COMMISSION DECISION

of 25 June 2007

on the compatibility with Community law of measures taken by Ireland pursuant to Article 3a(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

(2007/478/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1], and in particular Article 3a(2) thereof,

Having regard to the opinion of the Committee established pursuant to Article 23a of Directive 89/552/EEC,

Whereas:

(1) By letter of 7 November 2002, Ireland notified to the Commission measures to be taken pursuant to Article 3a(1) of Directive 89/552/EEC.

(2) The Commission verified, within three months from this notification, that such measures are compatible with Community law, in particular as regards the proportionality of the measures and the transparency of the national consultation procedure.

(3) In its examination, the Commission took into consideration the available data on the Irish media landscape.

(4) The list of events of major importance for society included in the Irish measures was drawn up in a clear and transparent manner and a far-reaching consultation had been launched in Ireland.

(5) The Commission was satisfied that the events listed in the Irish measures met at least two of the following criteria considered to be reliable indicators of the importance of events for society: (i) a special general resonance within the Member State, and not simply a significance to those who ordinarily follow the sport or activity concerned; (ii) a generally recognised, distinct cultural importance for the population in the Member State, in particular as a catalyst of cultural identity; (iii) involvement of the national team in the event concerned in the context of a competition or tournament of international importance; and (iv) the fact that the event has traditionally been broadcast on free television and has commanded large television audiences.

(6) A number of the events listed in the Irish measures, including the summer Olympics, the World Cup and European Championship football matches involving the Irish national team, as well as the opening games, the semi-finals and the finals of these tournaments, fall within the category of events traditionally considered to be of major importance for society, as referred to explicitly in recital 18 of Directive 97/36/EC. These events have a special general resonance in Ireland, as they are particularly popular with the general public, not just with those who usually follow sport events. Moreover, Ireland's games in the World Cup and in the European Championship have a generally recognised, distinct cultural importance as a catalyst of Irish cultural identity. Those games act as a focal point for society at large, helping to create a sense of national identity and pride in being Irish.

(7) Ireland's home and away qualifying games in the European Football Championship and the FIFA World Cup have a special general resonance in Ireland, extending well beyond those who ordinarily follow the sport.

(8) Gaelic football and hurling are distinctively Irish sports. Therefore, the All Ireland Senior Inter-County Football and Hurling Finals have a generally recognised, distinct cultural importance for the Irish population as a catalyst of national cultural identity.

(9) In Ireland, rugby is played on an organised basis throughout the entire country. Therefore, Ireland's games in the Six Nations Championship and in the Rugby World Cup finals tournament have a special general resonance for the people of Ireland. Ireland's games in the Rugby World Cup finals tournament involve the Irish national team in a major international tournament, thus having an impact on Irish national identity.

[1] OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

(10) The special general resonance of the listed horse racing and equestrian sports events in Ireland results from the major impact that the Irish horse industry has on rural communities throughout the country. The Irish Grand National and the Irish Derby are the most important horse races in Ireland. Given the importance of horse racing for tourism and the international reputation of Ireland, those events have a generally recognised, distinct cultural importance for the Irish population as a catalyst of national cultural identity. The Nations Cup at the Dublin Horse Show also has a distinct cultural importance as it promotes the discipline of Irish show jumping and attracts the strongest teams in the show jumping world.

(11) The listed events have traditionally been broadcast on free television and have commanded large television audiences in Ireland.

(12) The Irish measures appear proportionate so as to justify a derogation from the fundamental EC Treaty freedom to provide services on the basis of an overriding reason of public interest, which is to ensure wide public access to broadcasts of events of major importance for society.

(13) The Irish measures are compatible with EC competition rules in that the definition of qualified broadcasters for the broadcasting of listed events is based on objective criteria that allow actual and potential competition for the acquisition of the rights to broadcast these events. In addition, the number of listed events is not disproportionate so as to distort competition on the downstream free television and pay-television markets.

