



An Coimisiún um  
**Rialáil Cumarsáide**  
Commission for  
**Communications Regulation**

## Information Notice

### Market Review: Draft Decision on Broadcasting Transmission Services in Ireland

**Publication and notification to the European Commission (EC), the Body of European Regulators for Electronic Communications (BEREC) and other National Regulatory Authorities (NRAs) in other Member States of Draft Measures under Article 32 of Directive 2018/1972**

#### Information Notice

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## Additional Information

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1. This Information Notice concerns the Commission for Communications Regulation's ('**ComReg**') publication and parallel notification to relevant European authorities of its '**Draft Decision**' concerning its analysis of the wholesale markets for Broadcasting Transmission Services ('**BTS**'). A copy the Draft Decision is attached at Appendix 1.
2. In accordance with the requirements, at that time, of Article 6 of the Framework Directive (now Article 23 of the European Electronic Communications Code ('**EECC**')<sup>1</sup>), ComReg carried out a national public consultation<sup>2</sup> ('**Consultation**') on its analysis of the Relevant BTS Markets in Ireland over the period 11 May 2020 to 13 July 2020.
3. Prior to the adoption of a final decision, Article 32(3) of the EECC now requires ComReg to publish and, at the same time, make draft measures accessible to the European Commission ('**EC**'), the Body of European Regulators for Electronic Communications ('**BEREC**') and National Regulatory Authorities ('**NRAs**') in other Member States (the '**Article 32 Notification**').
4. The Article 32 Notification has today made by ComReg on the basis of the draft measures set out in the Draft Decision.
5. Note that this Information Notice, including the Draft Decision in Appendix 1, does not constitute a further national public consultation and should therefore not be construed as an invitation to make further submissions to ComReg.
6. Having completed the Article 32 Notification, ComReg will take utmost account of any views expressed by the EC, BEREC and NRAs in other Member States before adopting its final decision.

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<sup>1</sup> Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the '**EECC**') and which came into effect on 21 December 2020.

<sup>2</sup> On 11 May 2020 ComReg published the Market Review Broadcast Transmission Services in Ireland Consultation and Draft Decision, ComReg Document 20/31 available at: <https://www.comreg.ie/publication-download/broadcasting-transmission-services-in-ireland>.

# Appendix 1: Draft Decision on Broadcasting Transmission Services

A 1.1 Attached is copy of ComReg's Draft Decision.



An Coimisiún um  
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Commission for  
**Communications Regulation**

# Market Review

## Broadcasting Transmission Services in Ireland

**NOTE: THIS IS A DRAFT DECISION**

Response to Consultation and Decision

Reference: ComReg 21/xx

Version: Draft Decision

Date: 15/01/2021

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# 1 Executive Summary

## Overview

- 1.1 Broadcasting transmission and distribution services (**'BTS'**) at the wholesale level enable retail Free-to-Air (**'FTA'**) television (**'TV'**) programme service<sup>1</sup> providers such as RTÉ, Virgin Media (**'VM'**) and TG4 (**'Retail TV Broadcasters'**) and FTA national/quasi-national radio programme service providers such as RTÉ, Today FM and Newstalk (**'Retail Radio Broadcasters'**), (together referred to as **'Retail Broadcasters'**)<sup>2</sup>, to broadcast their content to end users.
- 1.2 In its 2013 Broadcasting Transmission and Distribution Decision<sup>3</sup> (**'2013 Decision'**) the Commission for Communications Regulation (**'ComReg'**) reviewed the Broadcasting Transmission and Distribution Markets in Ireland and found that the then identified two Relevant BTS Markets (**'the Relevant BTS Markets'**) warranted *ex ante* regulation:
- (a) **Market A:** A national wholesale market where an upstream terrestrial transmission network provider supplies a transmission and distribution service via its towers/masts infrastructure and relevant associated facilities (including transmission and distribution equipment, buildings etc.) in order to enable transmission of television and radio broadcasts; and
  - (b) **Market B:** A national wholesale market which is downstream from Market A, whereby a Digital Terrestrial Television (**'DTT'**) Multiplex Operator<sup>4</sup>, using wholesale inputs purchased (or self-supplied) in Market A, combined with carriage on its DTT multiplex supplies a managed digital multiplexing service.
- 1.3 ComReg is the National Regulatory Authority (**'NRA'**) responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector in the Republic of Ireland.

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<sup>1</sup> For the purposes of this Consultation, hereafter programme services means TV and / or radio content material distributed to end users (i.e. a TV and / or radio channel).

<sup>2</sup> For the purposes of this Decision, hereafter **'Retail Broadcaster'** means a TV and radio programme service provider and this terminology is used interchangeably with programme service provider throughout this Decision.

<sup>3</sup> ComReg 13/71, Decision D11/13 and EC Case number: **IE/2013/1445**. See [https://www.comreg.ie/publications/?date\\_from=&date\\_to=&orderby=date\\_desc&limit=10&query=13%2F71&start-month=01&start-year=1995&end-month=04&end-year=2019](https://www.comreg.ie/publications/?date_from=&date_to=&orderby=date_desc&limit=10&query=13%2F71&start-month=01&start-year=1995&end-month=04&end-year=2019)

<sup>4</sup> Digital terrestrial broadcast services are transmitted on multiplexes by 'Multiplex Operators'. Multiplex is defined in section 129 of the 2009 Broadcasting Act as meaning "an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public". DTT multiplexing services means the above service provided via a DTT multiplex(es) by a Multiplex Operator.

- 1.4 ComReg conducted a market analysis, and having regard to a range of identified competition problems, imposed a number of regulatory obligations on the operators identified as having Significant Market Power ('**SMP**') in the Relevant BTS Markets.
- 1.5 Neither the 2014 European Commission ('**EC**') Recommendation<sup>5</sup> on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation pursuant to Article 15 of the Framework Directive (Directive 2002/21/EC) nor the 2020 EC Recommendation<sup>6</sup> on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation pursuant to Article 64 of the European Electronic Communications Code ('**EECC**')<sup>7</sup> identify BTS markets as being susceptible to *ex ante* regulation.
- 1.6 However, subject to certain conditions being fulfilled, National Regulatory Authorities ('**NRA(s)**') such as ComReg have the power to apply regulation in any electronic communications market no longer identified by the EC in a recommendation on relevant product and service markets, on the basis of national circumstances. In this regard ComReg must undertake a so-called Three Criteria Test ('**3CT**') to determine if continued regulation is warranted in the relevant markets (i.e. whether there are high and non-transitory barriers to entry, whether there is no tendency towards effective competition over time and whether competition law alone is sufficient to address potential competition related market failures).
- 1.7 Where ComReg determines as a result of its market review that a given market is not effectively competitive, ComReg is then required to designate one or more undertakings in that market as having SMP and to impose on such undertaking(s) such specific obligations as ComReg considers appropriate.

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<sup>5</sup> European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (C(2014) 7174 final) ('**the 2014 Recommendation**'), see [http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc\\_id=7045](http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=7045).

<sup>6</sup> European Commission Recommendation of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code C(2020) 8750 final ('**2020 Recommendation**'). See <https://ec.europa.eu/digital-single-market/en/news/commission-updated-recommendation-relevant-markets>.

<sup>7</sup> DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN>.

- 1.8 Given the time that has elapsed since ComReg's previous analysis of the Relevant BTS Markets and, having regard to market developments, including the publication by the EC of the 2014 Recommendation, the 2020 Recommendation and the 2018 SMP Guidelines<sup>8</sup>, it is now considered appropriate to update the review of these markets. On 11 May 2020 ComReg published the Broadcast Transmission Services in Ireland Consultation and Draft Decision (the "**Consultation**")<sup>9</sup>
- 1.9 In accordance with its regulatory role to review certain electronic communications markets, ComReg sets out its views on whether, ultimately<sup>10</sup>, absent regulation, any Service Provider ('**SP**') has SMP in a Relevant BTS Market(s) and, if so, whether to impose appropriate obligations on such SP(s) to address any competition problems that have arisen or could arise in the duly-defined Relevant BTS Markets, ultimately to the detriment of downstream competition.
- 1.10 Overall, arising from this current market review, ComReg has decided to broadly maintain the same conclusions with respect to the market definitions, SMP assessments and remedies as set out under the 2013 Decision, with regulation imposed via this Decision largely being a continuation of the existing regime.

## Summary of Overall Views

- 1.11 The following is a summary of ComReg's position arising from its analysis of the Relevant BTS Markets. This summary should be read in the overall context of this Decision, which sets out in detail the reasoning underpinning ComReg's views.

## Retail Market Assessment

### Retail Market Trends and Developments

- 1.12 In Section 3 of this Decision, ComReg considers the main trends and developments in retail TV and radio markets and assesses them insofar as they inform ComReg's subsequent assessment of the Relevant BTS Markets.

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<sup>8</sup> The updated European Commission Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, C(2018) 2374 {SWD(2018) 124} (the '**2018 SMP Guidelines**').

<sup>9</sup> Market Review Broadcast Transmission Services in Ireland Consultation and Draft Decision, ComReg 20/31, available at <https://www.comreg.ie/publication/broadcasting-transmission-services-in-ireland>.

<sup>10</sup> As noted in paragraph 1.6 ComReg must first apply a three criteria test to assess whether, in its view, regulatory intervention in the relevant market(s) is warranted. See paragraphs 2.17 to 2.22 below.

- 1.13 With regard to Retail TV Broadcasters, ComReg's focal point for its analysis is FTA TV services delivered over the Digital Terrestrial TV ('**DTT**') platform ('**FTA DTT**') known as 'Saorview'<sup>11</sup> which is operated by RTÉ<sup>12</sup>.
- 1.14 From the perspective of national/quasi national retail radio broadcasting, ComReg notes that the main means of delivery of radio is over the national terrestrial BTS platform (masts/towers and associated facilities) operated by 2rn<sup>13</sup>. As with FTA Retail TV Broadcasters, Retail Radio Broadcasters do not charge a price to end users for the viewership/listenership of their programme services.
- 1.15 The most notable trends and developments in the supply of and demand for the services of Retail Broadcasters include:
- (a) As of July 2020 12% of TV homes<sup>14</sup> relied solely on Irish FTA terrestrial reception<sup>15</sup> for their TV viewing. This proportion has remained broadly stable since the 2013 Decision having increased slightly from 11.6% of TV Homes in April 2013<sup>16</sup>.
  - (b) Approximately 59% of TV homes had a pay TV<sup>17</sup> service as of July 2020, down from 70.9% in January 2015. Further, approximately 41% of TV homes had a FTA service<sup>18</sup> as of July 2020, up from 29.1% in January 2015.
  - (c) Internet Protocol TV ('**IPTV**') (as a managed TV transmission service) is currently limited mainly to urban areas and in July 2020 had a take-up of 6% of TV homes up from 0% in 2013. As higher speed broadband infrastructure is rolled out across Ireland, IPTV may become a more pervasive option for an increasing number of households. However, the proportion of TV homes relying primarily on IPTV remains relatively small compared to the other platforms and is likely to remain so for the period of this market review.

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<sup>11</sup> <https://www.saorview.ie/>. Saorview is owned and managed by RTÉ and is the brand name for the two national television multiplexes that RTÉ operates pursuant to the 2009 Broadcasting Act.

<sup>12</sup> [www.rte.ie](http://www.rte.ie).

<sup>13</sup> [www.2rn.ie](http://www.2rn.ie). 2rn is a wholly owned subsidiary of RTÉ. The infrastructure required to transmit the Saorview service is operated by 2rn (a wholly owned subsidiary of RTÉ).

<sup>14</sup> TV Homes refers to homes that have one or more platforms for viewing TV programming content.

<sup>15</sup> Irish FTA terrestrial reception is mainly transmitted via FTA DTT. However, there is also limited transmission via satellite.

<sup>16</sup> 2013 Decision, Figure C1, Appendix C

<sup>17</sup> Pay TV services are subscription or fee based services provided over Internet, cable and satellite platforms.

<sup>18</sup> FTA services are provided over digital terrestrial and satellite platforms.

- (d) In terms of radio broadcast transmission, content is primarily deployed over analogue terrestrial broadcasting networks, transmitted to in-home radio equipment or to in-car radios. More than 90% of households have an FM/AM radio, a situation which has not changed significantly since the 2013 Decision.

## Retail Market Assessment

- 1.16 ComReg's position is that retail television and terrestrial radio are distinct markets, as the experience and attributes of the two media are very different and substitution between the two is unlikely to meet the requirements of a radio listener or a television viewer. Therefore, Retail TV Broadcast and Retail Radio Broadcast markets are assessed separately.

### Retail TV Broadcast Assessment

- 1.17 ComReg's assessment of Retail TV Broadcast Services is that:
- (a) Pay TV services are not likely to be an effective substitute for FTA TV services<sup>19</sup>;
  - (b) Direct-to-home ('DTH') satellite FTA TV services are not likely to be an effective substitute for FTA DTT services<sup>20</sup>;
  - (c) Retail TV broadcasting services broadcast from other TV viewing platforms are unlikely to be an effective substitute for services delivered on the FTA DTT platform<sup>21</sup>;
  - (d) Supply-side substitutability is not likely to be sufficiently prompt or effective (and without incurring significant costs), such that suppliers of alternative BTS platforms could credibly switch to supplying FTA TV BTS on a coverage basis equivalent to that provided by the terrestrial BTS platform (and on a basis sufficient to meet Irish downstream DTT Broadcasters' statutory/licence coverage requirements)<sup>22</sup>; and
  - (e) Retail FTA DTT broadcasting services markets are likely to be national in scope<sup>23</sup>.
- 1.18 ComReg's position is that, within the lifetime of this BTS Review, retail substitution from the FTA DTT platform to other broadcasting platforms is not likely to be sufficiently effective to warrant the definition of a broader retail market and the FTA DTT platform is thus considered to be a distinct relevant market.

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<sup>19</sup> Discussed in paragraphs 3.28 to 3.31 below.

<sup>20</sup> Discussed in paragraphs 3.32 to 3.37 below.

<sup>21</sup> Discussed in paragraphs 3.38 to 3.49 below.

<sup>22</sup> Discussed in paragraphs 3.50 and 3.51 below.

<sup>23</sup> Discussed in paragraph 3.52 below.



### Retail Radio Broadcast Assessment

- 1.19 ComReg's assessment of Retail Radio Broadcast Services is that:
- (a) A sufficient number of end users would not be expected to switch to other radio BTS platforms (such as cable, satellite, and Internet) in the timeframe of this BTS Review such that it would effectively constrain the terrestrial radio BTS platform;
  - (b) Broadcasting over other BTS platforms is not likely to be an effective supply-side substitute to a terrestrial BTS platform due to a combination of issues such as lower coverage levels (save for satellite) and the limited availability / take-up / mobility of devices / equipment for listening to radio broadcasting via such other BTS platforms; and
  - (c) The geographic scope of retail radio services can be distinguished on a local/regional and national basis.
- 1.20 ComReg's position is that, at present, retail substitution from the FTA terrestrial radio broadcast platform to other alternatives is not likely to be sufficiently effective to warrant the definition of a broader retail radio broadcasting market in this BTS review. The FTA terrestrial radio broadcast platform is therefore considered to fall within a distinct relevant market.

### Wholesale Market Definition

- 1.21 ComReg's starting point for the wholesale market assessment relates to those defined markets in which there is SMP regulation currently in place. Therefore, ComReg considers the two separate Relevant BTS Markets as defined in ComReg's 2013 Decision (and identified below) and assess whether any changes should be made to these markets. The starting points are:
- (a) **Market A:** the market for Wholesale Access to National Terrestrial Broadcast Transmission Services; and
  - (b) **Market B:** the market for Wholesale Access to DTT Multiplexing Services.
- 1.22 The relationship between Market A and Market B and their relationship with other market participants in the broadcasting value chain, is described in paragraph 1.2 above and paragraph 2.48 of this Decision and diagrammatically in the associated Figure 1.

#### Market A

- 1.23 ComReg has defined a market for wholesale access to national terrestrial BTS (Market A). This is a wholesale upstream market whereby a BTS network provider supplies a transmission and distribution service via its towers/masts and relevant associated facilities including transmission and distribution equipment in order to enable:

- (a) The broadcast of national analogue terrestrial radio signals to end users; and,
- (b) The broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end users (such Multiplex Operators operate downstream from this Market A).

1.24 In arriving at the above conclusion, ComReg notes that there are a number of specific considerations that constrain the ability of national/quasi-national analogue Retail Radio Broadcasters and DTT Multiplex Operators from switching their wholesale demand for terrestrial BTS to wholesale services provided on other BTS platforms:

- (a) There are certain Retail TV Broadcasters (RTÉ, TG4 and VM) that are also Public Service Broadcasters ('PSB') that have statutory/licence obligations which effectively prevent them from switching to other alternative BTS platforms (i.e. cable, satellite and IPTV). RTÉ and TG4 are required under the 2009 Broadcasting Act<sup>24</sup> to be available, as much as reasonably is possible, to the whole community of Ireland on a FTA basis. Similarly, Virgin Media 1 ('VM1') and Virgin Media 2 ('VM2') are also required<sup>25</sup> to be available on a FTA basis to more than 90% of the population;
- (b) For cable, satellite and IPTV to be an effective alternative for terrestrial broadcast transmission, a sufficient number of terrestrial retail end users would have to move to such alternative platforms; this would involve the cost of purchasing and installing equipment necessary to receive their broadcasts on this different platform. As noted above, cable TV and IPTV platforms do not offer national coverage, and the costs of rolling out such networks are high (and largely sunk). ComReg also notes that effective satellite supply is likely constrained by jurisdictional restrictions regarding terrestrial Retail TV Broadcasters' programme content rights; and

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<sup>24</sup> Pursuant to sections 114 and 118 of the 2009 Broadcasting Act, RTÉ and TG4 have, amongst other things, statutory objectives to operate a national free to air broadcasting TV service. Section 130 of the 2009 Broadcasting Act requires RTÉ to provide for the broadcasting by digital means of the following channels: RTÉ One, RTÉ Two, TG4, those channels having the character of a Public Service Broadcaster (as designated by the Minister), and, where required by the Minister, the Irish Film Channel and the Houses of the Oireachtas Channel. See <http://www.irishstatutebook.ie/2009/en/act/pub/0018/index.html>

<sup>25</sup> Pursuant to section 70 of the 2009 Broadcasting Act the BAI has entered into a contract with VM and accordingly VM has a duty, subject to the terms of its TV programme service contract (with the BAI) and requirements under the 2009 Broadcasting Act to make its TV programme services available on a national FTA basis. In particular, VM1 and VM2 operate under a Section 70 Contract that includes a requirement to provide a free to air service to a minimum of 90% of the Republic of Ireland.

- (c) The ability of national analogue terrestrial Retail Radio Broadcasters to switch from the existing terrestrial BTS platform is likely to be constrained by the popularity of terrestrial radio services as a reception method at the retail level (where it is freely available nationally, at good quality, and offers mobility).

### Market B

- 1.25 ComReg has defined a separate wholesale market that operates downstream from wholesale Market A. That is, Market B, the market for wholesale access to DTT multiplexing services. A DTT Multiplex Operator, using purchased wholesale inputs from Market A, combined with carriage on its own DTT multiplex, then supplies wholesale managed BTS to DTT Retail Broadcasters thereby enabling the transmission of their DTT broadcasting programme signals to end users.
- 1.26 A Multiplex Operator's demand for access to Market A services is derived from downstream digital Retail Broadcasters' demand (and ultimately end users') for such access and, in that context, ComReg considers the question of wholesale demand-side substitution from the position of the underlying customer i.e. a DTT Retail Broadcaster (such as RTÉ, VM, TG4). The particular statutory/licence commitments of Irish DTT Retail Broadcasters (FTA national coverage) in effect, prevent them from having the ability to credibly threaten to switch from their existing DTT Multiplex Operator's services.
- 1.27 ComReg notes that RTÉ is the sole DTT Multiplex Operator in Market B, as there are currently no alternative sources of DTT multiplexing.

## Three Criteria Test

- 1.28 ComReg undertakes its assessment of the 3CT for Market A and Market B in section 5 of this Decision.
- 1.29 ComReg considers that each criterion of the 3CT is satisfied in Market A and Market B respectively (i.e. there are high and non-transitory barriers to entry, there is no tendency towards effective competition overtime and, competition law alone is insufficient to address potential competition related market failures).
- 1.30 ComReg also considers all relevant legislation which may have had an impact on its analysis of the Relevant BTS Markets in Ireland (such as the 2009 Broadcasting Act). However, in ComReg's view the relevant legislation is insufficient to address potential competition related market failures in Market A and Market B.

## Competition and SMP Assessment

### Market A Competition and SMP Assessment

- 1.31 ComReg has considered Market A in terms of existing competition, potential competition and countervailing buying power to determine whether any SP has SMP in the market.

- 1.32 2rn is the sole national terrestrial network provider in Market A and this has remained unchanged over time. ComReg is of the view that there are a number of barriers to entry and expansion in this market. These relate to control of infrastructure not easily duplicated, high sunk costs, economies of scale and scope which would be difficult to achieve by a competing entrant and given the nature of vertical integration in this market, market failures may arise for actual/potential downstream competitors of RTÉ. ComReg is of the view that there is no effective constraint on 2rn from potential competitors and insufficient countervailing buying power exists in this market.
- 1.33 In summary, ComReg's conclusions above are based on:
- (a) 2rn has 100% market share of the relevant market and this has remained stable over time;
  - (b) 2rn services operate from an extensive range of high tower/mast sites located throughout Ireland, many in strategically located high-sites, which together enable almost complete coverage of the population of Ireland. There is no alternative terrestrial network capable of ensuring the same level of services in Ireland for national terrestrial broadcasters and multiplex operators;
  - (c) Barriers to entry/expansion exist such as high financial (sunk) costs, control of infrastructure not easily replicated, economies of scale and scope, and vertical integration;
  - (d) The terrestrial broadcasting market can be influenced to a large degree by the action of RTÉ as a vertically integrated entity. The presence of RTÉ as a vertically integrated entity is an important determination for the level of competition and issues that could arise in the market, absent regulation. Access may be limited/foreclosed and/or there may be the potential for charging excessive fees to limit the competitive threat to RTÉ's position in the downstream retail broadcasting markets; and
  - (e) Insufficient countervailing buying power exists in this market (including having regard to the absence of credible alternative sources of supply) and so national terrestrial broadcasters and multiplex operators do not have the ability to exert significant constraint on their cost or other terms and conditions of supply from 2rn.
- 1.34 Having regard to the conclusions of the above market analysis, and considering the views of Respondents, ComReg's position is that that 2rn, the wholly owned subsidiary of RTÉ is designated as having SMP in Market A.

### Market B Competition and SMP Assessment

- 1.35 ComReg has considered this market in terms of existing competition, potential competition and countervailing buying power to determine whether any undertaking has SMP in the market.

- 1.36 Taken as a whole there are a number of high and non-transitory barriers to effective entry and expansion in this market which are largely of a legal/regulatory nature and hence there are limited competitive constraints on RTÉ. These include the process involved in acquiring a commercial DTT multiplex contract, the coverage obligations of Irish terrestrial television broadcasters, and potential switching costs for customers of RTÉ who have entered into contracts with RTÉ. Based on evidence to date ComReg is not aware of any express demand by potential new multiplex operators to provide commercial DTT which would be capable of effectively constraining RTÉ. In light of this and uncertainty as to whether (and if ever) a new commercial DTT contract process will be initiated and time involved in such a process, effective entry would not seem likely to occur in the period of review. As the sole operator in this market and one which is vertically integrated into the retail market where it competes with other broadcasters, ComReg is of the view that RTÉ has the ability and incentive to act independently of its competitors, customers and consumers.
- 1.37 In summary, ComReg's conclusions above are based on:
- (a) RTÉ having a 100% share of the relevant market;
  - (b) RTÉ has acquired the licenses for the operation of two PSB DTT multiplexes. There are no alternative commercial DTT multiplex operators in this market capable of effectively constraining RTÉ and, on the basis of the evidence to date, this seems unlikely to change during the period covered by this review;
  - (c) As a vertically integrated entity, RTÉ competes with other broadcasters in the retail market and is also a wholesale supplier to broadcasters; and
  - (d) Insufficient countervailing buying power exists and so DTT broadcasters do not have the ability to exert a sufficient constraint on RTÉ's behaviour.
- 1.38 Having regard to the conclusions of the above market analysis, ComReg's position is that RTÉ is designated as having SMP in Market B.

