by Independent Newspapers (Independent News & Media). These issues have now become even greater with the acquisition by Denis O'Brien's Communicorp, which controls, and/or has substantial interests in, six independent radio services in Ireland, of a 29.9% stake in Independent News & Media (INM). BAI found recently that, while Denis O'Brien did have a substantial interest in INM, he did not have a controlling interest in it.³¹ However, the Government is preparing new legislation to address media mergers and acquisitions. Currently these matters are provided for in s. 23 of the Competition Act 2002, which results in BAI, the Competition Authority and the Minister all having a role in deciding whether to permit particular mergers and acquisitions on a variety of different criteria.

There were 3,122,358 internet users in Ireland (representing 66.8% of the population) in December 2011, according to Internet World Stats. (Internet World Stats, April 2012). Over three quarters of adults (77%) in Ireland use the internet for personal use; there is near universal use of the internet from home, according to ComReg Consumer ICT Survey Q2 2010 carried out by MillwardBrown. Internet subscriptions (1,688,543) increased as rises in cable (+5.8%), fibre/satellite (+5.2%) and DSL (+0.4%) subscriptions compensated for falls in FWA (-7.1%) and narrowband subscriptions (-13.9%), according to the Commission for Communications Regulation (ComReg)'s Quarterly Report on the Irish telecommunications market for the period 1st October to 31st December 2011 (Q4). (ComReg, March 2012).

³⁰ See Athena Media, *Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland (BAI)*, 2010, available at http://www.bai.ie/wordpress/wp-content/uploads/20110325_StratEconAnlysRpt_vFINAL_AC.pdf According to data from ComReg in May 2011, 73% of Irish TV households received digital television. Pay-TV households had reached 80% in May 2011, divided between satellite and cable/MMDS. For further information on the television market in Ireland, see <http://mavise.obs.coe.int/country?id=17>

³¹ See <http://www.bai.ie/?p=2649>

8.2 GENERAL COMMENT ON YOUR OWN PERCEPTION REGARDING THE RELEVANCE OF THE MEDIA REGULATORY BODY(IES) IN THE NATIONAL MEDIA SYSTEM. IS/ARE IT/THEY SIGNIFICANT?

BAI and ComReg are very significant in the national media system. The self-regulatory bodies identified in the commentary above are also significant in their own right and in their own realms.