(14) After communication by the Commission to the other Member States of the Irish measures and consultation of the Committee established pursuant to Article 23a of Directive 89/552/EEC, the Director-General for Education and Culture informed Ireland, by letter of 10 February 2003, that the European Commission did not intend to object to the measures notified.

(15) The Irish measures were adopted on 13 March 2003.

(16) Those measures were published in the C Series of the *Official Journal of the European Union* [1] in accordance with Article 3a(2) of Directive 89/552/EEC, as amended by Directive 97/36/EC.

(17) It follows from the judgment of the Court of First Instance in Case T-33/01, Infront WM v Commission, that the declaration that measures taken pursuant to Article 3a(1) of Directive 89/552/EEC are compatible with Community law constitutes a decision within the meaning of Article 249 of the EC Treaty, which must therefore be adopted by the Commission. Accordingly, it is necessary to declare by this Decision that the measures notified by Ireland are compatible with Community law. The measures, as finally taken by Ireland and set out in the Annex to this Decision, should be published in the Official Journal in accordance with Article 3a(2) of Directive 89/552/EEC,

HAS DECIDED AS FOLLOWS:

Article 1

The measures pursuant to Article 3a(1) of Directive 89/552/EEC notified by Ireland to the Commission on 7 November 2002, as published in the *Official Journal of the European Union* C 100 of 26 April 2003, are compatible with Community law.

Article 2

The measures, as finally taken by Ireland and set out in the Annex to this Decision, shall be published in the Official Journal in accordance with Article 3a(2) of Directive 89/552/EEC.

Done at Brussels, 25 June 2007.

For the Commission

Viviane REDING

Member of the Commission

[1] OJ C 100, 26.4.2003, p. 12.

ANNEX

Publication in accordance with Article 3a(2) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

The measures taken by Ireland to be published pursuant to Article 3a(2) of Directive 89/552/EEC are as follows:

'NUMBER 28 OF 1999

Broadcasting (major events television coverage) act, 1999

Arrangement of sections

Section

1. Interpretation

2. Designation of major events

3. Consultation

4. Broadcasters' duties with respect to designated events

5. Broadcasters' duties with respect to Member States events

6. Civil remedies

7. Reasonable market rates

8. Short title

Acts Referred to

European Communities Act, 1972, No 27

European Communities (Amendment) Act, 1993, No 25

Broadcasting (major events television coverage) act, 1999

An act to provide for television coverage of events of major importance to society, to give effect to Article 3a of Council Directive 89/552/EEC of 3 October 1989, as amended by Council Directive 97/36/EC of 30 June 1997, and to provide for other related matters. [13 November 1999] be it enacted by the Oireachtas as follows:

1.

(1) In this Act:

'broadcaster' has the meaning assigned in the Council Directive;

'Council Directive' means Council Directive 89/552/EEC of 3 October 1989 (1) as amended by Council Directive 97/36/EC of 30 June 1997 (2);

'EEA Agreement' has the meaning assigned in the European Communities (Amendment) Act, 1993;

'event' means an event of interest to the general public in the European Union, a Member State or in the State or in a significant part of the State that is organised by an event organiser who is legally entitled to sell the broadcasting rights to the event;

'free television service' means television broadcasting service for the reception of which no charge is made by the person providing the service;

'Member State' means a member state of the European Communities (within the meaning of the European Communities Act, 1972) and includes a state that is a contracting state to the EEA Agreement;

'the Minister' means the Minister for Arts, Heritage, Gaeltacht and the Islands;

'near universal coverage' means:

(a) free television service, reception of which is available to at least 95 % of the population of the State; or

(b) if at any time fewer than three broadcasters are able to provide the coverage required under paragraph (a), free television service, reception of which is available to at least 90 % of the population of the State;

'qualifying broadcaster' means a broadcaster who is deemed under subsection (2) to be a qualifying broadcaster;

'television broadcasting' has the meaning assigned in the Council Directive.