## Competition Problems

- 1.39 As set out in Section 7 of this Decision, ComReg is of the view that each of 2rn and RTÉ have the ability and incentive to engage in exploitative and exclusionary behaviours in Market A and Market B respectively to the detriment of downstream competition and consequently negatively impact the availability of programme services available to end users in downstream retail markets. These include issues associated with the potential for constructive or actual denial of access, discrimination and pricing concerns.

## Remedies

### Market A Remedies

- 1.40 It is ComReg's position that the following obligations are being imposed on 2rn in Market A, with such obligations being a continuation of those remedies imposed under the 2013 Decision.
- (a) **Transparency Obligations:** requirements to publish a Reference Offer and service level agreements ('**SLAs**'); requirements to publish all SLAs (and any updates) on its publicly available website, network characteristics, terms and conditions for supply and use, and prices.
  - (b) **Non-Discrimination Obligations:** requirements to apply equivalent conditions in equivalent circumstances to Broadcast Operators<sup>26</sup>.
  - (c) **Access Obligations:** requirements to meet all reasonable requests from Broadcast Operators for the provision of access; requirements to grant Broadcast Operators access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) including Associated Facilities;
  - (d) **Price Control and Cost Accounting Obligations:** requirements that Access is provided under a cost oriented price control based on Historical Cost Accounting ('**HCA**') and Fully Distributed Cost ('**FDC**') methodology; and
  - (e) **Accounting Separation Obligations:** requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.
- 1.41 ComReg notes the requirement for transparency regarding how costs are incurred and attributed. ComReg's position is that this requirement is addressed through 2rn meeting the transparency obligations that ComReg is imposing, including various documentation and information that must be made available by 2rn<sup>27</sup>.

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<sup>26</sup> For the purposes of this Decision and the consideration of proposed remedies in Market A **Broadcast Operator** means a multiplex contractor, a national sound broadcasting contractor and RTÉ.

<sup>27</sup> In this regard ComReg notes that 2rn must make information available on the following:

- (a) Presentation of accounts (discussed in paragraphs 8.241 to 8.266 in this Decision);
- (b) Transfer charging mechanisms (discussed in 8.267 to 8.269 in this Decision);
- (c) Allocation of costs (discussed in paragraphs 8.270 to 8.271 in this Decision)
- (d) Audit (discussed in paragraphs 8.272 to 8.282 in this Decision); and
- (e) Other documentation (discussed in paragraphs 8.283 to 8.290 in this Decision).



- 1.42 ComReg further notes that 2rn must publish accounting<sup>28</sup> documentation, which includes 2rn's Regulated Accounts and the primary accounting documents which outline how costs are allocated. Having regard to the analysis set out at paragraph 8.229 to 8.301 of this Decision, it is ComReg's position that the obligation to publish a reference offer gives potential purchasers of Market A services a reasonable level of detail on the supply characteristics and terms and conditions and prices of Access.
- 1.43 It is also ComReg's position that such information and documentation provides a sufficient degree of certainty to allow Broadcasters<sup>29</sup> to plan and run their operations efficiently. Market A accounts are audited annually by an independent auditor, with the auditor being appointed by 2rn (and RTÉ) following consultation with ComReg. As part of the process a tri-partite arrangement is in place between 2rn, the independent auditor and ComReg whereby the auditor "owes a duty of care" to ComReg<sup>30</sup>. Similar arrangements are in place in other regulated markets.
- 1.44 ComReg has also decided to continue to impose obligations on 2rn requiring it to negotiate in good faith with Broadcasters requesting Access. Furthermore, as part of the conditions attached to the Access obligation, ComReg has continued to impose obligations governing fairness, reasonableness and timeliness to ensure that legally binding SLAs are appropriately concluded and implemented.
- 1.45 ComReg notes that it is open to access seekers to make requests to 2rn which would have to be assessed by 2rn in line with its obligations. If refused by 2rn then 2rn must provide the reasons for such refusal and the Broadcaster can raise a dispute. Similarly 2rn may raise a dispute.

### Market B Remedies

- 1.46 ComReg is imposing the following obligations on RTÉ in Market B, with such obligations being a continuation of those remedies imposed under the 2013 Decision.
- (a) **Transparency Obligations:** requirements to publish a Reference Offer and SLAs. RTÉ should be required to publish all SLAs (and any updates) on its publicly available website (or such other publicly available website as may be agreed by ComReg);
- (b) **Non-Discrimination Obligations:** requirements to apply equivalent conditions in equivalent circumstances to Broadcasters;

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<sup>28</sup> <https://www.2rn.ie/accounting-documentation/>

<sup>29</sup> The term '**Broadcaster**', as used in this Decision, refers to the definition in 2009 Broadcasting Act, where "broadcaster" means a person who supplies a compilation of programme material for the purpose of its being transmitted, relayed or distributed as a broadcasting service (whether that person transmits, relays or distributes that material as such a service or not).

<sup>30</sup> A similar arrangement is in place for Market B.

- (c) **Access Obligations:** requirements to meet all reasonable requests from Broadcasters for the provision of access;
  - (d) **Price Control and Cost Accounting Obligations:** requirements that Access is provided under a cost oriented price control based on a HCA, and FDC costing methodology; and,
  - (e) **Accounting Separation Obligations:** requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.
- 1.47 ComReg notes that Broadcasters are not precluded from entering into bilateral negotiations with RTÉ regarding potential changes to the Reference Offer, albeit that any terms and conditions agreed upon must be offered on a non-discriminatory basis. ComReg notes that such a process will be subject to negotiation with a right for either party to bring a dispute about such terms to ComReg for resolution, having regard to the specific regulatory obligations imposed under this Decision.
- 1.48 ComReg's position is that RTÉ is required to negotiate in good faith with Broadcasters requesting Access and the responsibility rests with RTÉ to demonstrate that its approach to negotiations with undertakings is done in good faith and that any unmet access requests must be shown to have been unreasonable, based on objective considerations.
- 1.49 ComReg notes that it is open to access seekers to make requests to RTÉ which would have to be assessed by RTÉ in line with its obligations. If refused by RTÉ then the Broadcaster can raise a dispute. Similarly RTÉ may raise a dispute.
- 1.50 ComReg notes that, in the context of its consideration of price control obligations in Section 8 of this Decision, it has examined possible alternative methodologies<sup>31</sup> for allocating the costs of operating the multiplexes that would allow for alternative pricing methodologies but finds that they do not reflect the principle of cost causality as well as the current cost allocation methodology.

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<sup>31</sup> See paragraphs 8.482 to 8.532 of this Decision.



## 2 Introduction

- 2.1 BTS at the wholesale level essentially enable Retail TV Broadcasters and Retail Radio Broadcasters to broadcast their content to end users.
- 2.2 The objective of this review is, ultimately<sup>32</sup>, to decide if, absent regulation, any SP has SMP in the Relevant BTS Markets and, if so, to impose appropriate remedies to address any competition problems that have arisen or could arise in the duly-defined Relevant BTS Markets.
- 2.3 Remedies (or obligations) imposed by NRAs in other European Union ('EU') Member States and by ComReg to date to address such competition problems have generally focussed on access obligations and price controls with respect to BTS, in addition to other remedies designed to ensure non-discrimination and transparency.
- 2.4 The analysis set out in this Decision adopts the approach recommended by the European Commission ('EC') and, in doing so, takes the utmost account of:
  - (a) The fact that the BTS Markets have not been included in the list of markets susceptible to ex ante regulation since the 2007 Recommendation on relevant product and service markets susceptible to ex ante regulation within the electronic communications sector, including in the 2014 Recommendation or more recently the 2020 Recommendation;
  - (b) The Explanatory Note to the 2014 Recommendation and to the 2020 Recommendation<sup>33,34</sup>;
  - (c) The 2018 SMP Guidelines on market analysis and the assessment of SMP; and
  - (d) The 2005 Accounting Separation and Cost Accounting Recommendation<sup>35</sup>.
- 2.5 ComReg also takes account of:

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<sup>32</sup> ComReg will also apply a three criteria test to assess whether regulatory intervention in the relevant market(s) is warranted. See paragraphs 2.16 to 2.20 below.

<sup>33</sup> Explanatory Note accompanying the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, dated 9.10.2014 (the '**Explanatory Note to the 2014 Recommendation**'). The Explanatory Note to the 2014 Recommendation is available at <https://ec.europa.eu/digital-single-market/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>

<sup>34</sup> See paragraph 2.9.

<sup>35</sup> European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications ((2005/698/EC) (OJ L266/64).

- (a) The European Commission's Notice on Market Definition for the purposes of community competition law<sup>36</sup>;
  - (b) The European Electronic Communications Code ('**EECC**'); and
  - (c) Any relevant common positions adopted by the Body of European Regulators for Electronic Communications ('**BEREC**').<sup>37</sup>
- 2.6 ComReg has also, where appropriate, had regard to relevant EC comments made, pursuant to Article 7 of the Framework Directive, with respect to other EU NRAs' market analyses.
- 2.7 This Decision defines the Relevant BTS Markets with respect to both product and geographic dimensions. It also assesses competition within those markets and examines potential competition problems before imposing appropriate regulatory remedies, in addition to associated impacts, to address the competition problems identified. The key elements in this regard include:
- (a) the definition of the Relevant BTS Markets from both a product and geographic perspective<sup>38</sup>;
  - (b) on the basis of an assessment of competition within the Relevant BTS Markets, which operators should be designated as having SMP; and
  - (c) the specification and imposition of appropriate wholesale access, pricing and other related remedies on such SMP operators in order to address competition problems that have arisen or could arise in each of these Relevant BTS Markets, absent *ex ante* regulation.
- 2.8 Before setting out the analysis underpinning this market review, the remainder of this introductory section describes the relevant legal and regulatory framework, in addition to the regulatory approach in the respective Relevant BTS Markets to date.

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<sup>36</sup> Commission notice on the definition of relevant market for the purposes of Community competition law, (the '**Notice on Market Definition**'), Official Journal C 372, 09/12/1997 pp.5-13.

<sup>37</sup> BEREC, as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing BEREC and the Office which has since been replaced and repealed by REGULATION (EU) 2018/1971 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 (the '**2018 BEREC Regulation**') <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1971&from=EN>.

<sup>38</sup> Further details on the methodology for defining relevant markets is set out in the Consultation at Annex 1 : Explanatory Note on Market Analysis, available at <https://www.comreg.ie/publication/broadcasting-transmission-services-in-ireland>.

## Legal basis and regulatory framework

- 2.9 This market review is undertaken by ComReg in accordance with its obligation under the **Framework Regulations**<sup>39</sup> to analyse relevant markets, taking utmost account of a EC recommendation on relevant markets susceptible to ex ante regulation and the 2018 SMP Guidelines, prior to determining whether competition is effective or not, and if not, to impose obligations in accordance with the **Access Regulations**.<sup>40</sup>
- 2.10 The Framework Regulations and the Access Regulations (together with the Authorisation Regulations and the Universal Service Regulations<sup>41</sup>) transpose in Irish law the regulatory framework for electronic communications set out in the Framework Directive, the Access Directive<sup>42</sup>, the Authorisation Directive<sup>43</sup>, and the Universal Service Directive<sup>44</sup>, all, now repealed with effect from 20 December 2020 and replaced with the EECC, which entered into force on 20 December 2018.
- 2.11 While the work undertaken by ComReg for the purpose of this market review was conducted in part prior to the coming into effect of the EECC, ComReg has been cognisant throughout of the need to be consistent with the tenet of the EECC.
- 2.12 Since 2007, the BTS market has not been considered to be a market susceptible to ex ante regulation. The removal of the market from the list of recommended markets in the 2007 EC Recommendation<sup>45</sup> was maintained in both the 2014 Recommendation and the 2020 Recommendation.

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<sup>39</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the "**Framework Regulations**").

<sup>40</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011, S.I. No. 334 of 2011 (the '**Access Regulations**').

<sup>41</sup> European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011, S.I. No. 335 of 2011 (the '**Authorisation Regulations**'); European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011, S.I. No. 337 of 2011 (the '**Universal Service Regulations**').

<sup>42</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the '**Access Directive**') as amended by Directive 2009/140/EC.

<sup>43</sup> Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, as amended by Directive 2009/140/EC (the '**Authorisation Directive**').

<sup>44</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the '**Universal Service Directive**').

<sup>45</sup> European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344 (the '**2007 EC Recommendation**').

- 2.13 However, subject to certain conditions being fulfilled (those being the same both before and after the EECC came into effect), NRAs have the power to apply regulation in any electronic communications market no longer identified in a EC recommendation on relevant product and services markets, on the basis of national circumstances. In this regard ComReg must undertake a 3CT to determine if continued regulation is warranted in the relevant markets (also having regard to non SMP regulation/legislation which may be in place such as the Broadcasting Act of 2009<sup>46</sup> (the '**2009 Broadcasting Act**'))<sup>47</sup>.
- 2.14 The 3CT is, accordingly, a screening exercise, which is designed to ensure that only those markets displaying indicative signs of market failure proceed to full market review. The 3CT sets out relevant criteria that must be cumulatively satisfied in order to proceed to a finding that a relevant market should be subject to *ex ante* regulation.<sup>48</sup>
- 2.15 The three criteria are:
- (a) the presence of high and non-transitory barriers to entry;
  - (b) a market structure which does not tend towards effective competition within the relevant time horizon; and
  - (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.
- 2.16 If the 3CT is not satisfied (i.e. where at least one of the above conditions is not met), this is indicative either that the market in question is not characterised by market failure, or that any such market failure is appropriately addressed by means of *ex post* competition law alone. Accordingly, if the criteria are not met, then regulatory intervention in the relevant market(s) would not be warranted.
- 2.17 If the 3CT is satisfied in respect of a particular market, ComReg will carry out a market analysis exercise in order to determine whether any operator has SMP in that market.
- 2.18 Where ComReg determines as a result of its market review that a given market is not effectively competitive, ComReg is then required, under Regulation 27(4) of the Framework Regulations, to designate one or more undertakings in that market as having SMP and to impose on such undertaking(s) such specific obligations as ComReg considers appropriate.

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<sup>46</sup>Broadcasting Act of 2009. Number 18 of 2009 (the '**2009 Broadcasting Act**'). See <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/html>

<sup>47</sup> On 10 January 2020, the Department of Communications, Climate Action and Environment published a General Scheme Online Safety Media Regulation Bill. The Bill proposes to amend the 2009 Broadcasting Act and transpose the revised Audiovisual Media Services Directive.

<sup>48</sup> The three criteria, set out in the 2014 Recommendation and 2020 Recommendation, are now also set out in Article 67(1) of the EECC.

- 2.19 *Ex ante* regulation may not be necessary if other forms of effective regulation are available. Therefore, in undertaking this BTS market review, ComReg will also consider whether other legislation that may apply to the Relevant BTS Markets in Ireland might impact upon the need for *ex ante* regulation, in particular, relevant aspects of the 2009 Broadcasting Act. However, it should be noted that the 2009 Broadcasting Act was found not to negate the need for SMP regulation at the time of the last review in 2013<sup>49</sup>.
- 2.20 Further, ComReg has taken care to ensure that its analysis is consistent with the 2018 SMP Guidelines.
- 2.21 Regulation 26 of the Framework Regulations requires that ComReg, taking the utmost account of the EC's recommendation on relevant product and service markets susceptible to *ex ante* regulation within the electronic communications sector and of the 2018 SMP Guidelines, define relevant markets appropriate to national circumstances, in accordance with the principles of competition law.
- 2.22 Regulation 25 of the Framework Regulations requires that, where ComReg determines, as a result of a market analysis and in accordance with Regulation 27, that a given market (defined in accordance with Regulation 26) is not effectively competitive, that ComReg is obliged under Regulation 27(4) to designate an undertaking or undertakings with SMP in that market. In addition ComReg must, as it considers appropriate, impose specific obligations on such undertaking(s), or maintain or amend such obligations where they already exist.
- 2.23 In line with the "Modified Greenfield Approach" ('MGA') set out in the Explanatory Note to the European Commission's 2014 Recommendation<sup>50</sup> and in the Explanatory Note to the 2020 Recommendation<sup>51</sup>, ComReg's market assessment starts from the assumption that SMP regulation is not present in the specific market under consideration. However, regulation present in other related markets or through the general regulatory framework is considered. This approach avoids erroneously drawing conclusions regarding the competitive structure of a particular market which may be influenced by, or indeed premised on, existing regulation on that market. Considering how markets may function absent regulation helps to ensure that SMP-based regulation is only applied (or withdrawn) in circumstances where it is justified and proportionate to do so.

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<sup>49</sup> See paragraph 2.46 regarding ComReg's 2013 Decision.

<sup>50</sup> Please refer to Page 13 of: <https://ec.europa.eu/digital-single-market/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>.

<sup>51</sup> Explanatory Note accompanying the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, dated 18.12.2020 (the 'Explanatory Note to the 2020 Recommendation'). See <https://ec.europa.eu/digital-single-market/en/news/commission-updated-recommendation-relevant-markets>, page 9.

- 2.24 Where an SP is ultimately designated as having SMP in a market, ComReg is obliged, under Regulation 8(1) of the Access Regulations, to impose on such an SP (or maintain where they already exist) such of the obligations set out in Regulations 9 to 13 of the Access Regulations as it considers appropriate. Obligations imposed must:
- (a) be based on the nature of the problem identified;
  - (b) be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Act 2002 (as amended),<sup>52</sup> and Regulation 16 of the Framework Regulations; and
  - (c) only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.
- 2.25 Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) sets out ComReg's objectives in exercising its functions in relation to the provision of electronic communications networks, electronic communications services and associated facilities, namely to:
- (a) Promote competition;
  - (b) Contribute to the development of the internal market; and
  - (c) Promote the interests of users within the European Union.
- 2.26 Apart from conducting a public consultation in accordance with Regulation 12 of the Framework Regulations, ComReg is also obliged, before making a final decision, to make its draft measures accessible to the European Commission, BEREC and NRAs in other Member States pursuant to Regulation 13(3) of the Framework Regulations.

## 2009 Broadcasting Act

- 2.27 The following section details the relevant provisions in the 2009 Broadcasting Act.
- 2.28 RTÉ is mandated by legislation to provide its broadcasting services to the "whole community of Ireland", particularly under the 2009 Broadcasting Act. RTÉ is subject to certain "public service objects" which means;
- "an activity undertaken by a corporation in pursuance of paragraph (a) to (i) of 114(1) or paragraphs (a) to (h) of section 118(1) ".*
- 2.29 Specific to RTÉ, section 114 outlines the "objects" or obligations imposed on RTÉ which include among other objects to;

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<sup>52</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended (the 'Communications Regulation Act 2002 (as amended)').



*“Establish, maintain and operate a national TV broadcasting service which shall have the character of a public service, be a FTA service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.”*

- 2.30 In conjunction with the objects outlined in section 114, section 77(11) and (12) of the 2009 Broadcasting Act discusses RTÉ’s “*must offer*” obligations (which are applicable to transmission via cable and satellite networks), and include that RTÉ must broadcast FTA, in so far as reasonably practicable, to the whole community of Ireland. In addition, Section 130(1) of the 2009 Broadcasting Act requires that a national television multiplex established, maintained and operated by RTÉ under section 114, shall provide for the broadcasting by digital means the following channels; RTÉ One and RTÉ Two, TG4, such other television services having the character of a public service (as may be designated by the Minister – see 2.39 below), and, where required by the Minister, the Irish Film Channel and the House of the Oireachtas Channel. Further, there is a requirement under Section 130(10) for the Minister, at the request of the Broadcasting Authority of Ireland and after consultation with RTÉ, to require RTÉ to make provision for the broadcasting, by digital means, of television programme services provided by a television programme service contractor (see paragraph 2.38 below in respect of the current Section 70 Contract involving VM1 and VM2).
- 2.31 It is noted that RTÉ holds a ‘multiplex licence’ under section 132 of the 2009 Broadcasting Act while other (potential) multiplex operators (**‘Multiplex Operator(s)’**)<sup>53</sup> would hold a ‘multiplex contract’ under section 131 of the 2009 Broadcasting Act. A multiplex licence is required from ComReg to provide spectrum rights of use which entitle the holder to provide DTT multiplexing services for the transmission of DTT. Under the 2009 Broadcasting Act, ComReg can only issue a multiplex licence to provide spectrum rights of use to RTÉ and the Broadcasting Authority of Ireland (**‘BAI’**). In the case of multiplex licences issued by ComReg to the BAI, the benefit of the spectrum rights of use is passed onto a DTT multiplex operator via a contract from the BAI following a tender process.
- 2.32 Further to the above objectives, section 132 of the 2009 Broadcasting Act outlines the duties of ComReg in respect of DTT multiplexes, and provides that ComReg must, at the request of RTÉ, issue up to two DTT multiplex licence(s) and, separately, at the request of the BAI, issue to the BAI at least four DTT multiplex licences. The BAI may then enter into DTT multiplex contracts with DTT Multiplex

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<sup>53</sup> Digital terrestrial broadcast services are transmitted on multiplexes by Multiplex Operators. Multiplex is defined in section 129 of the 2009 Broadcasting Act as meaning “an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public”. DTT multiplexing services means the above service provided via a DTT multiplex(es) by a Multiplex Operator.

Operators (which contracts are likely to be commercial in nature) in relation to these licences.

- 2.33 TG4<sup>54</sup>, similar to RTE, is subject to certain public service objectives. These include, among others, that TG4 establish, maintain and operate a national TV broadcasting service which shall have the character of a public service, be a FTA service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.
- 2.34 TG4 is mandated by legislation to provide its service and therefore does not have a licence term. Its carriage on Saorview is enabled under Section 130 (1) (a) of the 2009 Broadcasting Act.
- 2.35 VM1 and VM2 operate under a Section 70 Contract that includes a requirement to provide a free to air service to a minimum of 90% of the Republic of Ireland (+1 and HD variants are only available on other platforms). Transmission carriage on Saorview is provided for under Section 130 (10) of the 2009 Broadcasting Act. The current Section 70 contract covering VM1 and VM2 runs from 20th Sept 2018 to 19th Sept 2023. VM1 and VM2 are available on Saorview, Cable, Sky Satellite and IPTV networks. It may be open to VM, subject to legislation remaining unchanged, to apply for a contract for VM1 and VM2 under Section 70 or Section 71 of the 2009 Broadcasting Act in 2023.
- 2.36 VM 3 (**VM3**) operates under a Section 71 content provision contract. The contract term is from 01 November 2014 to 20 October 2024. It has been designated by the Minister under Section 130 (1) (a) (iv) as a channel having the character of a public service and may therefore be transmitted on Saorview. It is currently available on Saorview, Cable, Sky Satellite and IPTV networks. It does not have an absolute minimum percentage coverage requirement but is committed to being available on as many platforms as possible.
- 2.37 RTÉ provides national analogue terrestrial radio services to retail end users. In terms of terrestrial radio there are two categories of national terrestrial radio services. These are the PSB services provided by RTÉ and national independent commercial radio services licensed under a BAI contract.

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<sup>54</sup> TG4 as detailed in Part 1 section 2 [Definitions] of the 2009 Broadcasting Act means Teilifis na Gaeilge which further means the body, originally established by section 44 of the Broadcasting Act 2001. The objects of TG4 are discussed in section 118 of the 2009 2009 Broadcasting Act. Part 1, section 2 [Definitions] of the 2009 Broadcasting Act defines “pubic service objects, as “...an activity undertaken by a corporation in pursuance of paragraphs (a) to (i) of section 114(1) or paragraphs (a) to (h) of section 118(1)”



- 2.38 Section 115 of the 2009 Broadcasting Act provides that the Minister may, at the request of the BAI and after consultation with RTÉ, require RTÉ to co-operate with a holder of a sound broadcasting contract in the use of any mast, tower, site or other installation or facility needed in connection with the provision of transmission facilities for sound broadcasting services under the sound broadcasting contract. It also states that a sound broadcaster shall make to RTÉ such periodical or other payments in respect of any facilities as the Minister, after consultation with RTÉ and the BAI directs.
- 2.39 Today FM (owned by Communicorp Group Ltd) holds a national contract with the BAI for analogue terrestrial radio services provided, to retail end users together with the attendant ComReg spectrum licence.
- 2.40 Newstalk (owned by Communicorp Group Ltd) has quasi-national contract for with BAI for analogue terrestrial radio services to retail end users together with the attendant ComReg spectrum licence.
- 2.41 Independent broadcasters have entered into contractual arrangements with the BAI for national, quasi-national and regional radio services.