(2) The following broadcasters are deemed to be qualifying broadcasters:

(a) until the 31st day of December, 2001, a broadcaster who provides free television service coverage of a designated event to which at least 85 % of the population of the State have access;

(b) on and after the 1st day of January, 2002, a broadcaster who provides near universal coverage of a designated event.

(3) For the purpose of subsection (2), two or more broadcasters who enter into a contract or arrangement to jointly provide near universal coverage of a designated event shall be deemed to be a single broadcaster with respect to that event.

(4) A broadcaster may request the Minister to resolve any dispute as to the extent of free television service being provided by a broadcaster in the State for the purpose of subsection (2) and the definition of 'near universal coverage' in subsection (1).

(5) The Minister may consult with any technical experts or other persons or bodies he/she considers appropriate before resolving a dispute under subsection (4).

(6) In this Act:

(a) a reference to any enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended or extended by or under any subsequent enactment including this Act;

(b) a reference to a section is a reference to a section of this Act unless it is indicated that reference to some other enactment is intended; and

(c) a reference to a subsection, paragraph or subparagraph is a reference to the subsection, paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended.

2.

(1) The Minister may by order:

(a) designate events as events of major importance to society for which the right of a qualifying broadcaster to provide coverage on free television services should be provided in the public interest; and

(b) determine whether coverage on free television services of an event designated under paragraph (a) should be available:

(i) on a live, deferred or both live and deferred basis; and

(ii) in whole, in part or both in whole and in part.

(2) The Minister shall have regard to all the circumstances and in particular each of the following criteria in making a designation under subsection (1)(a):

(a) the extent to which the event has a special general resonance for the people of Ireland;

(b) the extent to which the event has a generally recognised distinct cultural importance for the people of Ireland.

(3) In order to determine the extent to which the criteria in subsection (2) have been met, the following factors may be taken into account by the Minister:

(a) whether the event involves participation by a national or non-national team or by Irish persons;

(b) past practice or experience with regard to television coverage of the event or similar events.

(4) The Minister shall consider the following in making the determination under subsection (1)(b):

(a) the nature of the event;

(b) the time within the State at which the event takes place;

(c) practical broadcasting considerations.

(5) The Minister may by order revoke or amend an order under this section.

(6) The Minister shall consult with the Minister for Tourism, Sport and Recreation before making, revoking or amending an order under this section.

(7) Where it is proposed to make, revoke or amend an order under this section, a draft of the order shall be laid before each House of the Oireachtas and the order shall not be made until a resolution approving the draft has been passed by each House.

3.

(1) Before making an order under section 2, the Minister shall:

(a) make reasonable efforts to consult with the organisers of the event and with broadcasters who are under the jurisdiction of the State for the purpose of the Council Directive;

(b) publish a notice of the event which the Minister intends to designate under that section in at least one newspaper circulating in the State; and

(c) invite comments on the intended designation from members of the public.

(2) The inability to establish who is the organiser of an event or the failure of the organiser or a broadcaster under the jurisdiction of the State to respond to the Minister's efforts to consult shall not preclude the making of an order under section 2.

4.

(1) Where a broadcaster under the jurisdiction of the State who is not a qualifying broadcaster acquires exclusive rights to broadcast a designated event, that broadcaster shall not broadcast the event unless the event has been made available to a qualifying broadcaster, in accordance with the order under section 2, on request and the payment of reasonable market rates by the qualifying broadcaster.

(2) Where a qualifying broadcaster acquires the right to broadcast a designated event (under this section or directly), the qualifying broadcaster shall broadcast the event on a free television service providing near universal coverage in accordance with the order under section 2.

(3) In this section, 'designated event' means an event that is designated in an order under section 2.

5.