## Previous Reviews of the BTS Markets

### ComReg's 2013 Decision

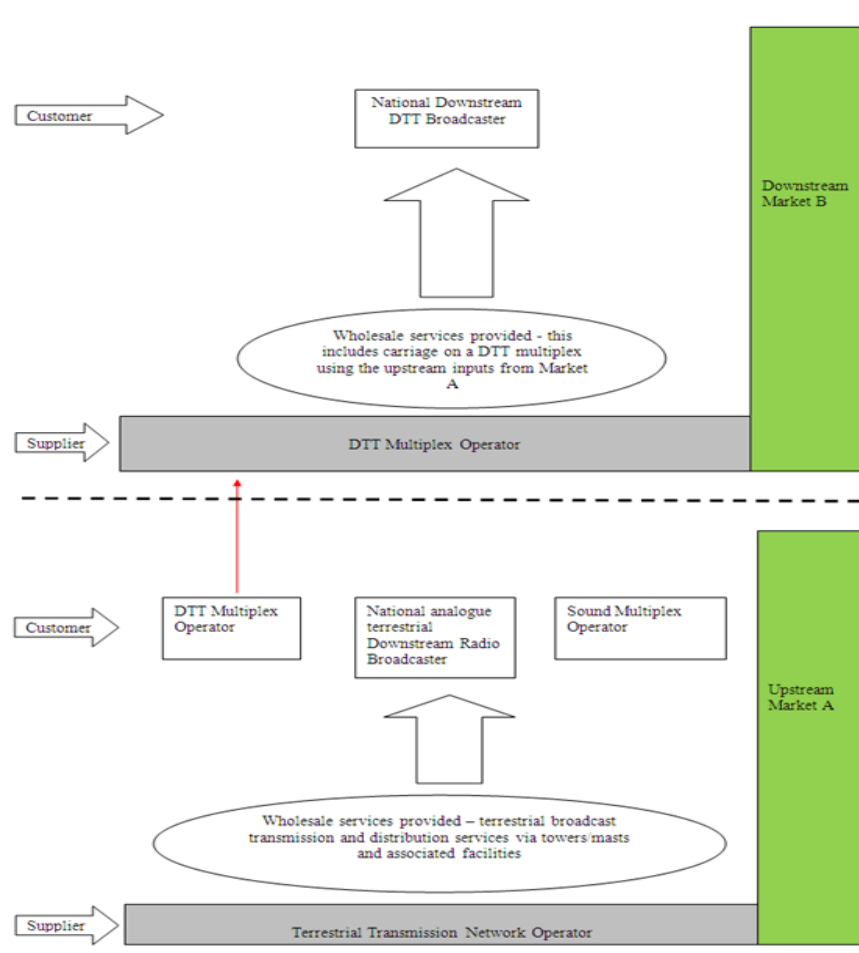
- 2.42 In its 2013 Decision ComReg reviewed the Broadcasting Transmission and Distribution Markets, in Ireland in order to establish whether these Relevant BTS Markets warranted *ex ante* regulation, and if so, what form *ex ante* regulation should take.
- 2.43 Following an assessment of retail and wholesale broadcast markets, ComReg defined the following two separate wholesale Relevant BTS Markets:
- (a) **Market A** is a national wholesale market where an upstream terrestrial transmission network provider supplies a transmission and distribution service via its towers/masts infrastructure and relevant associated facilities (including transmission and distribution equipment, buildings etc.) in order to enable (i) the broadcast of national analogue terrestrial radio signals to end users; and (ii) the broadcast by a Multiplex Operator<sup>55</sup> of its digital terrestrial broadcasting signals to end users; and
  - (b) **Market B** is a national wholesale market which is downstream from Market A, whereby a Digital Terrestrial Television ('DTT') Multiplex Operator, using wholesale inputs purchased (or self-supplied) in Market A, combined with carriage on its DTT multiplex supplies a managed digital multiplexing service.

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<sup>55</sup> See paragraph 1.2(b) and footnote 4.

2.44 The relationship between Market A and Market B and their relationship with other market participants in the broadcasting value chain, is described in Figure 1 below.

**Figure 1: Structure and Relationship between Market A and Market B**



### Three Criteria Test and SMP Analysis

- 2.45 ComReg undertook its assessment of the 3CT and SMP analysis for Market A in sections 5 and 6 of the 2013 Decision, while the assessment of the 3CT and SMP analysis for Market B was undertaken in sections 11 and 12 of that same decision.
- 2.46 ComReg considered that each criterion of the 3CT was satisfied in Market A and Market B respectively (i.e. there are high and non-transitory barriers to entry, there is no tendency towards effective competition overtime and, competition law alone is insufficient to address potential competition related market failures).
- 2.47 ComReg also considered all relevant legislation which may have had an impact on its analysis of the Relevant BTS Markets in Ireland (such as the 2009 Broadcasting Act). However, ComReg considered that relevant legislation was insufficient to address potential competition related market failures in Market A and Market B.

- 2.48 ComReg assessed whether each of the BTS providers and DTT Multiplex Operator operating within the above Relevant BTS Markets had SMP, that is, the ability to act, to an appreciable extent, independently of its competitors, customers and consumers.
- 2.49 Therefore, ComReg designated RTÉ Transmission Network Limited<sup>56</sup> as having SMP in Market A and, Raidió Teilifís Éireann ('RTÉ') as having SMP in Market B.

### Remedies

- 2.50 In light of the competition concerns identified in the SMP assessment in the 2013 Decision, ComReg deemed it necessary to impose a range of proportionate *ex ante* regulatory remedies, ultimately designed to ensure the development of effective competition, to the benefit of end users.

## Current Review of the Relevant BTS Markets

- 2.51 ComReg carried out a further review of the Relevant BTS Markets having regard to market developments and the time elapsed since previous analyses, and in May 2020, published a consultation and draft decision (the "**Consultation**")<sup>57</sup>.
- 2.52 Pursuant to Regulation 27(1) of the Framework Regulations, ComReg is required to carry out an analysis of the Relevant BTS Markets, where appropriate, consulting with the Competition and Consumer Protection Commission ('CCPC') under section 34 or 47G of the Competition Act 2002 (as amended).
- 2.53 Overall, in preparing this Decision, ComReg has taken account of its functions and objectives under the Communications Regulation Act 2002 (as amended), in addition to requirements under the Framework Regulations and the Access Regulations.

## Key functional characteristic of 2rn's network

- 2.54 2rn provides a fully managed broadcast<sup>58</sup> transmission (and distribution) service, including associated facilities which further include:
- (a) The provision of co-location<sup>59</sup> for the transmitter equipment;
  - (b) The provision of power and the backup power supply for the transmitter and associated equipment;

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<sup>56</sup> Formerly trading as 'RTÉNL', and as of Q2 2013 now trading as '2rn'. See [www.2rn.ie](http://www.2rn.ie)

<sup>57</sup> On 11 May 2020 ComReg published the Market Review Broadcast Transmission Services in Ireland Consultation and Draft Decision, ComReg 20/31, available at <https://www.comreg.ie/publication/broadcasting-transmission-services-in-ireland>.

<sup>58</sup> "broadcast" means the transmission, relaying or distribution by electronic communications network of communications, sounds, signs, visual images or signals, intended for direct reception by the general public;

<sup>59</sup> Pursuant to Regulation 12(2)(f) of the Access Regulations

- (c) The provision of telemetry<sup>60</sup> services;
- (d) The provision of access to the antenna combiner and feeder to enable the connection of the transmitter equipment to the combiner;
- (e) The provision of access to the microwave distribution system; and,
- (f) The provision of support services.

2.55 2rn serves, 6 customers, namely:

- (a) RTÉ Mux management DTT (2 multiplexes)<sup>61</sup>;
- (b) RTÉ FM Radio (four channels);
- (c) RTÉ LW Radio (one channel);
- (d) RTÉ DAB Mux management (1 multiplex); and
- (e) Communicorp (two channels).

2.56 The following is a breakdown of transmission services offered by 2rn, including the number of transmission sites per TV and radio broadcast programming service and geographic coverage:

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<sup>60</sup> Telemetry is the collection of measurements or other data at remote or inaccessible points and their automatic transmission to receiving equipment for monitoring.

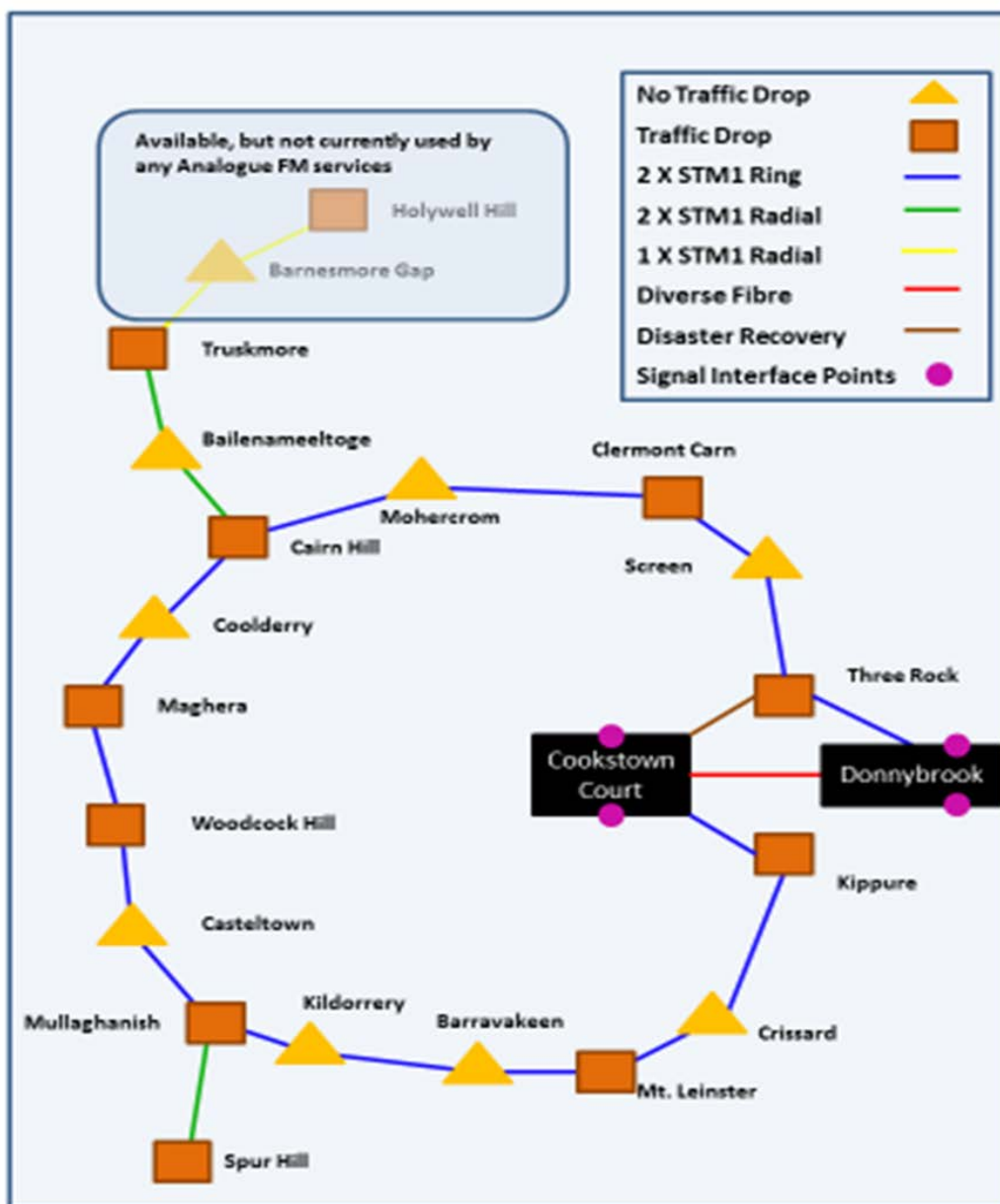
<sup>61</sup> A multiplex is also referred to a 'Mux'.

**Table 1: Transmission sites and Geographic coverage**

<b>Radio</b>		
<b>Channel</b>	<b>No. Sites</b>	<b>Coverage</b>
RTÉ Radio 1 FM	42	National
RTÉ Radio 2FM	41	National
RTÉLyric	41	National
Raidió na Gaeltachta	40	National
DAB	5	32% Geographic coverage
RTÉ Radio 1 LW	1	National
Today FM	23	National
Newstalk	17	National
<b>Television</b>		
<b>Channel</b>	<b>No. Sites</b>	<b>Coverage</b>
RTÉ PSB Mux 1	67	National
RTÉ PSB Mux 2	67	National

- 2.57 Figure 2 below displays an outline of 2rn’s distribution system, including sites which include the masts located around Ireland.
- 2.58 While Donnybrook is traditionally associated with the provision of RTÉ services, the distribution element is managed from its networks operation centre in Cookstown Court. These two locations are connected via a diverse fibre network which includes a disaster recovery element in the event of failure at one of these two sites.

Figure 2: 2rn Distribution System.



2.59 Content is sent between Donnybrook and Cookstown Court which is then distributed in both a clockwise and anti-clockwise direction along the distribution network via a fixed radio link network (Microwave). This network configuration provides a network redundancy so that should one element fail the content can still be distributed to all other elements on the network in another direction.

2.60 Further resilience through the installation of fibre is in place; the exact routes vary.

- 2.61 Information contained in 2rn's separated accounts shows that the net book value of infrastructure in Market A is currently c. €40m to €42m<sup>62</sup>. This consists of towers, reinforced buildings and specialised equipment designed to withstand severe weather events.
- 2.62 2rn has operated from many of the current transmission sites since the 1960s. Due to Ireland's geographical characteristics and sparse population density, the sites where 2rn's infrastructure is located tends to be high altitude sites which ensures adequate coverage is provided to remote areas. Access to these sites can be difficult, especially during winter months where, due to snow and ice for example, access roads may be blocked or inaccessible. Access to build new sites could prove to be problematic due to potential environmental and planning issues, making it difficult to replicate 2rn's current network and coverage area (97% population).

## Information Sources Relied Upon

- 2.63 As part of this market review, ComReg has obtained qualitative and quantitative information from operators through a series of formal and informal information requests, as well as through industry meetings. ComReg has also reviewed, in detail, the experience of NRAs in regulating Relevant BTS Markets in other jurisdictions and has carefully analysed guidance from the European Commission, BEREC and other relevant commentators before arriving at its views as set out in this Decision.
- 2.64 In conducting its analysis, ComReg has drawn on data from a number of sources, including:
- (a) Report by Mediatique for the Broadcasting Authority of Ireland "A report on market structure, dynamic and developments in Irish media" published on 24 April 2018 as part of the BAI's consultation on its Broadcasting Services Strategy (the '**2018 Mediatique Report**')<sup>63</sup>.

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<sup>62</sup> 2rn Regulated Accounts, Market A, for the year ended 31 December 2019

<https://www.2rn.ie/wp-content/uploads/2020/04/REGULATED-ACCOUNTS-MARKET-A-2019-1.pdf>

<sup>63</sup> [https://www.bai.ie/en/media/sites/2/dlm\\_uploads/2018/04/180410-Mediatique-Report.pdf](https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/04/180410-Mediatique-Report.pdf)

- (b) Information provided by SPs in response to detailed information requests<sup>64</sup> issued by ComReg in 2019 in which both quantitative and qualitative information on the Relevant BTS Markets and on other related broadcasting services was sought (**'2019 Information Requests'**);
- (c) Information provided to ComReg in subsequent follow-up correspondence and discussions in relation to (b);
- (d) Information provided to ComReg by Service Providers for the purpose of ComReg's Quarterly Key Data Reports (**'QKDR(s)'**);<sup>65</sup> and
- (e) Other information in the public domain.

2.65 ComReg refers to the outputs from the responses to the 2019 Information Requests and the 2018 Mediatique Report, along with the other data sources referred to above, throughout the remainder of the analysis in this Decision.

2.66 Taking account of the analysis in the Consultation and in this Decision and the information sources indicated above ComReg presents its position.

## Liaison with other Bodies

2.67 In accordance with Regulation 27(1) of the Framework Regulations, ComReg has consulted with the Competition and Consumer Protection Commission (**'CCPC'**) on the Relevant Markets set out in this Decision. A copy of correspondence from the CCPC (the **'CCPC Response'**) is set out at Annex: 6. The CCPC issued its opinion to ComReg on 18 December 2020 in which it noted that:

*"the Commission is satisfied that there are no compelling grounds to disagree with ComReg's conclusion that the existing definition of the BTS markets should be maintained. The Commission also agrees that, on the basis of the facts and analysis presented by ComReg, RTÉ Transmission Network DAC (trading as 2rn) and RTÉ each should be designated as having significant market power ("SMP") and that it continues to be appropriate to maintain SMP designations on these undertakings identified by ComReg in its previous BTS Market review."*

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<sup>64</sup> In May and June 2019, ComReg issued a series of detailed voluntary information requests (**'2019 Information Requests'**) to the following Service Providers: RTÉ, 2rn, VM, TG4, Communicorp, Sky, Vodafone, and Eir. Detailed responses were provided by 2rn on 8 August 2019; RTÉ on 19 July and 23 August; TG4 on 25 July 2019; Newstalk and Today FM (part of Communicorp) on 16 August 2019; VM on 26 July 2019. Although discussions were held with Sky, Vodafone and Eir they elected not to provide detailed written responses.

<sup>65</sup> This Decision data presented in ComReg's QKDR as at Q1 2020, which is available online at the ComReg data portal at: <https://www.comreg.ie/industry/electronic-communications/data-portal/>



2.68 On 15 January 2021 ComReg also made its draft measures accessible to the EC, BEREC and NRAs in other Member States pursuant to Article 32 of the EECC pursuant to Regulation 13(3) of the Framework Regulations (**'Notified Draft Measures'**). On [DATE PLACEHOLDER] the EC provided its response to ComReg (**'European Commission's Response'**) a copy of which is set out in Annex: 7. [COMREG WILL CONSIDER AND TAKE UTMOST ACCOUNT OF ANY COMMENTS IN ITS FINAL DECISION].

## Consultation Process

2.69 In accordance with Regulation 12 of the Framework Regulations, in May 2020 ComReg issued the Consultation which set out ComReg's then views based on an analysis of the relevant BTS Markets.

2.70 This Decision considers the 5 submissions received (referred to as the **'Submissions'**) in response to the Consultation. Submissions were received from the following respondents (together the **'Respondents'**)<sup>66</sup>:

- (a) 2rn
- (b) Broadcasting Authority Ireland (**'BAI'**);
- (c) VM;
- (d) RTÉ; and
- (e) TG4;

2.71 In this Decision, and consistent with all previous Decisions, ComReg has carefully considered Respondents' views before setting out its final position.

## Structure of the report

2.72 This Decision is structured as follows:

- Section 1:** An executive summary of the key issues and ComReg's approach for the regulation of the Relevant BTS Markets.
- Section 2:** An introductory overview that sets out the legal basis and regulatory framework for this market review.
- Section 3:** As updated overview of the main trends and an assessment of the structural and behavioural characteristics in the retail broadcast market(s), with a view to informing the subsequent definition and SMP analysis of the wholesale Relevant BTS Markets.

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<sup>66</sup> ComReg Document 21/03s, Market Review Broadcasting Transmission Services in Ireland Non Confidential Submissions to Consultation 20/31, published on the ComReg website on 15 January 2021.

- Section 4:** Defines the wholesale Relevant BTS Markets from both a product and a geographic perspective.
- Section 5:** Applies the Three Criteria Test to the Relevant BTS Markets from both a product and a geographic market perspective.
- Section 6:** Assesses competition within each of the defined Relevant BTS Markets and identifies those SPs operating within such markets that hold a position of SMP.
- Section 7:** Sets out the main competition problems that could, absent regulation, occur within the Relevant BTS Markets, along with the likely consequential impacts on competition and consumers.
- Section 8:** Sets out regulatory remedies to address competition problems, namely, in the form of obligations to be imposed on BTS Operators having SMP.
- Section 9:** Sets out the Regulatory Impact Assessment ('**RIA**') of the approaches to regulation in the Relevant BTS Markets.
- Section 10:** Sets out the next steps that will follow the publication of this Decision.
- Annex: 1** Contains the Regulatory Impact Assessment.
- Annex: 2** List of Consultation Questions
- Annex: 3** Glossary of Terms
- Annex: 4** Contains the Decision Instrument with respect to Market A.
- Annex: 5** Contains the Decision Instrument with respect to Market B.
- Annex: 6** Contains the consultation with the Competition and Consumer Protection Commission
- Annex: 7** [PLACEHOLDER: Contains the European Commission Response to ComReg's Notified Draft Measures and ComReg assessment if necessary]

## 3 Assessment of the Retail Market

### Introduction

- 3.1 In this section ComReg presents the main behavioural trends in the provision of retail broadcast services and sets out its position on the retail market assessment<sup>67</sup>. These trends are discussed insofar as they are relevant to the subsequent assessment of the Relevant BTS Markets
- 3.2 The analysis of the trends and main developments originally presented in Section 3 of the Consultation have been updated to include relevant QKDR data up to Q1 2020 and in light of other sources cited in this Decision. These updates also inform ComReg's stated positions as set out throughout this Decision.
- 3.3 Of the 5 Submissions received, 3 Respondents (VM, TG4 and the BAI) stated that ComReg had identified the main retail trends and developments in the Consultation and noted that they agreed with ComReg's views on the retail market assessment. Two Respondents (RTÉ and 2rn) raised certain issues with regard to ComReg's analysis of trends in the provision of retail broadcast services and disagreed with certain aspects of the retail market assessment. ComReg addresses the issues raised by RTÉ's and 2rn's Submissions directly in this Section 3<sup>68</sup>.
- 3.4 ComReg's assessment of the Relevant BTS Markets is informed by an analysis of demand at the retail level, from which demand for wholesale BTS services is derived. The retail level associated with BTS comprises the viewing of free-to-air television channels and listening to analogue and digital radio stations, and the purchase of advertising time by advertisers to gain access to those viewers and listeners.
- 3.5 ComReg's view is that television and terrestrial radio are distinct markets, as the experience and attributes of the two media are very different and substitution between the two is unlikely to meet the requirements of a radio listener or a television viewer. Therefore, in the sections that follow, Retail TV Broadcast and Retail Radio Broadcast markets are assessed separately under the following headings.
- (a) TV Transmission/Viewership Trends (discussed in paragraphs 3.6 to 3.24 below);

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<sup>67</sup> ComReg has analysed the retail markets to inform its subsequent definition of the Relevant BTS Markets and, in particular, to inform its assessment of whether, through substitutability at the retail level, other forms of communication potentially exercise an effective indirect constraint on an SP supplying wholesale BTS. For more details regarding the methodology for analysing and defining markets see Annex 1 of the Consultation.

<sup>68</sup> See paragraph 3.53 to 3.56.

- (b) Retail TV Broadcasting Assessment (discussed in paragraphs 3.25 to 3.57 below);
- (c) Radio Transmission/Listenership Trends (discussed in paragraphs 3.58 to 3.65 below); and
- (d) Retail Radio Broadcasting Assessment (discussed in paragraphs 3.66 to 3.70 below).

## TV Transmission/Viewership Trends

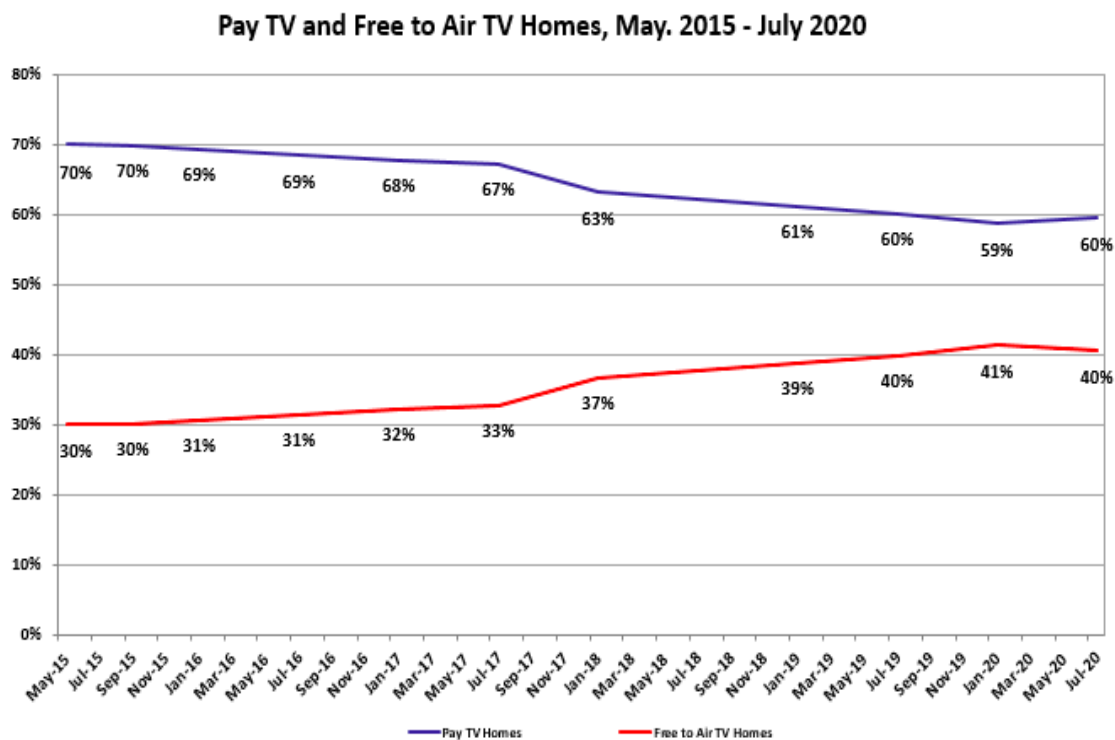
- 3.6 As of July 2020, there were 1.680 million TV homes in Ireland according to the Nielsen/TAM TV Audience Measurement Establishment Survey ('**Nielsen/TAM Establishment Survey**')<sup>69</sup>, representing an 88% penetration rate given approximately 1.903 million homes in Ireland<sup>70</sup>.
- 3.7 The two-sided nature of retail broadcasting markets is such that the reach, coverage and viewership of a Retail TV Broadcaster's programme services also impacts the level of advertising revenue that a Retail TV Broadcaster can receive. As a consequence, Retail TV Broadcasters typically use several broadcast platforms to distribute their programme services to end users.
- 3.8 Retail TV Broadcast services are available in Ireland primarily via terrestrial, cable, satellite and more recently on Internet Protocol ('**IP**') platforms and, depending on the type of platform, are offered either on a free to air ('**FTA**') basis or on a paid subscription basis ('**pay TV**').
- 3.9 Approximately 59% of TV homes had a pay TV service as of July 2020, down from 70.9% in January 2015. Further, approximately 41% of TV homes had an FTA service as of July 2020, up from 29.1% in January 2015 (see Figure 3 below).

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<sup>69</sup> The Nielsen/TAM Establishment Survey is a survey produced by Nielsen TV Audience Measurement (fieldwork is carried out by Behaviours and Attitudes) on behalf of Television Audience Measurement ('TAM') Ireland Ltd (a TV ratings body). The Establishment Survey covers areas such as ownership of TV related equipment, method of TV reception and demographics of TV household individuals.

<sup>70</sup> Based on the CSO's Labour Force Survey Q4 2019 estimate of number of households.

Figure 3: Pay Tv and Free to Air Tv Homes, January 2015 to January 2020



Source: Nielsen TV Audience Measurement Establishment Survey on Behalf of TAM Ireland Ltd.

**Source: Nielsen TV Audience Establishment Survey on Behalf of TAM Ireland Ltd**

- 3.10 The numbers in Figure 3 above include homes that have more than one platform for viewing TV programming content and that may (for example) have both a pay TV and FTA service (so-called ‘multi-platform’ homes). In order to understand the significance of different platforms for viewing behaviour a distinction is made between TV homes in which there is a single primary platform for viewing TV programming content and aggregate measures which consider homes with multiple platforms for viewing content. This is detailed below in paragraphs 3.11 to 3.18 with reference to ‘Reception Type’ and ‘Reception Method’.
- 3.11 Data from Nielsen’s TAM Establishment Survey shows that, based on ‘**Reception Type**’<sup>71</sup> data, as of July 2020 approximately 17% of TV homes were solely dependent on FTA terrestrial services for TV viewing (‘**FTA DTT Only Homes**’) compared to 17% in January 2015 and 18% in July 2016. In total, 38% of TV homes had a FTA TV service (which is split between the 17% accessing their programme services via FTA terrestrial means and 21% accessing via a FTA satellite platform and via Web-TV) (see Table 2 below).

<sup>71</sup>In the Nielsen/TAM Establishment Survey ‘Reception Type’ is hierarchically defined and mutually exclusive. A home is classified once within reception type, based upon the highest form of reception

Table 2: Television Homes by Reception Type, July 2020<sup>72</sup>

TV Reception Type (000s format)	July 2020	% of TV Homes
Irish FTA Terrestrial	198	12%
UK DTT	89	5%
FTA Satellite (UK Freeview)/Web-TV	352	21%
Cable/IPTV/Pay TV Satellite	1,041	62%
<b>Total TV Homes</b>	<b>1,680</b>	<b>100%</b>

3.12 As of July 2020, 12% of TV homes relied solely on Irish FTA Terrestrial<sup>73</sup> reception for their TV viewing. This proportion has remained broadly stable since the 2013 Decision which reported a figure of 11.6% of TV Homes in April 2013<sup>74</sup>. The proportion of TV Homes relying solely on UK FTA services has, however, shown a marked increase from 14.0% in January 2013 to 26.5% in January 2020 and 26% in July 2020. Most of this growth has involved uptake of the UK FTA satellite service which has grown from 12.5% in January 2013 to 21% in July 2020. The UK DTT FTA service grew from 1.5% in January 2013 to 6.0% in January 2020 and 5% in July 2020.

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available within the home. The reception hierarchy (from lowest to highest) is as follows: Irish DTT, UK DTT, FTA Satellite, Cable, Sky. The following hierarchy of reception types appears in the Nielsen/TAM Establishment Survey:

- **Irish FTA Terrestrial** refers to homes which receive any or all of the following: RTÉ One, RTÉ One +1, RTÉ2, RTÉ2+1, RTÉjr, RTÉ News Now, VM One, VM Two, TG4 & VM Three via an aerial (whether through a set-top box or an integrated digital TV) or via Saorsat. Irish FTA Terrestrial is referred to as '**Irish DTT**' in the Nielsen/TAM Establishment Survey.
- **UK DTT** refers to Homes which receive UK Freeview channels via an aerial (whether through a set-top box or an integrated digital TV).
- **FTA Satellite (UK Freeview)/Web-TV** refers to Homes which receive UK Freeview or foreign language channels via a satellite dish. Since January 2017, homes with a Sky satellite but no active Sky subscription have also been classified as FTA satellite. From July 2017, homes with Web TV-only are also included here (Broadband homes with no standard reception type that can view broadcast content online through a smart TV or connected device).
- **Cable/IPTV/Pay TV Satellite.** The Nielsen/TAM Establishment Survey refers to '**Total Cable**' (defined as including all Cable and IPTV homes) and '**Sky**' (including Sky's Pay TV Satellite Service). Until January 2017, Sky homes were defined as homes with Sky equipment (including active and lapsed subscribers). Since then, the Sky figure only includes homes with an active Sky subscription.

<sup>72</sup> Source: Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd

<sup>73</sup> Irish FTA Terrestrial as referred to in Table 1 consists primarily of the Irish DTT service 'Saorview' but includes a small number of TV Households receiving the equivalent service via satellite on Saorsat.

<sup>74</sup> 2013 Decision, Figure C1 Appendix C.

- 3.13 The proportion of pay TV homes has also remained relatively stable since the last review although has lost some ground relative to the change in the proportion of FTA TV homes. In January 2013 the proportion of cable/satellite/IPTV pay TV homes by Reception Type was at 70.9% declining to 61.6% in January 2020 (62% in July 2020).
- 3.14 End users can also receive satellite services on either a FTA or pay subscription basis. As of July 2020, approximately 21% of TV homes had a FTA satellite service and 40% a pay TV satellite service and such services are national in scope<sup>75</sup>.
- 3.15 IPTV (as a managed TV transmission service) can be regarded as another transmission platform for TV broadcasting.<sup>76</sup> It is currently limited mainly to urban areas and in July 2020 had a take-up of 6% of television homes up from 0% in 2013<sup>77</sup>. As higher speed broadband infrastructure is rolled out across Ireland IPTV may become a more pervasive option for an increasing number of households. However, the proportion of TV homes relying primarily on IPTV remains relatively small compared to the other platforms.
- 3.16 Figure 4 below shows how the proportion of TV homes by platform has changed on an annual basis since 2013.

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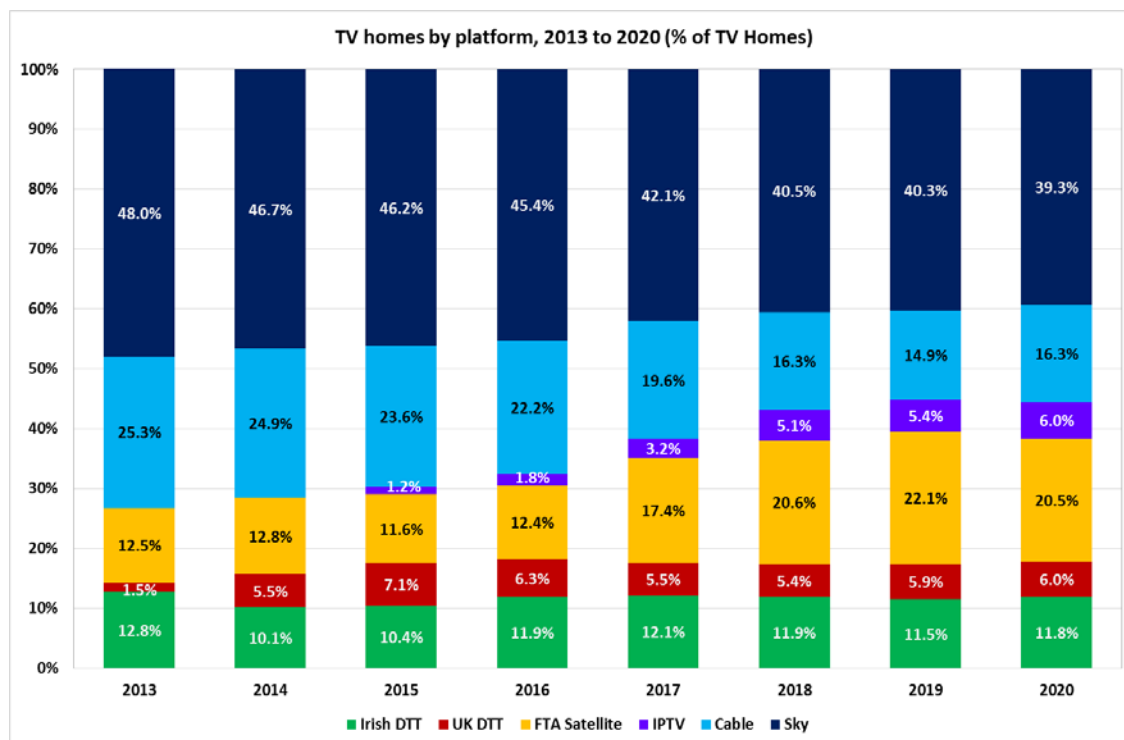
<sup>75</sup> These numbers refer to Reception Type. Therefore, it is based on the highest number of TV programme services received in a TV home and is mutually exclusive.

<sup>76</sup> Although broadcasting content can be viewed via the internet in a non-linear form this is not likely comparable to linear TV services. It is a non-managed service which can suffer from degradation, due to internet quality issues.

<sup>77</sup> Nielsen TV audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.



Figure 4: TV homes by platform for the period 2013 to 2020



Source: Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.

3.17 As can be seen in Figure 4 above the proportion of TV Homes viewing only Irish DTT has decreased slightly from 12.8% in January 2013 to 11.8% in January 2020. The share of Sky’s satellite pay TV offering and the share of VM’s cable pay TV offering has fallen since 2013. Although IPTV has grown by a small amount, the only platform that has shown any significant growth since 2013 is the UK FTA Satellite offering Freeview.

- 3.18 Based on ‘**Reception Method**’<sup>78</sup> data (see Table 3 below) 39% of TV homes in Ireland received Irish FTA Terrestrial TV Services<sup>79</sup> in their home. This suggests that a significant number of homes (over and above the 11.8% of TV homes relying solely on Irish FTA) are likely using Irish FTA Terrestrial Services together with TV services provided over other transmission platforms (including VM’s cable based pay TV services and Sky’s satellite TV service, as well as the UK FTA service “Freeview” via satellite).

**Table 3: Television Homes by Reception Method, July 2020**

TV Reception Method (000s format)	No. Homes January 2020	% of TV Homes
Irish FTA Terrestrial	641	38%
UK DTT	135	8%
Other Satellite (Freeview)	302	18%
Cable	377	22%
Pay TV Satellite	664	40%
IPTV	103	6%
Total TV Homes	1,680	n/a

**Source: Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.**

- 3.19 The continued importance of Irish terrestrial broadcasters’ TV programme services for Irish viewers is evident where, despite the increase in the range of TV programme services being available over time across cable and satellite platforms, these Irish FTA programme services have continued over time to maintain a large share of TV viewership relative to other commercial programme services.

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<sup>78</sup> ‘**Reception Method**’ data is measured differently to that of Reception Type. TV homes can have more than one method of reception. For example, a TV household may have Sky on their main set but receive channels on another set via Irish DTT. Establishment Survey respondents are asked to give details of reception type for each set within their home (up to 9 sets). The figures in Table 2 include details on all reception types within TV homes and are, therefore, not mutually exclusive. For this reason, the total % figures in the table do not add to 100%.

<sup>79</sup> Irish FTA Terrestrial refers to homes which receive any or all of the following: RTÉ One, RTÉ One +1, RTÉ2, RTÉ2+1, RTÉjr, RTÉ News Now, VM One, VM Two, TG4 & VM Three via an aerial (whether through a set-top box or an integrated digital TV) or via Saorsat. Irish FTA Terrestrial is referred to as ‘Irish DTT’ in the Nielsen/TAM Establishment Survey

- 3.20 In this respect, consolidated<sup>80</sup> national audience market shares for these TV broadcasters indicated that as of July 2020, RTÉ (RTÉ One, RTÉ One +1 RTÉ Two and RTÉ Junior) had a viewing market share of 23%, VM 1 (with +1) had 11% and TG4 had 2%<sup>81</sup>. In the 2013 Decision ComReg reported that in April 2012 RTÉ (being the programme services of RTÉ One, and RTÉ Two and associated +1 ‘timeshift’ channels) had a market share of 27.2%, TV3 (now VM 1) had 12.1% and TG4 had 2.5%<sup>82</sup>.
- 3.21 An important development in recent years has also been the entry and growth of over-the-top (‘OTT’) providers, in particular from subscription based video-on-demand (‘SVOD’) providers such as Netflix and Amazon Prime. These allow users to stream and/or download films and TV programme content in return for a monthly fee. Increasingly, the applications supporting these SVOD services are also available on the TV set via a smart TV or internet-enabled set top boxes or other devices. Alongside SVOD services, broadcaster VOD players associated with FTA services, such as 3player and RTÉ Player, have also grown in popularity.

## Consideration of Respondent’s Views

### Overview of Respondents’ Views

- 3.22 Of the five Submissions received, one Respondent (RTÉ) raised certain concerns with regards to ComReg’s analysis of trends in the provision of retail broadcast services. In this regard, RTÉ made a number of comments about the accuracy of the data used in the Consultation, including the following:

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<sup>80</sup> Consolidated data means Live + Timeshift data. The measurement and reporting of Time-Shifted Viewing (TSV) was introduced in September 2010. Since then Nielsen have been reporting on Live viewing, and time-shifted viewing, being any viewing that occurs post live broadcast. The sum of Live and TSV is the basis on which industry trades for advertising and, is the reference for all viewing, referred to as “Consolidated”. Consolidated data is issued after 7 days of viewing on day 8.

<sup>81</sup> The share of viewing by channel for July 2020 showed RTÉ One had 17.85%, RTÉ One + 1 had 1.21%, RTÉ Two had 3.86% and RTÉjr had 0.39%. VM 1 had 10.53% (with +1 equal to 0.34%), TG4 had 1.63%. VM 2 had 3.44% while VM 3 had 1.65% audience market share. . <https://www.tamireland.ie/downloads/reach-and-share/>

<sup>82</sup> See paragraph 3.19 of ComReg’s 2013 Decision.

- (a) The Retail TV Broadcast Market, according to RTÉ, is more complex than is suggested by the data and commentary set out at paragraph 3.7 of the Consultation<sup>83</sup> where ComReg noted that 61.6% of TV homes had a pay TV service as of January 2020, down from 70.9% in January 2015 and that approximately 38.4% of TV homes had an FTA service as of January 2020, up from 29.1% in January 2015. RTÉ submitted that the reduction in the total pay TV market from 70.9% to 61.6% reflects only a subset of the totality of the FTA Services market. According to RTÉ the complexity of this market is better described in Table 3<sup>84</sup> in the Consultation which set out the number of TV Homes by Reception Method. RTÉ also submitted that the commentary and data provided in paragraphs 3.8 and 3.9 of the Consultation<sup>85</sup> is overly simplistic.
- (b) RTÉ submit that the commentary at paragraph 3.10 of the Consultation which provides that “...*the proportion of TV Homes relying solely on UK FTA Services has, however, shown a marked increase from 14.0% in January 2013 to 26.5% in January 2020...*”, does not accurately reflect the market. According to RTÉ the majority of these homes share Saorview with the UK FTA services. RTÉ further submitted that the commentary in the Consultation that “...*most of this growth has involved uptake of the UK FTA satellite service which has grown from 12.5% in January 2013 to 20.5% in January 2020...*”, and that “...*the UK DTT FTA service grew from 1.5% in January 2013 to 6.0% in January 2020...*” does not accurately reflect the market.
- (c) In conclusion RTÉ submitted that Irish DTT and UK DTT are not exclusive homes, rather they overlap considerably. In addition, ‘Irish DTT’ and ‘Other Satellite’ homes categories are not exclusive homes but also overlap considerably.

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<sup>83</sup> Paragraph 3.9 in this Decision.

<sup>84</sup> Table 3 in this Decision.

<sup>85</sup> See paragraphs 3.10 and 3.11 of this Decision.

## ComReg's Consideration of Respondents' Views

- 3.23 ComReg does not agree with RTÉ's comments regarding the accuracy of the data used in the TV Transmission/Viewership Trends analysis as set out in paragraphs 3.4 to 3.18 of the Consultation and addressed in paragraphs 3.6 to 3.21 of this Decision. RTÉ's primary concern appears to be that ComReg has not accurately reflected in its analysis the complexity regarding the relationship between FTA and Pay TV platforms and RTÉ's view that there is considerably greater overlap between these two and also with other platforms. In this regard RTÉ suggest that the characterisation in Table 3<sup>86</sup> of the Consultation 'better describes' the complexity of the Retail Broadcast TV Market. RTÉ then submit further that ComReg's reference to 'FTA DTT Only' homes in paragraph 3.9 of the Consultation is incorrectly characterised as exclusive. ComReg notes that RTÉ appears to be confusing the distinction between the 'Reception Type' and 'Reception Method' data used in the Consultation. This distinction is however clearly made in paragraph 3.8 of the Consultation (and repeated in paragraph 3.10 of this Decision) in which ComReg notes that in order to understand the significance of different platforms for viewing behaviour a distinction is made between TV homes in which there is a single primary platform for viewing TV programming content and aggregate measures which consider homes with multiple platforms for viewing content. This distinction is clearly set out with reference to the difference between 'Reception Type' (defined in footnote 71 of this Decision)<sup>87</sup> and 'Reception Method' (defined in footnote 78 of this Decision)<sup>88</sup>. Importantly the reference to 'FTA DTT Only Homes' in paragraph 3.9 of the Consultation is based on 'Reception Type' data which is hierarchically defined and mutually exclusive and refers to the main form of reception available within the home.
- 3.24 ComReg also considered the fact that there are households with multiple platforms for viewing content. This is reflected in paragraph 3.18 above (paragraph 3.16 in the Consultation) which considers transmission by 'Reception Method' noting that households are likely using Irish FTA Terrestrial Services together with other TV services provided over other transmission platforms (including pay TV services like Virgin over cable and Sky via satellite, as well as the UK FTA service Freeview via satellite). ComReg therefore notes that it does in fact deal with the complexity inherent in the Retail TV Broadcast Market. Further, it is noted that a careful reading of the distinctions made between Reception Method and Reception Type will clarify any confusion on the part of RTÉ about the accuracy of the data in the Consultation.

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<sup>86</sup> Table 3 shows Television Homes by 'Reception Method'.

<sup>87</sup> Footnote 57 in the Consultation.

<sup>88</sup> Footnote 63 in the Consultation.

## Retail TV Broadcasting Assessment

3.25 There are two main dimensions according to which the retail market could potentially be divided, namely, either according to the TV viewing platform<sup>89</sup> or according to the nature of the service (i.e. FTA TV and pay TV). As in the 2013 Decision ComReg's focal point for its analysis is FTA TV services delivered over the DTT platform ('**FTA DTT**'). From this focal point ComReg must then assess whether the retail market definition should be broadened, based on effective demand-side substitutability<sup>90</sup> and supply-side substitutability<sup>91</sup> considerations. An explanatory note setting out ComReg's approach to market analysis in general and, in particular, to defining relevant markets is set out in Annex 1 of the Consultation<sup>92</sup>.

### DTT Demand-Side Substitution

3.26 In terms of demand-side substitution, as a Small but Significant Non-Transitory Increase in Price ("**SSNIP test**") becomes problematic in examining FTA services (as no charge is levied from which the effects of a SSNIP by a hypothetical monopolist ('**HM**') supplier of FTA TV Services can be examined), ComReg examines these broadcasting services on the basis of product/service characteristics and conditions of intended use and supply<sup>93</sup>.

3.27 ComReg's position with respect to the scope of demand for Retail TV Broadcast Services is that:

- (a) Pay TV services are not likely to be an effective substitute for FTA TV services (discussed in paragraphs 3.28 to 3.31 below);

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<sup>89</sup> Television services are currently available in Ireland through the following BTS platforms: DTT, cable, satellite and internet protocol ('**IP**') technology.

<sup>90</sup> Following the reasoning set out in the European Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5) ("**Notice on Market Definition**"), a substitute is 'effective' if customers can switch easily to the available substitute product, such that it can have a significant impact on the prevailing conditions of sale, such as prices. The approach to market definition is set out in greater detail Annex 1 of the Consultation.

<sup>91</sup> Supply-side substitution refers to whether suppliers of alternative transmission platforms could credibly switch to supply on a FTA basis and with comparable coverage levels to terrestrial broadcast transmission (sufficient to meet broadcasters legal requirements) without incurring significant additional costs.

<sup>92</sup> The methodology employed for market definition purposes is useful for purposes of the retail market analysis as this will also inform subsequent definition of the Relevant Wholesale BTS Markets and, in particular, inform ComReg's assessment of whether, through substitutability at the retail level, other forms of communication potentially exercise an effective indirect constraint on an SP supplying Wholesale BTS.

<sup>93</sup> The concepts referred to in this paragraph (e.g., demand-side substitution, SSNIP and HM) are explained in greater detail in Annex 1 of the Consultation.

- (b) Direct-to-home ('DTH') satellite FTA TV services are not likely to be an effective substitute for FTA DTT services (discussed in paragraphs 3.32 to 3.37 below); and
- (c) Retail TV broadcasting services broadcast from other TV viewing platforms are unlikely to act as an effective constraint on the FTA DTT platform (discussed in paragraphs 3.38 to 3.49 below).