Where another Member State has designated an event as being of major importance to society in that Member State and the European Commission has communicated the measures taken by that Member State in accordance with Article 3a(2) of the Council Directive, no broadcaster under the jurisdiction of the State who acquires exclusive rights to the designated event shall exercise the exclusive rights in such a way that a substantial portion of the public in that Member State is deprived of the possibility of following the events in accordance with the measures taken.

6.

(1) Where it is alleged by a broadcaster (the 'aggrieved broadcaster') that any activity or conduct prohibited by section 4 or 5 is being, has been or is about to be carried on by one or more other broadcasters (the 'other broadcaster'), the aggrieved broadcaster shall be entitled to apply to the High Court for the following remedies against the other broadcaster:

(a) an order restraining the other broadcaster from carrying on or attempting to carry on the activity or conduct prohibited by section 4 or 5;

(b) a declaration that the contract under which the other broadcaster received exclusive rights to the designated event is void;

(c) damages from the other broadcaster;

(d) a direction that the right to provide television coverage of the event shall be offered to the aggrieved broadcaster at reasonable market rates.

(2) An application to the High Court for an order referred to in subsection (1) shall be by motion and the court, when considering the matter, may make such interim or interlocutory order as it considers appropriate.

7.

(1) For the purpose of section 4(1), if broadcasters are unable to agree on what constitutes reasonable market rates with respect to television coverage of an event, either of the broadcasters may apply to the High Court in a summary manner for an order determining reasonable market rates for an event.

(2) An order under subsection (1) may contain such consequential or supplementary provisions as the High Court considers appropriate.

8.

This Act may be cited as the Broadcasting (Major Events Television Coverage) Act, 1999.

Statutory Instruments

S.I. No 99 of 2003

Broadcasting (Major Events Television Coverage) Act 1999 (Designation of Major Events) Order

2003

I, Dermot Ahern, Minister for Communications, Marine and Natural Resources, in exercise of the powers conferred on me by subsection (1) of section 2 of the Broadcasting (Major Events Television Coverage) Act 1999 (No 28 of 1999) and the Broadcasting (Transfer of Departmental Administration and Ministerial Functions) Order 2002 (S.I. No 302 of 2002) (as adapted by the Marine and Natural Resources) (Alteration of Name of Department and Title of Minister) Order 2002 (S.I. No 307 of 2002)) after consultation with the Minister for Arts, Sport and Tourism as provided for by subsection (6) (as adapted by the Tourism, Sport and Recreation (Alteration of Name of Department, Title of Minister) Order 2002 (S.I. No 307 of 2002)) of that section, hereby make the following order with respect to which, pursuant to subsection (7) of that section, a draft has been laid before each House of the Oireachtas and a resolution approving the draft has been passed by each such House:

1. This Order may be cited as the Broadcasting (Major Events Television Coverage) Act 1999 (Designation of Major Events) Order 2003.

2. The events specified in the Schedule to this Order are designated as events of major importance to society for which the right of a qualifying broadcaster to provide coverage on a live basis on free television services should be provided in the public interest.

3. Each of Ireland's games in the Six Nations Rugby Football Championship is designated as an event of major importance to society for which the right of a qualifying broadcaster to provide coverage on a deferred basis on free television services should be provided in the public interest.

SCHEDULE

Regulation 2

The Summer Olympics

The All-Ireland Senior Inter-County Football and Hurling Finals

Ireland's home and away qualifying games in the European Football Championship and the FIFA World Cup Tournaments

Ireland's games in the European Football Championship Finals Tournament and the FIFA World Cup Finals Tournament

The opening games, the semi-finals and final of the European Football Championship Finals and the FIFA World Cup Finals Tournament

Ireland's games in the Rugby World Cup Finals Tournament

The Irish Grand National and the Irish Derby

The Nations Cup at the Dublin Horse Show

GIVEN under my Official Seal,

13 March 2003.

DERMOT AHERN

Minister for Communications, Marine and Natural Resources.'