### Pay TV services are not likely to be an effective substitute for FTA TV services

- 3.28 ComReg's view is that pay TV is not an effective substitute for FTA TV services.
- 3.29 ComReg notes that while the percentage of TV homes with a pay TV service has declined from 73% in January 2013 to 62% in July 2020 the percentage of TV Homes with a FTA Service has grown from 27% in January 2013 to 38% in July 2020<sup>94</sup>.
- 3.30 In this regard ComReg notes that the relative fall in the uptake of traditional pay TV platforms (i.e., cable and satellite) may be somewhat attributed to the growth in SVOD services such as Netflix and Amazon Prime which, when combined with an FTA TV service, presents an affordable alternative to the traditional cable and satellite pay TV services. In this regard the 2018 Mediatique Report observed that:

*"A growing number of non-pay TV households are augmenting free TV with SVOD subscriptions, a trend enabled by improving connectivity and the widespread ownership of internet-enabled devices.*

*As one might expect, SVOD penetration is lower among free TV households. These consumers tend to be older, less likely to have smart TVs or other means of accessing OTT services, are less likely to have internet access, and generally have a greater unwillingness to make regular payments for any TV content.*

*There is, however, a clear group of consumers for whom SVOD services and free TV together offer a better mix of cost-effectiveness, quality, or both. For some of these households, SVOD services are a substitute for pay TV services".<sup>95</sup>*

- 3.31 Consistent with the 2013 Decision, ComReg therefore maintains its view that pay TV is not an effective substitute for FTA TV services.

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<sup>94</sup> Nielsen TV Audience Measurement Establishment Survey on Behalf of TAM Ireland Ltd.

<sup>95</sup> Mediatique Broadcasting Authority of Ireland "A report on market structure, dynamic and developments in Irish media" December 2017 [https://www.bai.ie/en/?attachment\\_id=132760](https://www.bai.ie/en/?attachment_id=132760)



### **DTH satellite FTA TV services are not likely to be an effective substitute for terrestrial FTA DTT services**

- 3.32 ComReg's view is that FTA satellite services are not substitutes for FTA DTT services.
- 3.33 ComReg notes that due to content rights issues (i.e. the costs associated with purchasing broadcasting content rights to enable the satellite broadcast of such content to a footprint outside of Ireland), Irish terrestrial TV programme services (RTÉ One and RTÉ Two), are not available via FTA satellite (other than "Saorsat" as discussed below). This means that end users who wish to view such programme services would require broadcasting equipment (e.g. combi-set top box, aerial / "Saorview" TV and satellite reception equipment) capable of receiving both FTA DTT terrestrial and satellite signals.
- 3.34 RTÉ stated in its response to the 2019 Information Request<sup>96</sup> that since 2013 there is a satellite service with a transponder spot beam in the Ka-Band which is specifically focused on the Republic of Ireland and from which RTÉ's DTT programme services are also made available (marketed as Saorsat, albeit as a secondary means of BTS of last resort)<sup>97</sup>. However, as noted by RTÉ a different low noise block down-converter ('LNB')<sup>98</sup> is required for domestic installation compared to the common Ku-LNB. ComReg notes that this introduces additional obstacles to consumers switching to a new satellite service such as Freeview or Saorsat.
- 3.35 It is noted that households with existing FTA or subscription based satellite services have their satellite dishes pointing to an orbital position which is different to the satellite from which RTÉ's Saorsat service operates and, it is ComReg's view that a sufficient number of households would be unlikely to adjust/reorient their existing satellite dishes towards the satellite from which Saorsat is broadcast, in particular, given the expertise/costs involved in doing so, along with the potential loss of the reception of their existing satellite programme services. The content available via the satellite from which Saorsat is broadcast is far less than that which is available via other satellite services. In view of this, ComReg's view is that it reduces its attractiveness to households, including those with an existing satellite dish.

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<sup>96</sup> RTÉ's 23 August 2019 submission in response to the 2019 Information Requests.

<sup>97</sup> In this respect, RTÉ indicates that Saorsat is effectively a service of last resort given that it states that homes should exhaust all options of receiving Saorview (its DTT service) before reverting to Saorsat. RTÉ also states that Saorsat has been put in place in order to reach the 1-2% of television homes who are unable to receive DTT.

<sup>98</sup> LNB is the receiving device mounted on satellite dishes used for satellite TV reception, which collects the radio waves from the dish. It receives the microwave signal from the satellite collected by the dish, amplifies it, down converts the block of frequencies to a lower block of intermediate frequencies ('IF'), so the signal can be carried to the indoor satellite TV receiver using coaxial cable.

- 3.36 ComReg accepts that it is technically possible for Saorsat satellite services and separate FTA satellite platforms to be received on a single satellite dish. However, this would require the end user to install a second LNB offset on its existing satellite dish. ComReg considers that there are a number of issues which make this difficult and are thus likely to limit its attractiveness to even many existing FTA satellite end users. To receive both Saorsat and other FTA satellite services, an end user would need to have:
- (a) A solid satellite dish;
  - (b) A LNB for the Ku-Band (that is used by the FTA ASTRA satellite service 'Freesat');
  - (c) A LNB for the Ka-Band (that is used by the FTA Eutelsat satellite service 'Saorsat');
  - (d) An appropriate support arm to mount both LNBs on the satellite dish; and
  - (e) A set top box/TV set that can decode the FTA satellite signals as received at the dish.
- 3.37 It is ComReg's position that all but a few technically competent users would not be in a position to safely and correctly install most of the above equipment and, in view of this it would likely require an installation service to do so. As a consequence of these issues including greater complexity of installation, the need for particular equipment (e.g. solid satellite dish) to view both Saorsat and other FTA satellite signals, along with the additional cost to the end user of making such changes, ComReg's view is that this is likely to limit the attractiveness of such an option as a potential alternative for consumers.

### **Retail TV broadcasting services broadcast from other TV platforms are unlikely to act as an effective constraint on the FTA DTT platform**

- 3.38 ComReg's position is that demand-side substitution to other TV platforms is unlikely to effectively constrain services provided over the FTA DTT platform.
- 3.39 As noted above, RTÉ has submitted (in its response to the 2019 Information request) that ComReg must have regard to developments in the Irish media landscape since 2013. In particular RTÉ state that account must be taken of the convergence of media and telecommunications, the increase in the variety of platforms available for viewing content as well as changes in the manner in which content is consumed<sup>99</sup>.

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<sup>99</sup> Page 6, 7 of RTÉ's 23 August 2019 submission in response to the 2019 Information Requests.

- 3.40 ComReg acknowledges the importance of these developments and their potential impact on competition in the sector and, ultimately, the need for *ex ante* regulation. However, ComReg notes that for purposes of this review it is also important to consider whether or not Retail TV Broadcasting services broadcast from other TV platforms are an effective indirect constraint<sup>100</sup> on the price of wholesale BTS. i.e., whether retail end user behaviour would prevent a profitable SSNIP in wholesale BTS prices through FTA DTT viewers switching to other TV platforms.
- 3.41 In order to conclude that Retail TV Broadcast Services broadcast from other TV platforms are an indirect constraint on the price of wholesale BTS, evidence would be needed that a wholesale price increase would be passed through to retail customers and that this would result in sufficient demand substitution at the retail level to render the wholesale price increase unprofitable.
- 3.42 However, because FTA DTT is viewed on a free basis, channels cannot simply pass on higher wholesale BTS costs to viewers. It is possible in principle that channels could respond to higher wholesale BTS costs in ways that would reduce the relative quality of DTT programme content or quality (say by broadcasting in Standard Definition rather than a High Definition) and that retail customers could respond by switching to other platforms.
- 3.43 Channels could in principle respond to higher wholesale BTS costs by reducing quality (e.g. investing less in content). However, this would potentially affect non-DTT platforms, on which the same channels are present. While it is possible in principle that the quality of FTA channels could reduce to an extent that marginal consumers of DTT switched to subscription services, a change in wholesale BTS costs would need to have a material impact on channels' overall costs, and consequently on their quality, in order to have this effect on the DTT platform as a whole.
- 3.44 Alternatively, channels could withdraw from the DTT platform. However, there is limited scope for channels to leave the DTT platform in response to higher wholesale BTS prices, given the presence of coverage obligations in Ireland. In their submissions in response to the 2019 Information Requests RTÉ, VM and TV4 emphasised the fact that national coverage obligations imposed on them through the 2009 Broadcasting Act and/or related licensing conditions means that they are dependent on RTÉ's DTT platform in order to meet these national coverage obligations<sup>101</sup>. They therefore have no alternative but to be on the FTA DTT platform. In this respect RTÉ is an unavoidable trading partner.

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<sup>100</sup> See paragraphs 4.34 to 4.35 regarding the assessment of indirect constraints in the context of wholesale market analysis.

<sup>101</sup> See paragraphs 2.30 to 2.44 for an overview of statutory and licensing obligations of all the public service broadcasters in Ireland.

- 3.45 In this regard ComReg notes that the proportion of FTA DTT Only TV Homes has increased from 14% in January 2013 to 17% in July 2020. ComReg also notes that the 17% of FTA DTT Only Homes can be split into 12% TV Homes with an Irish DTT only service (**'Irish DTT Only'**) and 5% of TV Homes with a UK DTT only service (**'UK DTT Only'**). The proportion of Irish DTT Only TV Homes has declined slightly from 12.7% in 2013 to 12% in July 2020. This suggests that there has been little effective substitution of Irish DTT Only TV Homes to other TV platforms. The percentage of UK DTT Only TV Homes has increased from 1.5% in 2013 to 5% in July 2020. ComReg notes that substitution between the Irish DTT and UK DTT service is unlikely due to the fact that RTÉ programming content is not available on the UK FTA services available in Ireland (including DTT and satellite)<sup>102</sup>.
- 3.46 As noted in paragraph 3.29 above the decline in the proportion of TV Homes with a pay TV Service (including TV Homes with multiple TV platforms) relative to the proportion of TV Homes suggests that where alternative platforms are available to households, other TV platforms are more likely to complement a FTA service rather than be a substitute.
- 3.47 ComReg also notes that the content of pay TV programme services (whether provided over cable or via satellite) is far greater and diverse than that which is usually available via FTA platforms, much of which is likely to continue to only remain available through a pay TV service. Indeed, those end users that subscribe to pay TV services are likely to do so in order to view the particular content (sports, movies, other specific programme content etc.) they are unable to receive via FTA platforms. As existing FTA end users have largely shown an unwillingness to switch to a pay TV service (i.e. as noted in paragraph 3.30 above), this suggests to ComReg that for such end users, the perceived benefits of receiving additional content through the cable, satellite and IPTV pay TV platforms do not sufficiently outweigh the costs (such as recurring subscription fees, equipment fees and minimum contract term commitments<sup>103</sup>).

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<sup>102</sup> Source: Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.

<sup>103</sup> Note further that pay TV services also entail minimum contract commitments (typically 12 months) which are subject to early cancellation fees which would be likely to reduce the incentive of end users to switch between FTA and pay TV services.

- 3.48 ComReg is of the view that the availability of Retail Broadcast Services provided over broadband (such as IPTV) is not, over the period of this review, likely to exert a sufficiently effective indirect constraint on the existing wholesale BTS/DTT platform in Ireland. This is partly related to the reasons discussed above (national coverage obligations of RTÉ, VM, and TG4 and stability in the number of FTA DTT only TV Homes) and also because next generation broadband infrastructure is not yet universally available to all households in Ireland (in order to potentially be used, for example, as a FTA TV delivery platform at a coverage level to meet coverage obligations). In its submission in response to the 2019 Information Requests RTÉ noted that the improved broadband infrastructure needs to be considered by ComReg in terms of potential long-term substitutability as this could (depending on the success of its roll out) be an effective substitute for FTA DTT<sup>104</sup>. In this regard ComReg notes that even with greater availability of broadband an assessment would still have to be done to determine whether or not platforms such as IPTV would be an effective substitute. While it is possible that eventually ubiquitous high speed broadband networks could be available in Ireland; if this were to occur, the channels that are currently delivered FTA could technically be delivered to all Irish homes over broadband. However, this is unlikely to happen in the next 3 to 5 years. Many consumers prefer to watch the FTA service via DTT, rather than over their broadband connection, so it is not clear that FTA DTT would be effectively constrained, even with ubiquitous high speed broadband availability<sup>105</sup>.
- 3.49 ComReg is therefore of the view that currently and for the next three to five years demand-side substitution to other TV platforms is unlikely to effectively constrain services provided over the FTA DTT platform. While there has been some progress with the implementation of the National Broadband Plan ('NBP') this is (as of the writing of this Decision) in its early stages and much work remains to be done before roll-out targets are met<sup>106</sup>. However, ComReg will continue to monitor developments in the availability of alternative platforms (particularly broadband infrastructure) and will assess the potential impact in this regard on the scope of demand for Retail TV Broadcasting services and BTS.

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<sup>104</sup> Page 7 of RTÉ's 23 August 2019 submission in response to the 2019 Information Requests.

<sup>105</sup> Page 4 of VM's 26 July 2019 submission in response to the 2019 Information requests

<sup>106</sup> <https://www.gov.ie/en/press-release/e15062-high-speed-broadband-for-11m-people-in-homes-schools-businesses-acro/> The NBP aims to bring broadband to 537,596 premises, including 100,000 businesses and farms, and over 600 schools. By the end of 2021 the NBP aims to pass 150,000 premises. Approximately 70,000-100,000 premises will be passed each year thereafter with the final premises to be completed in 2026.

## DTT Supply-Side Substitution

- 3.50 ComReg is of the view that effective supply-side substitution is unlikely due to the high cost involved in building digital terrestrial BTS networks. Cable networks do not provide the same level of coverage<sup>107</sup> as the FTA DTT platform and is a pay TV service. IPTV is also a pay TV service and is currently concentrated in urban areas given the current level of high speed broadband availability.<sup>108</sup> While satellite services are national in coverage, as noted in paragraphs 3.32 to 3.37 above, planning restrictions may limit the likely ability of end users to take up such services. Further, content rights issues would likely restrict the ability of Irish terrestrial programme services to be carried via satellite (with the exception of the Eutelsat satellite which, as noted in paragraph 3.33 above, has a specific spot beam focused on Ireland).
- 3.51 These issues are unlikely to make supply-side substitutability sufficiently prompt or effective (and without incurring significant costs), such that suppliers of alternative BTS platforms could credibly switch to supplying FTA TV BTS on a coverage basis equivalent to that provided by the terrestrial BTS platform (and on a basis sufficient to meet Irish downstream DTT Broadcasters' statutory/licence coverage requirements).

## DTT Geographic Scope

- 3.52 ComReg is of the view that retail FTA DTT broadcasting services markets are likely to be national in scope. Unlike terrestrial and satellite broadcast services, cable and IPTV are not nationally available. Nevertheless, the content and pricing of all platforms tends to be geographically uniform within their geographic footprints.

## Consideration of Respondents' Views

### Overview of Respondents' Views

- 3.53 Of the five Submissions received, two Respondents (RTÉ and 2rn) disagreed with certain aspects of the retail market assessment.
- 3.54 RTÉ did not agree with ComReg's view in paragraph 3.40 of the Consultation that there is little effective substitution of Irish DTT Only TV Homes to other TV platforms. RTE submitted that Irish DTT Only and UK DTT Only homes overlap considerably and are 'not exclusive'.

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<sup>107</sup> Approximately 54% of homes were passed (i.e. technically available) by cable TV services.

<sup>108</sup> IPTV subscriptions were estimated at circa 5.7% of TV homes in Ireland as of July 2019.



3.55 2rn submit that while the only FTA terrestrial transmission market is delivered via the 2rn broadcast infrastructure, other platforms such as cable and pay satellite, deliver a comparable services which are in competition with the service delivered using the 2rn FTA BTS platform and which consumers could choose as a substitute for FTA services. 2rn is of the view that it is an excessively narrow definition of the television transmission market to conclude that all pay services do not constitute an effective substitute for the current FTA offerings. According to 2rn consumers wishing to substitute from services delivered via the 2rn platform to alternatives, e.g. cable or satellite services, would incur a level of cost which is a point of differentiation but does not necessarily effectively put these FTA and pay TV services in a different market. Therefore, 2rn submit that retail substitution, particularly in the Retail TV Broadcast Market, is possible and is likely to become more seamless during the period covered by the current review. 2rn therefore are of the view that a broader definition of the Retail TV Broadcast Market is appropriate.

## ComReg's Consideration of Respondents' Views

3.56 ComReg does not agree with 2rn's assertions that the Retail TV Broadcast market has been defined too narrowly by ComReg. Firstly, 2rn does not provide any evidence to support its assertion that there is effective retail substitution from the FTA DTT platform to other broadcast platforms. Secondly, 2rn's views in this regard appear to contradict those of RTÉ who has stated in its submission that it agrees with ComReg's preliminary conclusions on the retail television market assessment. In this regard RTÉ acknowledged in its Submission that the IPTV market share is currently limited, although noting that it is likely to grow as a mix of FTA and pay TV services over the coming years, following on from the rollout of rural broadband. Importantly, RTÉ submit that IPTV services are "...*poised to increase their market power within the next five to seven years*"<sup>109</sup>. ComReg notes in this regard that currently and for the next three to five years demand-side substitution to other TV platforms is unlikely to effectively constrain services provided over the FTA DTT platform<sup>110</sup>. Neither RTÉ nor 2rn have provided any meaningful evidence to the contrary. As noted in paragraph 3.49 above ComReg will continue to monitor developments in the availability of and any substitution to alternative platforms (particularly broadband infrastructure).

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<sup>109</sup> See page 12 of RTÉ's Submission in response to the Consultation.

<sup>110</sup> See paragraph 3.15 for example in which it is noted that IPTV is currently limited mainly to urban areas and in July 2020 had a take-up of 6% of television homes up from 0% in 2013.



## Conclusions on Retail Television Broadcasting

- 3.57 Having regard to the analysis set out in paragraphs 3.25 to 3.52 above, ComReg's conclusion is that, within the lifetime of this BTS Review, retail substitution from the FTA DTT platform to other broadcasting platforms is not likely to be sufficient to warrant the definition of a broader retail market and is thus a distinct relevant market.

## Radio Transmission/Listenership Trends

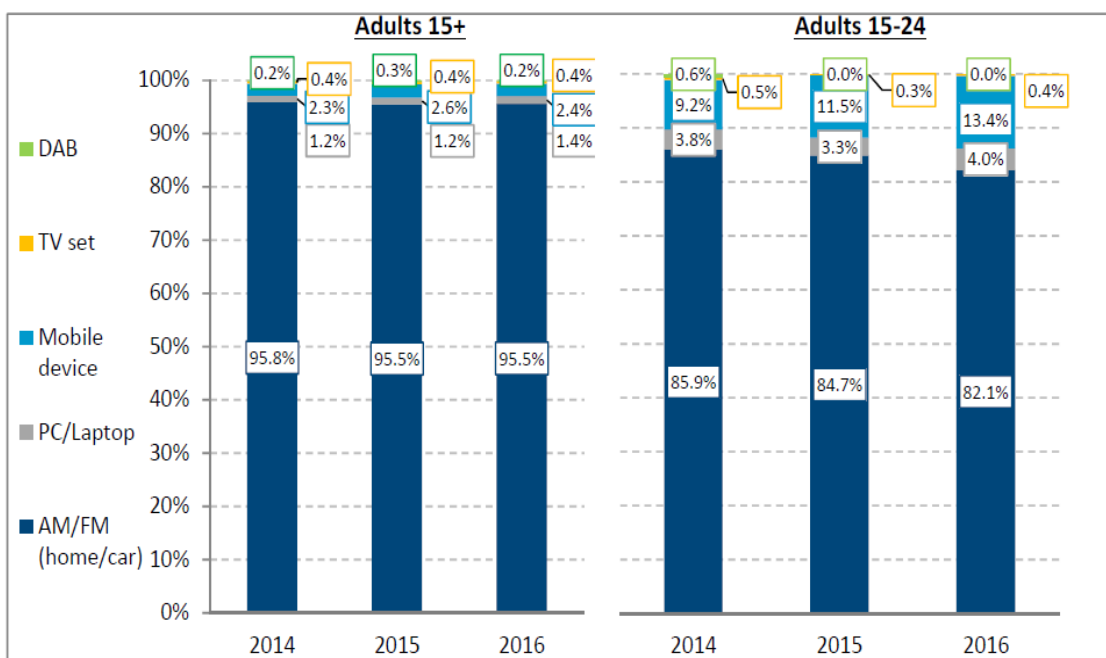
- 3.58 In terms of radio transmission, content is primarily deployed over terrestrial broadcasting networks, transmitted to in-home radio equipment or to in-car radios.
- 3.59 The 2018 Mediatique Report notes that in 2016, 92% of households had FM/AM radio and 90% had an 'in-car radio', with only 20% penetration for Digital Audio Broadcast ('DAB')<sup>111</sup> radio sets. The 2018 Mediatique Report notes further that despite the recent growth in DAB take-up among the population (up from 10% in 2012), it still only accounts for a small proportion of overall listening, partly because 55+ listeners – who are proportionally heavier listeners of radio – are less likely to own DAB sets. Figure 5 below shows radio consumption by device for all adults 15 years and older and for younger adults aged 15 to 24 for the period 2014 to 2016. There appears to be a trend with young adults in the 15 to 24 age group of an increasing proportion of radio listening via mobile devices. However, radio listening via AM/FM has been the dominant means and ComReg considers that this is not likely to change within the period of this review.
- 3.60 The 2018 Mediatique Report notes further that widespread ownership of smartphones notwithstanding:

*“overall radio listening on these devices is constrained by mobile data allowances and cost, low uptake of Irish online/app based radio, and pre-existing user habits (that is, most consumers are accustomed to listening through traditional sets, and they are more likely to listen to the radio at times of day when they have access to traditional/car radios)”*

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<sup>111</sup> DAB is a digital radio standard for broadcasting digital audio radio services. It refers to a method for the digital transmission of radio signals for mobile reception.

Figure 5: Radio Consumption by device for adults 15+ and adults 15 – 24, 2014 to 2016



Source: JNLR Media and platform report 2016. 2015-16 data is for Jan-Dec; 2014 is for Jan-Sept

3.61 There are two categories of national terrestrial radio broadcast services in Ireland, namely, RTÉ’s PSB radio services and national/quasi-national independent commercial radio services provided by Today FM and Newstalk. Localised radio services are also provided by other independent broadcasters.

3.62 Table 4 below compares share of listening by radio station group for 2012 versus 2019.

Table 4: Share of weekday listening, 7am – 7pm, by radio station group, 2012 - 2019<sup>112</sup>.

Radio Stations	Age 15+		Age 15 - 34	
	2012 share	2019 share	2012 share	2019 share
Any RTÉ radio	32.1%	31.3%	15.7%	20.6%
Today FM	9.4%	7.4%	14.6%	11.7%
Newstalk	4.4%	6.5%	3.5%	4.2%
Regional / local	54.1%	54.8%	66.2%	63.5%

<sup>112</sup> Data obtained from <https://www.bai.ie/en/news-and-information/publications/>. Publication dates January 2012 to December 2012 (available at file:///D:/Users/weeksk/Downloads/20130130\_JNLR\_PR\_JanDec12\_PK.pdf) and 2019/08/01 for 12-month periods July 2011 to June 2012 and January 2018 to December 2019 (available at [https://info.ipsosmrb.com/assets/files/jnlr/user\\_information/18-096611-JNLR-Feb'20-Press%20Release-Final.pdf](https://info.ipsosmrb.com/assets/files/jnlr/user_information/18-096611-JNLR-Feb'20-Press%20Release-Final.pdf)).

- 3.63 The JNLR/Ipsos MRBI report for the 12-month period from January 2019 to December 2019 show that more than 3.15 million (age 15+) listeners tune into radio every weekday – that is, daily radio listening at 81% of all adults<sup>113</sup>.
- 3.64 A large majority of Irish adults (82%) listen to the radio on an average day. More than half, 55% tune into their local or regional station and 43% listen to a national station. Among the younger, 15 to 34-year market, 71% listen daily.
- 3.65 Irish radio audiences continue to listen to a significant amount of radio everyday – tuning in, on average, for almost 4 hours (226 mins) per day during the prime 7am to 7pm time (Irish Adults listening Mon-Fri). In terms of share of all minutes listened in the country, National Radio currently has a 45.2% share of all minutes while a variety of local and regional radio stations hold the majority share position with 54.8% in this reporting period.

## Retail Radio Broadcasting Assessment

### Terrestrial Radio Demand-Side Substitution

- 3.66 From the perspective of radio broadcasting, ComReg notes that the main means of delivery of radio is over the terrestrial BTS platform. As with FTA Retail TV Broadcasters, Radio Retail Broadcasters do not charge a price to end users for the listenership of their programme services. Therefore, switching in response to price changes would not be observed in the case of Retail Radio Broadcasting. Although other qualitative factors (e.g., the quality of content) may have a bearing on the behaviour of listeners the fact remains that the vast majority of people listen to radio through terrestrial means and this has not changed over time.
- 3.67 Therefore, ComReg's view is that a sufficient number of end users would not be expected to switch to other radio BTS platforms (such as cable, satellite, and Internet) in the timeframe of this BTS Review such that it would effectively constrain the terrestrial radio BTS platform.

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<sup>113</sup> A summary of the JNLR/Ipsos MRBI report into radio listening is available at <https://www.ipsos.com/en-ie/ipsos-mrbijnlr-20194-summary-results>.

## Terrestrial Radio Supply-Side Substitution

3.68 ComReg's view is that broadcasting over other BTS platforms is not likely to be an effective supply-side substitute to a terrestrial BTS platform due to a combination of issues such as lower coverage levels (save for satellite) and the limited availability / take-up / mobility of devices / equipment for listening to radio broadcasting via such other BTS platforms.

## Terrestrial Radio Geographic Scope

3.69 ComReg's view is that the geographic scope of retail radio services can be distinguished on a local/regional and national basis, given that terrestrial Retail Radio Broadcasters receive licences from the BAI with defined coverage limits along these lines. Furthermore, ComReg notes that end users would likely listen to local/regional broadcasting services mainly for local news and content but would likely listen to national radio services mainly for national and international news and content.

## Conclusions on Retail Radio Broadcasting

3.70 Having regard to the analysis set out in paragraphs 3.58 to 3.69 above, ComReg's conclusion is that, at present, retail substitution from the FTA terrestrial radio platform is not likely to be sufficiently effective to warrant the definition of a broader retail radio broadcasting market in this BTS review such that the FTA terrestrial radio platform falls within a distinct relevant market.

## 4 Wholesale Market Definition

- 4.1 The purpose of market definition in this review is to identify the markets to which ComReg will apply the 3CT and, if necessary, to structure and inform ComReg's forward looking assessment of whether any SP holds a position of SMP in such BTS markets. In this section, ComReg presents its conclusions on which products are included in the relevant markets as well as the geographic extent of those markets.
- 4.2 Of the five Submissions received in response to the Consultation, 2rn agreed with the definition of Market A (while not commenting on Market B). RTE agreed with the definition of Market B (while not commenting on Market A). VM, TG4 and the BAI agreed with the wholesale market definitions in respect of both Market A and Market B.
- 4.3 In this Decision ComReg's maintains its position that the starting point for the assessment relates to those defined markets in which there is SMP regulation currently in place. Therefore, ComReg will consider the two separate Relevant BTS Markets as defined in ComReg's 2013 Decision (and identified below) and assess whether any changes should be made to these markets:
- (a) **Market A:** the market for Wholesale Access to National Terrestrial Broadcast Transmission Services (discussed in paragraphs 4.11 to 4.40 below); and
  - (b) **Market B:** the market for Wholesale Access to DTT Multiplexing Services (discussed in paragraphs 4.41 to 4.56 below).
- 4.4 In this Decision, ComReg refers to Market A and Market B collectively as the Relevant BTS Markets.
- 4.5 Market A is currently defined as a wholesale national market where an upstream terrestrial transmission network provider supplies a transmission and distribution service via its towers/masts infrastructure and relevant associated facilities (including transmission and distribution equipment, buildings etc.) in order to enable (i) the broadcast of national analogue terrestrial radio signals to end users; and (ii) the broadcast by a DTT Multiplex Operator<sup>114</sup> of its digital terrestrial broadcasting signals to end users.
- 4.6 Market B is currently defined as a wholesale national market which is downstream from Market A, whereby a DTT Multiplex Operator, using wholesale inputs purchased (or self-supplied) in Market A, combined with carriage on its DTT multiplex supplies a managed digital multiplexing service.

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<sup>114</sup> See paragraph 2.34 for a description of a Multiplex Operator.

- 4.7 The relationship between Market A and Market B and their relationship with other market participants in the broadcasting value chain, has been described in paragraph 2.48 and diagrammatically in the associated Figure 1.
- 4.8 ComReg's starting point is to consider the demand from terrestrial analogue Retail Radio Broadcasters and Multiplex Operators for wholesale access to terrestrial BTS and the demand from terrestrial Retail TV Broadcasters for wholesale access to DTT multiplexing services (being the narrowest product set)<sup>115</sup>. In line with the Modified Greenfield Approach<sup>116</sup> ('MGA'), ComReg's assessment starts with the presumption that SMP regulation would no longer be present in the specific markets under consideration. However, regulation present in other related markets or through the general regulatory framework is considered. This presumption ensures that ComReg avoids circular reasoning, whereby it draws conclusions regarding the competitive structure of a particular market which may be influenced by, or indeed premised on, existing regulation on that market.
- 4.9 ComReg is of the view that non-national terrestrial radio broadcasting transmission services which are provided on a very local or regional basis are in a separate market to the market for national and quasi-national BTS, but it is one which does not satisfy the 3CT (due to lower barriers to entry associated with, for example, ease of developing localised networks) and therefore, this is not considered further in this Decision<sup>117</sup>.

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<sup>115</sup> See paragraphs 3.25 to 3.70.

<sup>116</sup> See paragraph 2.26 above.

<sup>117</sup> Radio broadcasters enter into a contract with the BAI for the supply of a defined radio service area which can be local/regional or national, and radio broadcasters purchase local/regional or national transmission services on the basis of this contract. Although national radio broadcasters may broadcast their programme services from a number of third party transmission sites in addition to those service they receive from the national network provider, ComReg is of the view that these services are not a substitute for national terrestrial broadcast transmission and distribution services. The national terrestrial network has masts located in key high altitude sites around Ireland which enable large population coverage areas which are not capable of being easily replicated in a relevant time period, without which national coverage would be infeasible to address. Due to differences between local and national transmission networks (including area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters at co-located at sites) there are complex technical barriers which would have to be overcome by local terrestrial network operators before they could collectively provide a substitutable service to the national terrestrial network.

4.10 Market definition is a framework that enables the identification and assessment of the boundaries of competition between firms, ultimately to assess whether any SP has SMP in a particular market. In the context of this review the aim of this section is to consider whether there are any products or services which might be considered by a SP as an effective wholesale substitute for BTS, taking account of demand-side and supply-side considerations. This ultimately results in the identification of the product and geographic boundaries within which a SP is subject to any direct and indirect constraints in a given market. In defining the Relevant BTS Markets, ComReg begins by identifying the appropriate wholesale focal products in Market A and Market B respectively. From here, ComReg examines whether the respective focal product is in a market of its own, or whether a broader market should be defined taking into account direct supply-side or demand-side substitutes. ComReg also assesses the degree to which indirect constraints arising from downstream retail markets might effectively and sufficiently constrain behaviour in the respective BTS Markets, before then assessing the geographic scope of the market(s)<sup>118</sup>.

## Market A: The Market for Wholesale Access to National Terrestrial BTS

- 4.11 ComReg's assessment of the relevant market for wholesale access to national terrestrial BTS is set out below under the following headings:
- (a) Description of the Market A wholesale focal product (discussed in paragraphs 4.12 to 4.17 below);
  - (b) Demand-side substitution considerations (discussed in paragraphs 4.18 to 4.29 below);
  - (c) Supply-side substitution considerations (discussed in paragraphs 4.30 to 4.33 below);
  - (d) Indirect constraint considerations (discussed in paragraphs 4.34 to 4.35 below);
  - (e) Geographic scope of the market (discussed in paragraphs to 4.36 to 4.38 below); and
  - (f) Overall conclusions on the definition of Market A (discussed in paragraphs 4.39 to 4.40 below).

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<sup>118</sup> An explanatory note setting out ComReg's approach to market analysis and, in particular, to defining relevant markets is set out in the Consultation at Annex: 1: Explanatory Note on Market Analysis, available at <https://www.comreg.ie/publication/broadcasting-transmission-services-in-ireland>



## Description of Market A Wholesale Focal Product

- 4.12 ComReg's view is that the appropriate wholesale focal product, being the starting point for the market definition exercise, is the provision of national terrestrial BTS. ComReg's view is that national terrestrial BTS includes national terrestrial radio BTS purchased by national analogue Retail Radio Broadcasters and national DTT BTS purchased by Multiplex Operator(s) who in turn provide digital broadcasters with multiplexing services for terrestrial broadcasting.
- 4.13 ComReg's view is that a network designed to support downstream supply of national DTT BTS would also be able to deliver national terrestrial radio BTS. ComReg considers that a HM supplier of national terrestrial radio BTS could not therefore, profitably raise its prices above the competitive level, as it would likely face a sufficient constraint from a national DTT BTS provider. ComReg's view, therefore, is that it is appropriate to conclude that terrestrial DTT and radio BTS should fall within the same wholesale market. This was the position adopted by ComReg in its 2013 Decision and ComReg is of the view that there is no objective reason why this has materially changed since then<sup>119</sup>.
- 4.14 As outlined at section 2.57 to 2.65 above, 2rn is the sole provider of national terrestrial BTS in the Republic of Ireland. Table 5 below sets out a breakdown of transmission services offered by 2rn, including the number of transmission sites per TV and radio broadcast programming service and the associated geographic coverage

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<sup>119</sup> See paragraph 4.5 to 4.7 of the 2013 Decision.

Table 5: Breakdown of transmission services offered by 2rn

2018	Number of transmission sites employed	Geographic coverage
<b>RADIO</b>		
<b>RTÉ Radio 1 FM</b>	42 <sup>120</sup>	National
<b>RTÉ Radio 2FM</b>	41	National
<b>RTÉLyric</b>	41	National
<b>Raidió na Gaeltachta</b>	40	National
<b>DAB</b>	5 <sup>121</sup>	32% geographic coverage
<b>RTÉ Radio 1 LW</b>	1	National
<b>Today FM</b>	23	National
<b>Newstalk</b>	17	National
<b>TELEVISION</b>		
<b>RTÉ PSB Mux 1</b>	67	National
<b>RTÉ PSB Mux 2</b>	67 <sup>122</sup>	National

Source: 2rn Submission<sup>123</sup>

- 4.15 Information contained in 2rn's published separated accounts<sup>124</sup> indicates that the net book value of infrastructure in Market A is currently in the range of €40 to €45 million on an annualised basis. This consists of masts and towers, reinforced buildings built to withstand severe weather events, and specialised equipment also designed to withstand severe weather. These costs are significant relative to the size of the market for viewers and listeners in Ireland.

<sup>120</sup> The number of transmitters for FM (Radio 1 and Raidió na Gaeltachta) decreased in the years 2018 to 2020 from 43 to 42 sites because 2rn moved from an existing site to a new site in the midlands and there was a period of overlap.

<sup>121</sup> The number of transmitters for DAB decreased from 6 to 5 in the period 2018 to 2020; for DAB there had been a temporary transmitter in Dublin that is no longer in use.

<sup>122</sup> RTE PSB Muxes 1 and 2 transmitters increased from 66 to 67 (from 2018 to 2020).

<sup>123</sup> Based on best information as available to 2rn.

<sup>124</sup> <http://www.2rn.ie/wp-content/uploads/2019/05/REGULATED-ACCOUNTS-MARKET-A-2018.pdf>.

- 4.16 2rn has operated from many of the current transmission sites since the 1960s. Due to Ireland's geographical characteristics and sparse population/premises density, the sites where 2rn's infrastructure is located tend to be on high altitude sites which ensures adequate coverage is provided to remote areas. Paragraphs 2.57 to 2.65 above provide more detail on the key functional characteristics of the 2rn network.
- 4.17 In addition, access to these sites can be difficult, especially during winter months where, due to weather conditions (snow and ice for example), access roads may be blocked or inaccessible. Access to build new sites could prove to be problematic due to potential environmental and planning issues, making it difficult to replicate 2rn's current network and coverage area (97% population).

## Demand-Side Substitution

- 4.18 ComReg notes that there are a number of specific considerations that constrain the ability of national analogue Retail Radio Broadcasters and terrestrial Retail TV Broadcasters from switching their wholesale demand for terrestrial BTS to potential wholesale services provided on other BTS platforms.
- 4.19 ComReg considers that there are certain Retail TV Broadcasters (RTÉ, TG4 and VM) that have statutory/licence obligations which effectively prevent them from switching to other alternative BTS platforms (i.e. cable, satellite and Internet). RTÉ and TG4 are required under the 2009 Broadcasting Act<sup>125</sup> to be available, as much as reasonably is possible, to the whole community of Ireland on a FTA basis. Similarly, VM1 and VM2 is required<sup>126</sup> to be available on a FTA basis to a large percentage of the population (circa 90%).
- 4.20 ComReg notes that although UK TV programme services, among others, can be viewed in Ireland via FTA unencrypted satellite services, Irish DTT programme services such as those offered by RTÉ, TG4 and VM are not broadcast from these FTA satellite services, mainly given the coverage footprint of such FTA satellites (which extends beyond the Irish market and into other European countries for example) and owing to restrictions relating to the broadcast of certain content rights in non-Irish jurisdictions. As such, ComReg does not consider these FTA satellite services to be a viable terrestrial BTS substitute for TG4, VM and RTÉ. ComReg also notes that Irish DTT programme services are available via Sky's pay TV service in Ireland only, but are offered as part of its encrypted pay TV service and would not meet RTÉ's, TG4's and VM's requirements to broadcast their services on a FTA basis.

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<sup>125</sup> Pursuant to sections 114 and 118 of the 2009 Broadcasting Act, RTÉ and TG4 have, amongst other things, statutory objectives to operate a national free to air broadcasting TV service. 2009 Broadcasting Act. See <http://www.irishstatutebook.ie/2009/en/act/pub/0018/index.html>

<sup>126</sup> See paragraph 2.38 regarding the obligations of VM1 and VM2.

- 4.21 Insofar as cable is concerned, this is currently sold to end users only on a paid for basis and is more limited in coverage in comparison to the terrestrial BTS platform. Given the more limited coverage of cable and noting the licensing obligations (e.g. coverage and FTA transmission) of TG4, VM and RTÉ, it is ComReg's position that, cable is not likely to be considered as an effective substitute by terrestrial Retail TV Broadcasters.
- 4.22 ComReg also notes that although TV broadcasting programme content can be viewed via the Internet in a non-linear format, this is not, in ComReg's view, comparable to the viewing of linear TV services. Unlike other BTS platforms, the 'public' internet is an unmanaged service which can suffer from degradation, due to internet quality issues. As such ComReg does not view the unmanaged public internet to be an effective substitute to terrestrial BTS.
- 4.23 However, IPTV services could be considered to be another BTS platform for the broadcast of retail TV services. Currently the percentage of households in Ireland with a subscription to IPTV services is still relatively low. Given that IPTV is not currently a predominant means of TV access by end users, it is considered by ComReg to be unlikely that it will be a sufficiently attractive alternative BTS proposition for terrestrial Retail TV Broadcasters in the timeframe of this BTS Review. In any event, ComReg notes that IPTV generally operates on a pay basis which would restrict RTÉ, VM and TG4 from switching to this means of BTS given their statutory/licence requirements to be available on a FTA basis.
- 4.24 ComReg notes that the ability of national analogue terrestrial Retail Radio Broadcasters to switch from the existing terrestrial BTS platform is likely to be constrained by the popularity of terrestrial radio services as a reception method at the retail level (where it is freely available nationally, at good quality, and offers mobility). ComReg is of the view that in response to a SSNIP by a terrestrial radio BTS provider, national analogue terrestrial Retail Radio Broadcasters would be unlikely to switch in sufficient numbers to alternative broadcasting platforms such that it would effectively constrain the price setting behaviour of the HM supplier.
- 4.25 ComReg would note that while satellite services can technically offer a potential alternative means of BTS for Retail Radio Broadcasters, a listener (consumer) would be required to purchase a satellite receiver to receive a radio signal by such means. There has been limited demand for such receivers in Ireland to date and, in ComReg's view this situation is unlikely to change within the timeframe of this BTS Review. Furthermore, it is also unclear to ComReg how the demand for radio services consumed by listeners on the move (e.g. in their vehicles) could be effectively (i.e. within a short timeframe without incurring significant costs) met were satellite BTS to be used as an alternative for terrestrial radio BTS.

- 4.26 ComReg is of the view that the provision of retail radio services over broadband is not likely to be considered by terrestrial Retail Radio Broadcasters to be an effective substitute for the terrestrial BTS platform (owing to subscription costs, the need for additional equipment such as a set top box, a lack of mobility, and coverage limitations compared to terrestrial BTS). Retail demand for cable broadcasting services is predominantly driven by the demand for TV broadcasting content, with the listenership of radio via cable being low. Therefore, ComReg's view is that radio broadcasting services supplied over cable are not likely to be considered by terrestrial Retail Radio Broadcasters to be an effective substitute to national FTA terrestrial radio BTS.
- 4.27 Given the lack of comparable mobility of radio broadcasting over the internet and potential quality issues in an unmanaged public internet context, ComReg considers that it is unlikely to be regarded as an effective substitute to terrestrial supply by listeners and, in turn, an attractive substitute platform by terrestrial downstream Radio Broadcasters. Though use of such services may increase in the future, it is unlikely that such services will become a significant alternative access means to traditional terrestrial radio services in the timeframe of this BTS Review.
- 4.28 ComReg therefore considers that the terrestrial BTS platform is of significant commercial importance to national analogue terrestrial Retail Radio Broadcasters so that effective demand-side substitution is unlikely.
- 4.29 Therefore, ComReg's view is that demand-side substitution to other BTS platforms is unlikely to effectively constrain the price setting behaviour of a HM supplier of terrestrial national DTT / radio BTS.

## Supply-Side Substitution

- 4.30 ComReg's view is that supply-side substitution must be considered having regard to the two-sided nature of broadcasting markets, namely the relationship between audience market share on the one hand and advertising revenues on the other, as well as the desire for Retail Broadcasters to be on as many platforms as possible to maximise this two-sided relationship.

- 4.31 For cable, satellite and IPTV to be an effective alternative for terrestrial broadcast transmission, terrestrial retail end users would have to move to such platforms; this would involve the cost of purchasing and installing equipment necessary to receive their broadcasts on this different platform. ComReg notes that cable TV and IPTV platforms do not offer national coverage, and the costs of rolling out such networks are high (and largely sunk). ComReg also notes that effective satellite supply is likely constrained by jurisdictional restrictions regarding terrestrial Retail TV Broadcasters' programme content rights<sup>127</sup>.
- 4.32 The question then arises whether, in response to a 5 – 10% increase in the price of terrestrial BTS, potential suppliers could reasonably be expected to switch to supply competing terrestrial services relatively promptly (e.g. within a one year timeframe) and without incurring any significant costs or risks such as to be credible and capable of preventing this price increase from being sustained.
- 4.33 It is unlikely that suppliers of alternative broadcast transmission platforms could credibly switch to supplying broadcasters on a FTA basis and with comparable coverage levels to terrestrial broadcast transmission (sufficient to meet these broadcasters' legal requirements) without incurring significant additional costs, risks and time delays. Prompt or effective supply-side substitution is highly unlikely due to the high entry costs associated with building such networks most of which would be sunk in the case of market exit. Other barriers to entry include difficulty in finding suitable sites for broadcast transmission on a national scale, and the likely difficulty of getting planning permission. Therefore ComReg's view is that effective supply-side substitution is unlikely.

## Indirect Constraints

- 4.34 ComReg's view is that, having regard to the retail market assessment in Section 3<sup>128</sup>, indirect constraints are not likely to be sufficient to effectively constrain a HM national terrestrial BTS network supplier, as terrestrial FTA Retail Broadcasters (either on the DTT platform or radio) do not charge a price to end users for the viewership/listenership of their programme services (in accordance with their licence conditions) and thus a SSNIP in wholesale BTS prices cannot be passed directly to end users.

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<sup>127</sup> See paragraph 3.33 above.

<sup>128</sup> See in particular paragraphs paragraph 3.25 to 3.57 above.

- 4.35 An increase in wholesale prices for BTS, while not being capable of being passed through directly to end users at the retail level, could potentially affect the scope and nature of content offered by a terrestrial Downstream Broadcaster. This in turn, could impact the terrestrial Downstream Broadcaster's retail audience market share and the related advertising revenues it could command which would likely benefit a vertically integrated HM supplier of terrestrial BTS who also competes in the same or related downstream markets. However, a 5-10% rise in wholesale prices above competitive levels will, in ComReg's view, be unlikely to pose an effective constraint on the price setting behaviour of the HM supplier of terrestrial BTS, given that an insufficient number of end users would be likely to switch to other BTS platforms in response. As noted in ComReg's assessment of the wholesale market in paragraphs 4.12 to 4.17, there is limited scope for Retail Broadcasters to leave 2rn's BTS platform in response to higher BTS prices, given the presence of national or near national coverage obligations on a FTA platform.

## Geographic Scope

- 4.36 ComReg's position is that although it may be argued that each BTS base station/mast site constitutes a separate market (transmission from alternative sites are not substitutes) it is appropriate to define the geographic market by grouping together areas which are subject to sufficiently homogeneous competitive conditions and can be differed from neighbouring areas. In this regard, ComReg considers the competitive conditions across all sites to be sufficiently homogenous, given that access to wholesale BTS by downstream national/quasi-national radio broadcasters and Multiplex Operators is contracted on the basis of the national network footprint.
- 4.37 ComReg notes that national terrestrial Retail Radio Broadcasters' coverage obligations are set out either in legislation or in their BAI awarded licensed programme service contracts, and as a result require terrestrial BTS coverage on a national/quasi-national basis<sup>129</sup>.
- 4.38 Given the above, and that the actual national coverage footprint of terrestrial BTS networks (estimated at 98% population coverage), ComReg considers the geographic market to be national in scope.

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<sup>129</sup> As noted in paragraph 4.9 ComReg is of the view that non-national terrestrial radio broadcasting transmission services which are provided on a local or regional basis are in a separate market to the market for national and quasi-national BTS, but it is one which does not satisfy the 3CT (due to low barriers to entry) and therefore, this is not considered further in this document.



## Overall Conclusions on Wholesale Market A Definition

4.39 Having regard to the overview in paragraphs 4.13 to 4.38 above ComReg has defined a market for wholesale access to national terrestrial BTS (referred to as Market A). This is a wholesale upstream market whereby a BTS network provider supplies a transmission and distribution service via its towers/masts and relevant associated facilities including transmission and distribution equipment in order to enable:

- (a) The broadcast of national analogue terrestrial radio signals to end users; and,
- (b) The broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end users (such Multiplex Operators operate downstream from this Market A).

4.40 Having set out a definition of Market A, ComReg next considers the definition of a separate wholesale market for access to DTT multiplexing services (being Market B). This wholesale market operates downstream to Market A.

## Market B: The Market for Wholesale Access to DTT Multiplexing Services

4.41 Of the five Submissions received in response to the Consultation, RTE agreed with the definition of Market B (2rn did not comment on Market B). VM, TG4 and the BAI agreed with the wholesale market definitions in respect of both Market A and Market B<sup>130</sup>.

4.42 ComReg's assessment of the relevant market for wholesale access to DTT multiplexing services is set out below under the following headings:

- (a) Description of Market B wholesale focal product (discussed in paragraph 4.43 to 4.47 below);
- (b) Demand-side substitution considerations (discussed in paragraphs 4.48 to 4.51 below);
- (c) Supply-side substitution considerations (discussed in paragraphs 4.52 to 4.53 below);
- (d) Indirect constraint considerations (discussed in paragraph 4.54 below);
- (e) Geographic scope assessment (discussed in paragraph 4.55 below); and
- (f) Overall Conclusions on Wholesale Market B Definition (discussed in paragraph 4.56 below).

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<sup>130</sup> As noted in paragraph 4.2.

## Description of Market B wholesale focal product

- 4.43 ComReg's view is that a distinct wholesale demand arises in a separate product market which operates downstream from wholesale Market A. That is, a demand from downstream DTT Broadcasters (such as RTÉ, VM, TG4) for wholesale access to DTT multiplexing services provided by a DTT Multiplex Operator (being a service which combines programme services material and related and other data in a digital form, and the transmission of such programme material and data so combined for reception by the general public/ end users). ComReg's view, therefore, is that the Market B focal product is wholesale access to DTT multiplexing services provided by a DTT Multiplex Operator.
- 4.44 Market B is a wholesale market which is downstream from Market A, whereby a DTT Multiplex Operator, using wholesale inputs purchased (or self-supplied) in Market A, combined with carriage on its own DTT multiplex, supplies a managed digital multiplexing service to DTT Retail Broadcasters enabling the transmission of their DTT broadcasting signals to end users.
- 4.45 ComReg notes that in an analogue terrestrial broadcasting environment, a Retail Broadcaster, providing downstream TV and radio services in retail markets, purchases wholesale services directly from the terrestrial BTS network provider operating in Market A. However with the advent of DTT, the TV programme signals received from DTT Retail Broadcasters must now be first multiplexed through the use of DTT multiplex equipment, prior to then being transmitted and distributed via the BTS network. To legally operate, a DTT Multiplex Operator requires a spectrum licence (PSB DTT) or contract (commercial DTT)<sup>131</sup>. A Retail DTT Broadcaster (e.g. RTÉ, VM, and TG4) then needs to negotiate with the licensed/contracted DTT Multiplex Operator, who uses Market A inputs to transmit the multiplexed broadcasting signals in order to have its DTT programme signal transmitted to end users.
- 4.46 ComReg notes that there has been no new entry of commercial DTT Multiplex Operators since the 2013 Decision and, further, any entry in future appears to be unlikely. Nevertheless, the current licensing regime provides for the possibility of the BAI entering into contracts with commercial Multiplex Operators. In this regard, ComReg notes the BAI's statement in its revised 2018 Broadcasting Services Strategy document:

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<sup>131</sup> Section 132 of the 2009 Broadcasting Act provides that ComReg must, at the request of RTÉ, issue up to two DTT multiplex licence(s) and, separately, at the request of the BAI, issue to the BAI at least four DTT multiplex licences. The BAI may then enter into DTT multiplex contracts with DTT Multiplex Operators (which contracts are likely to be commercial in nature) in relation to these licences.

Part of RTÉ's PSB objects include "...to establish, maintain and operate one or more national multiplexes." For the purposes of this Decision RTÉ multiplexes are hereafter typically referred to as 'PSB Multiplexes'. ComReg typically refer to multiplexes other than RTÉ's PSB multiplexes, as 'Commercial Multiplexes'.

*“The BAI is statutorily obligated to endeavour to arrange for the establishment, maintenance and operation of three national television multiplexes. The BAI has discharged these statutory duties through the operation of a multiplex licensing process in 2008, which was unsuccessful due to the withdrawal of the applicants from commercial discussions. The barriers to entry were significant and continue to be so, as evidenced in the independent review reports on the marketplace commissioned by the BAI (2013 & 2017). The BAI will continue to analyse the marketplace and assess the capacity for the potential to establish such multiplexes”<sup>132</sup>. [EMPHASIS ADDED]*

- 4.47 ComReg’s view is that, having regard to the demand-side and supply-side considerations discussed below, the differences in the nature of entry barriers to each of the above markets, and the BAI’s intention to continue to assess the potential to establish commercial multiplexes it remains appropriate to identify Market A and Market B as being two distinct wholesale terrestrial BTS markets.

## Demand-Side Substitution

- 4.48 Having considered demand-side and supply-side substitutability for Market A as set out in paragraphs 4.18 to 4.29 above, ComReg considers whether any effective demand-side substitutes for a wholesale DTT multiplexing service exist.
- 4.49 A Multiplex Operator’s demand for access to Market A services is derived from downstream digital Retail Broadcasters’ demand (and ultimately end users’) for such access and, in that context, ComReg considers the question of wholesale demand-side substitution from the position of the underlying customer i.e. a DTT Retail Broadcaster (such as RTÉ, VM, TG4). The particular statutory/licence commitments of Irish DTT Retail Broadcasters (FTA national coverage) in effect, prevent them from having the ability to credibly threaten to switch from their existing DTT Multiplex Operator’s services.
- 4.50 ComReg notes that RTÉ is the sole DTT Multiplex Operator in Market B, as there are currently no alternative sources of DTT multiplexing.
- 4.51 Therefore, ComReg’s view is that demand-side substitution to other DTT multiplexing platforms is unlikely to effectively constrain the price setting behaviour of a HM supplier of a national DTT multiplexing service.

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<sup>132</sup> See page 15 of the document Broadcasting Services Strategy, October 2018 available at <https://www.bai.ie/en/consultations/draft-broadcasting-services-strategy-bss/>

## Supply-Side Substitution

- 4.52 ComReg next assesses whether, in response to a SNNIP by a HM DTT Multiplex Operator in Market B, other firms might be able to switch to the supply of DTT multiplexing services in the short term and without incurring significant costs or risks and whether such supply would effectively constrain the price setting behaviour of the HM DTT supplier (i.e. supply-side substitutability).
- 4.53 ComReg's view is that within the short to medium term, a DTT Retail Broadcaster is not likely to be in a position to switch to self-supplying a DTT multiplexing service (or to a third party entering Market B for the purpose of external supply). In particular, issues such as the process involved in acquiring a DTT multiplex contract from the BAI and associated costs among others, would prevent credible and timely supply-side substitution which could effectively constrain a HM DTT multiplexing service supplier's behaviour. This includes:
- (a) The likely process of obtaining a commercial DTT multiplex licence from the BAI (likely via a tendering process) and the timing for any such commercial DTT multiplex contract award; and,
  - (b) The differing business model of DTT Retail Broadcasters and DTT Multiplex Operators, whereby on the one hand the Retail DTT Broadcaster is mainly interested in availing of wholesale carriage of its own programme services from a DTT Multiplex Operator in order to reach end users, typically earning revenues on the basis of advertising (the value of which is related to its viewership). On the other hand, a DTT Multiplex Operator is a wholesale supplier of its own and / or third party DTT Retail Broadcasters' programme services earning its revenues from the provision of its wholesale DTT multiplexing services, and / or advertising and end user subscription service if the DTT Multiplex Operator has its own programme services and or operates on a pay TV basis.

## Indirect Constraints

4.54 For similar reasons to those discussed in the context of Market A in paragraphs 4.34 and 4.35 above, ComReg's view is that indirect constraints on Market B are not likely to be effective. In order to conclude that other TV platforms are an indirect constraint on the price of BTS, a wholesale price increase would have to be passed through to retail customers and this would result in sufficient demand substitution at the retail level to render the wholesale price increase unprofitable. However, because DTT is FTA, channels of Retail TV Broadcasters cannot simply pass on higher BTS costs to viewers. It is possible in principle that these Retail TV Broadcasters could respond to higher BTS costs in ways that would reduce the relative quality of DTT and that retail customers would respond by switching to other platforms. However, as noted in ComReg's assessment of the wholesale market in paragraphs 4.48 to 4.51, there is limited scope for Retail TV Broadcasters to leave the DTT platform in response to higher BTS prices, given the importance of DTT in Ireland and the presence of coverage obligations.

## Geographic Scope

4.55 ComReg considers that the factors discussed in the context of Market A in paragraph 4.36 to 4.38 above are equally relevant in the context of Market B. In particular ComReg considers that DTT Retail Broadcasters, given their statutory/licence coverage requirements, require access to terrestrial BTS on a national basis, with this only being capable of being served by the national DTT Multiplex platform operated by RTÉ. Therefore, ComReg considers the geographic scope of Market B to be national in scope.

## Overall Conclusions on Wholesale Market B Definition

4.56 Having regard to the analysis in paragraphs 4.41 to 4.55 above, ComReg has defined a separate wholesale market that operates downstream from wholesale Market A. That is, the market for wholesale access to DTT multiplexing services (Market B). A DTT Multiplex Operator, using purchased wholesale inputs from Market A, combined with carriage on its own DTT multiplex, then supplies wholesale managed BTS to DTT Retail Broadcasters thereby enabling the transmission of their DTT broadcasting programme signals to end users.

## 5 Three Criteria Test

### Introduction

- 5.1 As explained in Section 2<sup>133</sup>, BTS is not identified in the 2014 Recommendation or 2020 Recommendation as a market that may be susceptible to *ex ante* regulation. However, NRAs have the power to apply regulation in any electronic communications market no longer identified in a recommendation on relevant product and service markets, on the basis of national circumstances. In this regard ComReg must undertake a 3CT to determine if continued regulation is warranted in the Relevant BTS markets.
- 5.2 Of the five Submissions received, four Respondents (RTÉ, VM, TG4 and BAI) noted that they agreed with ComReg's preliminary conclusions with regards to the 3CT. One Respondent (2rn) did not agree with ComReg's preliminary conclusions. ComReg addresses the issues arising from 2rn's Submission directly in this Section 5<sup>134</sup>.
- 5.3 The 3CT sets out relevant criteria that must be cumulatively satisfied in order to proceed to a finding that a relevant market should be subject to *ex ante* regulation. The three criteria are:
- (a) the presence of high and non-transitory barriers to entry;
  - (b) a market structure which does not tend towards effective competition within the relevant time horizon; and
  - (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.
- 5.4 Therefore, prior to assessing whether service providers operating within Market A and/or Market B have SMP and whether the imposition of regulatory obligations is appropriate, ComReg first assesses whether the 3CT above is cumulatively met in relation to each market.

### Three Criteria Test – Market A

- 5.5 ComReg next sets out in sequence its consideration of each criterion of the 3CT.

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<sup>133</sup> See paragraph 2.15 above.

<sup>134</sup> The overview of Respondents' views and Comreg's consideration of those views is set out in paragraphs 5.20 to 5.22.

## High and Non-Transitory Barriers to Entry

- 5.6 ComReg notes that there is one BTS supplier in Market A, 2rn, and this has remained unchanged over time (including since the 2013 Decision). ComReg notes further that there are likely substantial fixed (and sunk) and variable costs of entry in Market A associated with building the necessary mast and tower infrastructure and finding suitable high location sites which have suitable radio propagation characteristics to support a national coverage footprint.
- 5.7 ComReg considers that for any potential new entrant seeking to build its own BTS network, these factors may result in an increased level of investment being required, owing to the need to establish a greater number of lower lying altitude sites than would otherwise be the case for the existing BTS supplier in Market A. These costs and the technical know-how required to compete with an established player such as 2rn would likely make it uneconomical for an entrant to compete with 2rn and it is unclear whether coverage levels offered by 2rn could, in any event, be sufficiently replicated. In this regard ComReg notes that it is unlikely that new entrants would build the necessary infrastructure upfront without commitments from purchasers who, in turn, would require sufficient demand for their offerings in order to meet those commitments.
- 5.8 ComReg notes further that there would likely be a medium to high risk of planning rejection for the development of new BTS sites or potentially the use of existing BTS sites for new purposes (where they are feasible). This uncertainty would contribute to delay and/or increased costs.
- 5.9 With regard to the possible use of a dense network of lower towers/masts such as those utilised by mobile operators, ComReg's view is that using such network sites would likely lead to increased costs associated with the need to establish a greater number of sites due to their lower height (and therefore lower level of coverage). Additionally, signing commercial agreements across multiple site owners/mast owners (to the extent that this may be possible) to create a national footprint is also considered to be very difficult operationally and would raise transaction costs (including on the basis that there would be lower economies of scale). It is also noted that it is unclear whether 2rn's coverage levels could be replicated in such circumstances.
- 5.10 Further, as 2rn has used existing infrastructure for the purpose of its provision of BTS, it may be in a position to offer better contractual terms to national terrestrial Retail Radio Broadcasters and Multiplex Operators than a new entrant who may be required to recoup a greater level of return from a higher risk greenfield investment. This would also undermine the business case for such investment in the first place given users of 2rn's BTS network would be unlikely to switch when faced with such higher costs.



- 5.11 ComReg also notes that while in theory local terrestrial radio operators might be able to collectively achieve national coverage by pooling their BTS resources, due to technical differences between local and national BTS networks (associated with frequency planning and the need to avoid interference) there are complex technical barriers which would have to be overcome, therefore, making this a very unlikely proposition.
- 5.12 ComReg's overall view is that, having regard to the foregoing assessment, there are high and non-transitory barriers to entry in Market A associated with the significant sunk costs involved in establishing a national terrestrial BTS network comparable to that of 2rn's and that this situation is not likely to materially change within the timeframe of this BTS Review.
- 5.13 ComReg has considered the potential for IPTV as an alternative platform for BTS and notes that this may be a possibility in future. However high speed broadband is currently not sufficiently ubiquitous in Ireland for it to be a viable alternative at this stage. As set out in paragraphs 2.3 to 2.39 of this Decision RTÉ, TG4 and VM have various public service objectives and obligations in terms of the 2009 Broadcasting Act which require them to provide a free to air service to a minimum of 90% of the Republic of Ireland.

## **No Tendency towards Effective Competition over the Relevant Time Horizon**

- 5.14 ComReg notes that there is one BTS supplier in Market A, 2rn, with a 100% market share and this has remained unchanged over time. ComReg also considers that there is unlikely to be future entry in this market over the time horizon of this review, including having regard to the clear structural barriers limiting the scope for any tendency towards effective competition in the provision of terrestrial BTS services. Indeed, there has been no new entry since the 2013 Decision.
- 5.15 An important consideration related to the competitive structure/conditions of Market A is the vertically integrated relationship of RTÉ. ComReg's view is that, as a vertically integrated service provider, RTÉ can influence the competitive conditions of both the Relevant BTS Markets and related retail markets.

- 5.16 ComReg notes that, across all TV platforms, RTÉ provides both the most viewed TV programme services (as of January 2020 RTÉ One and RTÉ Two had a combined viewing market share of 29.06%<sup>135</sup> with the remaining viewing shares distributed among other Retail TV Broadcasters). Terrestrially, RTÉ had the most listened to national radio programme services (RTÉ's radio services<sup>136</sup> had a national listenership market share of 31.3%<sup>137</sup>). Its wholly-owned subsidiary, 2rn, also owns the only national terrestrial tower/mast BTS network infrastructure and therefore, provides a key wholesale input related to the supply of national terrestrial FTA BTS for both RTÉ and other competing terrestrial Downstream Retail Broadcasters.
- 5.17 ComReg's view is that as a vertically integrated operator, 2rn has the ability and incentive to act in an anti-competitive manner in order to ultimately prevent a loss of market share of RTÉ viewers/listeners to other Retail Broadcasters (with associated loss of advertising revenues). Therefore, absent regulation, ComReg considers that there is the possibility that 2rn could seek to exploit absolute/strategic barriers to entry and expansion (such as denying or impeding access by downstream Retail Broadcasters and/or charging excessive and/or discriminatory BTS fees).

## Insufficiency of Competition Law Alone

- 5.18 ComReg's view is that competition law alone is insufficient to deal with such potential competition problems which could arise in Market A. In this respect it is noted that competition law is limited to *ex post* investigation which can take considerable time to complete. Addressing a particular harm through the application of *ex post* competition law in Market A may not generate sufficient legal/regulatory certainty or predictability to existing or potential downstream wholesale and/or retail market participants.

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<sup>135</sup> See paragraph 3.20 above.

<sup>136</sup> RTÉ Radio 1, RTÉ2FM and RTÉ Lyric FM.

<sup>137</sup> See paragraph 3.62 and Table 4 above.

5.19 In particular, ComReg considers that *ex post* enforcement of competition law would not likely provide a sufficient suite of remedies to be applied to the range of competition problems that could potentially arise. ComReg noted that an Irish court applying competition law<sup>138</sup> will not normally mandate remedies such as imposing specific prices or pricing methodologies or police the evolution of prices on an ongoing basis as ComReg, as an NRA, can do. In addition, it was considered that it would be difficult to apply competition law to address strategic decisions (e.g. tactical refusals of access) which may attempt to limit the possibility of new terrestrial programme services entering downstream wholesale and retail markets.

## Consideration of Respondents' Views

### Overview of Respondents' Views

5.20 Of the five Submissions received four Respondents (RTÉ, VM, TG4 and BAI) noted that they agreed with ComReg's preliminary conclusions with regards to the 3CT. 2rn submitted that while it agreed that the first criteria with respect to Market A (high and non-transitory barriers to entry) has been met, it did not agree that the second criteria (no tendency towards effective competition) has been satisfied in Market A.

### ComReg's Consideration of Respondents' Views

5.21 2rn did not elaborate on the reasons why it disputes that the second criteria is not satisfied in Market A. However, 2rn's conclusion in this regard is consistent with its view that ComReg's definition of the Retail TV Broadcast market is too narrow. 2rn's views in this regard are also consistent with its view that Market A should not be susceptible to *ex ante* regulation (on the basis that the 3CT have not been met) and that 2rn does not have SMP in this market<sup>139</sup>.

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<sup>138</sup> A National Competition Authority ('NCA') in Ireland (such as the Irish Competition and Consumer Protection Commission ('CCPC') or ComReg) cannot make a finding that competition law has been breached. An NCA would need to bring a prosecution before the Irish courts which would then determine whether the law has been breached.

<sup>139</sup> See paragraphs 6.50 to 6.53 below regarding 2rn's submissions on the competition analysis and assessment of SMP.

5.22 As noted in paragraph 3.56, ComReg does not agree with 2rn's assertions that the Retail TV Broadcast market has been defined too narrowly and notes in particular that 2rn did not provide any meaningful evidence to support its views. ComReg therefore reiterates its position that over the next three to five years demand-side substitution to other TV platforms is unlikely to effectively constrain services provided over the FTA DTT platform. ComReg's reasoning and evidentiary basis in this regard is set out in paragraphs 3.25 to 3.57 of this Decision.

## Conclusion on the Three Criteria Test in Market A

5.23 ComReg's view is that the 3CT is satisfied in Market A and, therefore, that Market A is susceptible to *ex ante* regulation.

## Three Criteria Test – Market B

5.24 ComReg notes that given the relationship between Market A and Market B, the competitive dynamics of Market A can be expected to influence the competitive conditions of Market B. Therefore, ComReg's assessment of Market B assumes, in the context of the MGA, the presence of the suite of regulatory obligations that it will impose in Market A and seeks to identify whether such Market A obligations are likely to be sufficient to facilitate the development of effective competition (through the value chain) into Market B, and, if not, whether additional SMP related obligations in Market B may be required.

5.25 ComReg next sets out in sequence its consideration of each criterion of the 3CT.

## High and Non-Transitory Barriers to Entry

5.26 ComReg's view is that there are a number of related issues which result in there being high and non-transitory barriers to entry in Market B and these are of both a legal/regulatory and structural nature.

- 5.27 A DTT multiplex (spectrum) licence is required under section 132 of the 2009 Broadcasting Act in order to operate as a wholesale supplier in Market B. ComReg would issue such DTT multiplex licence(s) on request directly to RTÉ, and separately, directly to the BAI who, typically following the conduct of any competitive tender process, could issue a multiplex contract to a commercial DTT Multiplex Operator. A DTT Multiplex Operator then has to separately negotiate with 2rn for access to its terrestrial BTS network, being those BTS services provided in Market A (in the absence of any effective alternative suppliers)<sup>140</sup>. ComReg also notes that although the BAI previously ran a tendering process for commercial DTT Multiplex Operator contracts, commercial DTT entry failed to materialise<sup>141</sup>.
- 5.28 Based on experience to date and, having regard to BAI licensing requirements and the likely timeframe associated with the conduct of any new tendering process, ComReg's view is that it is unlikely that effective commercial DTT Multiplex Operator entry into Market B will happen within the timeframe of this BTS Review. ComReg has regard to, in particular, likely time delays (associated with the preparations involved in submitting a bid for commercial DTT multiplex licences which could require a partnership / consortium based approach) and commercial uncertainties (such as the conduciveness of the economic operating environment to commercial DTT Multiplex Operator entry). ComReg is not aware of any recent expressed demand from potential commercial DTT Multiplex Operators. Further the view of the BAI expressed in its Broadcasting Services Strategy is that there is little prospect of immediate entry by a commercial DTT Multiplex Operator, although the BAI conducts periodic reviews to assess prospects in this regard<sup>142</sup>.

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<sup>140</sup> See paragraph 4.45. and 4.46.

<sup>141</sup> See BAI Media Statement of 7 January 2014 (<https://www.bai.ie/en/bai-publishes-review-of-potential-for-commercial-dtt-in-ireland-3/>) in which the BAI state that: "The Authority agreed with the findings contained in the report, which suggested that the market conditions for launching commercial DTT services have not improved and remain very challenging since the last unsuccessful licensing process was undertaken in 2008."

\*See also "Prospects for commercial digital terrestrial television in the Republic of Ireland: A report for the Broadcasting Authority of Ireland prepared by Oliver & Ohlbaum Associates Limited August 2013".

<sup>142</sup> Page 54/60 of the Consultation on the Broadcasting Services Strategy (<https://www.bai.ie/en/consultations/draft-broadcasting-services-strategy-bss/>) "Work undertaken by the BAI on DTT to-date revealed that market conditions would not support the launch of commercial DTT services. This work involved a number of independent reviews of the marketplace and the Mediatique research report of December 2017 supports these views.

In this context, the BAI commits to its current approach to DTT, that of commissioning an independent review approximately every three years to ascertain the capacity of the market place, including the identification of potential applicants".

- 5.29 While the costs of entry to Market B are not fully sunk, ComReg notes that costs may be a consideration for potential entrants, taking into account the size of the market, i.e. whether they could achieve minimum efficient scale following entry, within a reasonable period of time having regard to the potential revenue/profit opportunities from such entry. Some of the costs of such entry would likely be partially sunk, such as marketing/advertising costs. These could be significant over the lifetime of a commercial DTT multiplex contract. By way of illustration, the Boxer consortium (one of the commercial DTT Multiplex Operator consortia who failed to agree access with 2rn in the previous BCI/BAI tender process) was proposing to spend €20 million on marketing alone over a four year period although whether such costs would be similar today is uncertain having regard to any changes in advertising cost levels and the advertising strategy of any second entrant<sup>143</sup>.
- 5.30 ComReg notes that RTÉ would be likely to continue self-supply of DTT multiplexing services (as it holds the licences for the two existing PSB DTT multiplexes)<sup>144</sup>. ComReg also notes that, existing DTT Retail Broadcasters such as TG4 and VM would be likely to have already contracted with RTÉ for the supply of DTT multiplexing services prior to any potential entry from commercial DTT Multiplex Operator. Therefore, the market size available to prospective commercial DTT Multiplex Operators would likely be reduced if its future business case was dependent on securing revenues from these existing (non RTÉ) Retail DTT Broadcasters.
- 5.31 ComReg notes that given the statutory/licensing coverage and FTA commitments of TG4 and VM, potential new entrant commercial DTT Multiplex Operators would need to be able to provide for similar coverage and FTA transmission conditions as supplied by RTÉ. A commercial DTT Multiplex Operator that has less coverage or offers the DTT Retail Broadcasters programme services it carries on a pay TV service to end users in retail markets would not likely be an effective demand-side substitute.
- 5.32 In this respect, ComReg notes that it is unclear whether commercial DTT Multiplex Operator(s) would wish to offer broadcast services from all of the same transmission sites which RTÉ operates from (i.e. they may offer less coverage), and it is also unclear whether a commercial DTT Multiplex Operator would supply wholesale services for FTA Retail DTT Broadcasters (i.e. it may just self-supply or supply to end users on a paid for subscription basis).

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<sup>143</sup> See Boxer consortium detail at <https://www.irishtimes.com/business/boxer-pulls-out-of-digital-tv-service-1.749489>

<sup>144</sup> See paragraph 4.45 above.

- 5.33 ComReg also notes that in the context of self-supply by an existing Retail DTT Broadcaster, the business case of VM and TG4 and a DTT Multiplex Operator will likely be different.
- 5.34 These DTT Retail Broadcasters would likely need to form partnerships with other parties in order to successfully tender for any commercial DTT multiplex contract offered by the BAI, all of which adds further complexity.
- 5.35 ComReg is of the view that the barriers to entry in Market B above are high and non-transitory, meaning that any entry, including self-supplied entry, is unlikely to manifest itself effectively in the timeframe of this BTS Review.

## **No Tendency Towards Effective Competition over the Relevant Time Horizon**

- 5.36 ComReg's view is that Market B is not a market that could be expected to tend towards effective competition over time, unless there is the launch of commercial DTT multiplexing services and where such a launch results in alternative wholesale DTT multiplexing services being made available that can compete effectively with existing services. ComReg notes that there has been no entry of commercial DTT Multiplex Operators since the 2013 Decision and that it appears unlikely that there will be any entry in the foreseeable future.
- 5.37 Therefore, ComReg does not consider that effective commercial DTT Multiplex Operator entry is credible, such that, it is likely to be capable of effectively constraining RTÉ's pricing behaviour in Market B within in the timeframe of this BTS Review.
- 5.38 Further, as noted in paragraphs 3.48 and 3.49, Retail Broadcast Services provided over broadband (e.g., IPTV) is not, over the period of this review, likely to constitute a viable alternative to the existing DTT platform in Ireland.



## Insufficiency of Competition Law Alone

- 5.39 This criterion considers whether there is a need for *ex ante* regulation in this market in light of competition law and any market relevant legislation. If *ex post* competition law remedies are sufficient then there should be no need for a separate regulatory regime. However, ComReg considers that competition law alone is insufficient to address potential failures in this market. Whereas the electronic communications regulatory framework applies *ex ante*, competition law is restricted to *ex post* investigation, analysis, and (if merited) enforcement action. Such investigations, analyses, and enforcement actions can take considerable time to complete and are of course subject to appeal. In a market such as that discussed here, where, in the opinion of ComReg, there is not effective competition nor is effective competition likely to emerge within the relevant time period, the benefits of addressing a particular harm through *ex post* competition law may not give sufficient certainty/predictability to existing or potential market participants.
- 5.40 A court applying competition law will not normally mandate that specific prices or pricing methodologies be used, nor would the court police the evolution of these prices on an ongoing basis, as ComReg may do under the regulatory framework. Although competition law could be used to allow access to be granted, it would not be likely to deal with other forms of potential discriminatory behaviour, and most especially it would not deal with them in advance of their occurring. For these reasons, it is unlikely, in the current context, that application of competition law would enable a sufficient suite of remedies to be applied that would address the range of problems that might potentially arise.
- 5.41 ComReg does not view competition law as being sufficient in itself to deal with the potential competition problems that may arise in Market B.

## Conclusion on the Three Criteria Test in Market B

- 5.42 Having regard to the analysis in the BTS Consultation and this Decision, ComReg's view is that Market B satisfies the 3CT.

# 6 Competition Analysis and Assessment of Significant Market Power

## Overview

- 6.1 In Section 6 of the Consultation ComReg set out its preliminary views on the competition analysis and assessment of Significant Market Power (**'SMP'**) within each of the Relevant BTS Markets.
- 6.2 Of the 5 Submissions received, four Respondents (RTÉ, VM, TG4 and the BAI) agreed with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in the Relevant BTS Markets. One Respondent (2rn) did not agree with ComReg's preliminary conclusions with regards to Market A. ComReg addresses the points arising from 2rn's Submission directly in this Section 6<sup>145</sup>.
- 6.3 Having regard to the views of Respondents, ComReg maintains its position that competition is not effective in Market A and that 2rn is being designated as having SMP in Market A. Further, having regard to the views of Respondents, ComReg maintains its position that competition is not effective in Market B and that RTÉ is being designated with SMP in Market B.
- 6.4 In this section ComReg sets out its position on the competition analysis and assessment of SMP within each of the Relevant BTS Markets. This is carried out as follows:
- (a) an overview of the framework for assessing SMP (discussed in paragraphs 6.5 to 6.13 below);
  - (b) the assessment of SMP in Market A (discussed in paragraphs 6.14 to 6.56 below);
  - (c) the SMP Designation in Market A (discussed in paragraphs 6.57 to 6.58 below);
  - (d) the assessment of SMP in Market B (discussed in paragraphs 6.59 to 6.86 below); and
  - (e) the SMP Designation in Market B (discussed in paragraphs 6.87 to 6.88 below).

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<sup>145</sup> The overview of Respondents' views and ComReg's consideration of those views is set out in paragraphs 6.50 to 6.53.

## Framework for Assessing SMP

6.5 Having defined the Relevant BTS Markets in Section 4, ComReg must determine whether each Relevant BTS Market is effectively competitive, having regard to whether or not any of the Service Providers operating on those relevant markets has SMP.

6.6 The European Regulatory Framework for electronic communications networks and services has aligned the concept of SMP with the competition law definition of dominance first advanced by the European Court of Justice in *United Brands v. Commission*.<sup>146</sup>

*“The dominant position referred to [by Article 102 of the Treaty on the Functioning of the European Union] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.” (EMPHASIS ADDED)*

6.7 Article 14(2) of the Framework Directive<sup>147</sup> effectively mirrors this definition of dominance, stating that:

*“An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.” (EMPHASIS ADDED)*

6.8 Arising from this definition, ComReg assesses whether SMP exists on the Relevant BTS Markets in accordance with the framework established by the European Commission. The European Commission’s 2018 SMP Guidelines, of which ComReg is required to take utmost account,<sup>148</sup> refer to a range of criteria that may be considered by NRAs when seeking to establish whether an undertaking has SMP on a relevant market.

6.9 The 2018 SMP Guidelines also note that very large market shares give rise to a presumption of dominance:

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<sup>146</sup> Case 27/76 *United Brands v European Commission* [1978] ECR 207, Paragraph 65.

<sup>147</sup> Which is transposed into Irish law by means of Regulation 25(1) of the Framework Regulations.

<sup>148</sup> In accordance with Regulation 25(2) of the Framework Regulations.

*“According to established case-law, very large market share held by an undertaking for some time — in excess of 50% — is in itself, save in exceptional circumstances, evidence of the existence of a dominant position. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of SMP.”<sup>149</sup>*

- 6.10 Market shares in excess of 50% give rise to a rebuttable presumption of SMP. However, the 2018 SMP Guidelines also state<sup>150</sup> that the existence of a high market share alone is not sufficient to establish the existence of SMP; rather it means that the undertaking concerned might be in a dominant position and this needs to be considered alongside other potentially relevant criteria for assessing the existence of SMP, including:
- (a) Absolute and relative size of the undertaking;
  - (b) Control of infrastructure not easily duplicated;
  - (c) Technological and commercial advantages or superiority;
  - (d) Absence of, or low, countervailing buyer power;
  - (e) Easy or privileged access to capital markets/financial resources;
  - (f) Product/services diversification (e.g. bundled products or services);
  - (g) Economies of scale;
  - (h) Economies of scope;
  - (i) Vertical integration;
  - (j) A highly developed distribution and sales network;
  - (k) Absence of potential competition;
  - (l) Barriers to expansion;
  - (m) Barriers to Entry;
  - (n) Direct and indirect network effects;<sup>151</sup>
  - (o) Conclusion of long-term and sustainable access agreements; and
  - (p) Engagement in contractual relations with other market players that lead to market foreclosure.

6.11 The 2018 SMP Guidelines also state that:

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<sup>149</sup> Paragraph 55 of the 2018 SMP Guidelines.

<sup>150</sup> Paragraphs 56 and 57 of the 2018 SMP Guidelines.

<sup>151</sup> Direct network effects are present when the consumption of one good by an increased number of customers increases the use/utility of that good for one consumer. Indirect network effects occur when the value a consumer derives from a good or service increases with the number of additional customers of identical and/or complementary goods or services.

*“If taken separately, the above criteria may not necessarily be determinative of a finding of SMP. Such finding must be based on a combination of factors.”<sup>152</sup>*

- 6.12 ComReg’s approach to assessing whether or not an undertaking has SMP in the Relevant BTS Markets is to carry out a forward-looking analysis on the basis of existing and foreseeable market conditions<sup>153</sup> and to consider a range of factors that are relevant to these markets. Many of the factors identified in paragraphs 6.10 above, while presented separately, may in fact be interrelated, and all available evidence is considered as a whole before a determination on SMP is made.

## Approach to Existing Regulation

- 6.13 In markets subject to *ex ante* SMP regulation an undertaking’s behaviour may be restricted by way of existing SMP regulatory controls. It is accordingly necessary to consider the potential ability of the undertaking to exert market power absent *ex ante* SMP regulation<sup>154</sup> in the market concerned. To do otherwise might lead to a circular finding of no SMP on the basis of SMP regulatory remedies that would cease to exist following a market analysis and, in the absence of which, the undertaking may be able to exert market power. In the context of an SMP assessment of the specific Relevant BTS Market, the key hypothetical questions are:

- (a) How the service provider in question would be likely to behave in the markets being assessed if it were free from current or potential SMP regulatory constraints; and
- (b) How the service provider in question would be likely to behave in the market being assessed, having regard to the existence of any SMP and other obligations in related markets which could impact on the specific Relevant BTS Markets.

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<sup>152</sup> Paragraph 57 of the 2018 SMP Guidelines.

<sup>153</sup> Paragraphs 13 to 17 of the 2018 SMP Guidelines states that “*In carrying out the market analysis ..... NRAs will conduct a forward looking, structural evaluation of the relevant market over the relevant period. .... To this aim, NRAs should take into account existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation based on significant market power; this is known as a Modified Greenfield Approach. On the other hand, the analysis should take into account the effects of other types of (sector-specific) regulation, decisions or legislation applicable to the relevant retail and related wholesale market(s) during the relevant period.*”

<sup>154</sup> However, while discounting SMP regulation in the market concerned, following the Modified Greenfield Approach, other obligations (such as relevant SMP remedies existing in other markets, or obligations relating to general consumer protection or interconnection) are considered. See paragraph 74 of the 2018 SMP Guidelines.

## Assessment of SMP in Market A

- 6.14 Given the potential for overlap, ComReg combines its assessment of the factors listed in paragraph 6.7 under three broad headings as follows:
- (a) **Existing competition:** an assessment of factors such as market shares, overall size of the undertaking, and relative strength of existing competitors;
  - (b) **Potential competition:** an assessment of factors such as the extent to which control of infrastructure is not easily duplicated, economies of scale, economies of scope, vertical integration, as well as considering the overall strength of potential competitors; and,
  - (c) **Strength of Countervailing Buying Power:** an assessment of the ability of the buyer(s) (e.g. radio broadcasters and DTT Multiplex Operators) to reduce prices to a level consistent with a competitive outcome, or more generally, to obtain terms and conditions of supply more consistent with a competitive outcome.
- 6.15 Other factors which could be used to indicate market power have been considered, but are seen as less relevant in this market, for the reasons outlined below:
- (a) **Technological advantages or superiority:** any advance made by a provider in this market would (from a technological point of view) likely be adopted by others. It is unlikely that technology itself could be used as a sustainable advantage in this market;
  - (b) **Easy or privileged access to capital markets/financial resources:** while this may be a potentially relevant factor in this market, it is less clear and predictable than other relevant factors and therefore more difficult to measure on a forward looking basis;
  - (c) **Product or services diversification:** this is of relatively less importance in this market as bundled offerings do not feature to a significant extent at the wholesale level;
  - (d) **A highly developed broadcast distribution and sales network:** the existence of a highly developed distribution and sales network would, in ComReg's view, be a secondary factor when considering economies of scale and scope. This factor, over the medium to long term, is likely to be less of a barrier in this wholesale market as terrestrial BTS are purchased by a relatively small number of wholesale customers.

## Existing competition

### Overall size of the undertaking, market shares and relative strength of existing competition

- 6.16 RTÉ, the national public service broadcaster, operates the broadcast transmission platform through its network division 2rn.
- 6.17 2rn is the only provider of national broadcast transmission services in Market A in Ireland and this has remained unchanged since ComReg's 2013 Decision.
- 6.18 2rn currently provides wholesale services to its customers which include broadcast distribution and transmission services. 2rn operates from a network of transmission sites<sup>155</sup> providing services to both national television and radio broadcasters.
- 6.19 All national terrestrial broadcasters effectively (whether directly or in the case of DTT indirectly via a downstream multiplex operator) must purchase broadcast transmission services from 2rn as there is no effective alternative source of providing national FTA terrestrial broadcast transmission services. 2rn's network delivers television and radio broadcast transmission services. National DTT services were launched in May 2011 and the DTT Multiplex Operator requires access to 2rn's network in order to provide their services in the downstream markets. Currently, there are only two DTT multiplexes in operation i.e. two RTÉ PSB DTT multiplexes, which connect to 2rn's Market A broadcast transmission network infrastructure. Any other potential commercial DTT Multiplex Operator would also require access to 2rn's network in order to have adequate coverage to attract digital broadcasters to its DTT multiplex service. Similarly, other than 2rn's supply of national terrestrial analogue radio BTS, there is no effective alternative source of national radio BTS and it is ComReg's view that this is unlikely to change within the timeframe of this BTS Review.
- 6.20 Therefore, 2rn has a 100% market share in the supply of Market A services, a position which has remained unchanged over time. There is therefore no existing competitor to 2rn in Market A.
- 6.21 However, market shares alone are not likely to be a sufficient indicator as to whether SMP exists because despite persistently high market shares, entry barriers may be low, existing operators may be able to easily expand in the market and/or customers may have strong bargaining power which may restrict operators with high market shares from actually charging prices above competitive levels. It is therefore necessary to consider factors other than market share, with such factors discussed below.

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<sup>155</sup> See Table 5.



## Potential Competition

- 6.22 In the absence of a material competitive constraint posed by existing competition, ComReg assesses possible constraints posed by potential competition in Market A. This assessment of potential competition considers whether entry (and expansion) are likely to such an extent that they would constrain 2rn's ability to act independently of its competitors, customers and consumers.
- 6.23 In assessing the possibility for any potential new entrants to act as a constraint on 2rn over the period of this review, ComReg has analysed the nature and extent of any barriers to firms both entering and expanding. The high and non-transitory barriers to entry discussed in paragraphs 5.26 to 5.35 also apply in this context.
- 6.24 ComReg is of the view that there are a number of barriers to entry and expansion in this market. These relate to control of infrastructure not easily duplicated due to the importance of high altitude sites for national terrestrial transmission, high sunk costs, economies of scale and scope which would be difficult to achieve by a competing entrant. Further, due to the fact that RTÉ, through 2rn is a vertically integrated entity, and the sole network provider in this market, market failures may arise. ComReg will assess this further below.

### Control of infrastructure not easily duplicated

- 6.25 The 2018 SMP Guidelines cite control of infrastructure not easily duplicated as one relevant criterion for assessing whether SMP exists. This may be relevant where, for example:
- (a) Access to a certain infrastructure is necessary to produce a particular product or service;
  - (b) The required infrastructure is exclusively or overwhelmingly under the control of a certain undertaking; and,
  - (c) There are high and non-transitory barriers associated with replacing the infrastructure in question.
- 6.26 This measure is linked to the absolute size of 2rn, as well as the assessment of the sunk costs and economies of scale and scope associated with the infrastructure discussed below.
- 6.27 According to the 2018 SMP Guidelines, it is not necessary for the infrastructure to be deemed "essential" within the meaning of EU competition law. Ownership of a significant infrastructure may confer an absolute cost advantage on the incumbent and the cost and time involved in operators replicating the infrastructure in question may pose a significant barrier to entry. In addition, it may be possible for the owner of the infrastructure in question to leverage their market power into horizontally or vertically related markets.

- 6.28 There are a number of barriers to replication of 2rn's network. The timeframe and cost involved in building an alternative network is likely to make it uneconomical to compete with 2rn. It is likely that replication of 2rn's high tower network would take a number of years, from sourcing the materials and suitable transmission site locations, reaching commercial agreements with land owners, and building the network itself while also considering that there may be a high risk of planning permission rejection or planning permission delays associated with this process.
- 6.29 Given the propagation characteristics of the spectrum used for broadcasting, site location is important in terms of the height required for broadcasting to a national area from a network that is deployed in a high tower, high power manner. 2rn has masts located in important key, high-altitude sites around the country which enable large coverage areas of Ireland to be reached. 2rn owns many of the sites from which it operates while others are held by lease or licence.
- 6.30 Aside from the difficulty of locating suitable high-site locations, it is likely that new entrants would find it difficult to obtain planning permissions as new high-sites may be viewed as obstructions on the landscape. In addition, Irish planning guidelines favour mast and site sharing.
- 6.31 It might be possible to build an alternative network using a denser network of lower towers; however, the complexity and costs of such a network may make this uneconomical. In any event, it is also unclear whether the level of coverage available via 2rn's network would be achievable using such a network.

### Sunk Costs

- 6.32 This factor looks at any significant investments in network infrastructure, technology, equipment, marketing, advertising, promotions, staff training costs, research and development, etc. that cannot be resold or recouped or can only be partially recouped on exit from the market.
- 6.33 There are significant costs involved in the establishment of a broadcast transmission network capable of providing for the broadcast transmission of national terrestrial radio and television broadcasting services. This relates to the development of a network of high towers capable of carrying broadcasting equipment and purchasing and maintenance of transmission sites. Many of these costs would be sunk in the case where a firm exited the market<sup>156</sup>.

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<sup>156</sup> As noted in paragraph 4.15 the net book value of infrastructure in Market A is currently in the range of €40 to €45 million.

6.34 The mere existence of sunk costs does not automatically imply that entry barriers are high. Consideration also needs to be given to other relevant factors such as the level of customer demand in the market, customer switching costs and any other barriers to entry/expansion. ComReg's view is that considering all the other barriers discussed here, these costs are a significant deterrent to market entry and expansion.

### Economies of scale and scope

6.35 Economies of scale and scope refer to potential advantages that larger incumbents may enjoy over smaller new entrants<sup>157</sup>.

6.36 Economies of scale do not necessarily in themselves create entry barriers. To constrain entry they must be significantly large relative to the market as a whole and other factors such as high sunk costs must be present. One means of examining economies of scale in a market is to determine what is the minimum efficient scale ('MES'). That is, what is the minimum number of customers, volume of output or level of sales an operator would need to achieve to be cost efficient or to minimise average costs? If the MES is large relative to the market as a whole and sunk costs are large and/or barriers to expansion exist, economies of scale are likely to represent a more significant entry barrier.

6.37 ComReg's view is that the competitive conditions of this market are unlikely to materially change in the timeframe of this review. As such, ComReg believes the size of this market is unlikely to grow to such an extent over the timeframe of this review that minimum efficient scale would be achievable by a competing efficient market entrant particularly as it is likely to be exacerbated by the barriers to entry and expansion already discussed.

6.38 In terms of economies of scope, 2rn's broadcast transmission network is designed to accommodate both radio and television equipment on its mast/tower structures (as well as use by mobile operators) enabling it to spread its investment for both these services over the same network. Given the barriers to entry already identified (e.g. number and location of broadcast transmission sites, planning permission issues etc.) ComReg considers that it would be difficult for a new entrant to exploit the economies of scope in this market.

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<sup>157</sup> Economies of scale generally refer to the cost advantage which a large scale operator may have over a smaller operator where the marginal cost of production decreases as the quantity of output produced increases. Economies of scope refer to the potential efficiencies which may be gained by a firm jointly producing a range of goods and services, e.g. where a cable network could be used to provide television, voice telephony and internet access services simultaneously.

### Vertical integration as a barrier to entry into relevant markets

- 6.39 Vertical integration can constitute an entry barrier where the presence of a firm at multiple levels of the production or broadcast distribution chain raises the costs of new entry. For example, in the presence of a vertically integrated incumbent, the retail market available to the potential entrant in Market A is more limited.
- 6.40 Prospective new entrants may also perceive the need to enter the wholesale and retail markets simultaneously to achieve efficiencies and pose a more viable competitive constraint on the vertically integrated operator 2rn.
- 6.41 Vertical integration further increases the possibilities for the integrated operator to create strategic barriers to entry by hindering or foreclosing competition at one or more levels in the value chain. For example, where a vertically integrated firm such as RTÉ (including 2rn) is the only or primary source of access for certain inputs necessary for competing in downstream markets, the possibility of it leveraging its control into downstream markets could act as a disincentive to new entry into those related markets and in turn reinforce entry barriers at the upstream level.
- 6.42 RTÉ through its wholly owned subsidiary 2rn both supply key network services to national terrestrial broadcasters (and potentially to non-RTÉ multiplex operators) and competes with their programme services in the retail market. As a vertically integrated entity and the only operator in this market, RTÉ through 2rn has the ability and incentive to exclude potential terrestrial competitors (broadcasters and multiplex operators) from accessing 2rn's broadcast transmission network and/or to potentially charge them excessive broadcast transmission fees or engage in margin squeezing where 2rn could price its upstream services in such a way as to impede effective downstream competition, due to an insufficient margin between wholesale and retail prices (in the case where there was commercial DTT for example) and, in the case of other competing broadcasters, by increasing their costs and reducing their ability to attract talent and content.
- 6.43 It may also be in RTÉ's interests to strategically determine the available capacity on its network for potential downstream competitors, thus effectively foreclosing or impeding entry/expansion in downstream markets and further delaying network investment and entry in upstream Market A.
- 6.44 ComReg is of the view that in a market such as this where there is a vertically integrated entity who is the sole transmission network provider protected by high structural barriers to entry and with a significant presence in downstream markets, market failure may arise where the network operator could act independently of its competitors and customers to an appreciable extent.

## Countervailing buying power

6.45 Another potential constraint on an undertaking's ability to exercise market power is buying power. Countervailing buying power ('**CBP**') can arise if, for example, a particular purchaser is sufficiently important to its supplier to influence the price or other terms and conditions of supply. In its Guidelines on horizontal mergers, the European Commission notes that:

*“Countervailing buyer power ..... should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers.”*

6.46 The circumstances where countervailing buying power might be observed include where a customer:

- (a) Accounts for a significant proportion of the supplier's total output;
- (b) Is well-informed about alternative sources of supply; and
- (c) Is able to switch to other suppliers at little cost to itself, or to self-supply the relevant product relatively quickly and without incurring substantial sunk costs.

6.47 As discussed earlier, there is no alternative source of supply for national terrestrial broadcast transmission to 2rn's network and this is unlikely to change within the timeframe of this review.

6.48 In the case of a Multiplex Operator(s), in order to provide its services they would have to negotiate with 2rn for access to its network infrastructure as no other alternative exists.

6.49 Given the barriers to entry and expansion already discussed ComReg does not view it as likely that the competitive conditions of this market will change sufficiently within the timeframe of this review. Buyers are not able to credibly exert a significant constraint on the price or other terms and conditions of supply offered by 2rn given the lack of alternative options. Neither are there alternative suppliers apart from 2rn who could provide national terrestrial broadcast transmission services<sup>158</sup>, and the conditions of the market do not allow for self-supply.

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<sup>158</sup> As noted in paragraph 3.49 ComReg is of the view that currently and for the next three to five years broadband availability is such that IPTV is not a viable alternative to services provided over the FTA DTT platform. While there has been some progress with the implementation of the National Broadband Plan ('NBP') this is (as of the writing of this Consultation) in its early stages and much work remains to be done before roll-out targets are met.

## Consideration of Respondents' Views

### Overview of Respondents' Views

- 6.50 Of the 5 Submissions received, four Respondents (RTÉ, VM, TG4 and the BAI) agreed with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in Market A. One Respondent (2rn) did not agree.
- 6.51 2rn submitted that it does not accept the assessment of ComReg that currently, and for the foreseeable future, 2rn has SMP in Market A. 2rn's submission in this regard follows from its view that the Retail TV Broadcast market should be defined more broadly and that the second criterion of the 3CT (no tendency towards effective competition over the relevant time horizon) has not been satisfied. 2rn note that its view that Ireland is currently seeing the rollout of the NBP and according to 2rn this will, during the timeframe envisaged by this market review, deliver broadband to substantially all homes and businesses in Ireland.

### ComReg's Consideration of Respondents' Views

- 6.52 ComReg does not agree with 2rn's view. ComReg notes that 2rn has not responded to the assessment of SMP directly but, rather, argues that it does not have SMP on the basis that the 3CT has not been satisfied due to there being a broader Retail TV Broadcast market. ComReg does not agree that the 3CT has not been satisfied and has set out its response in this regard in paragraphs 3.25 to 3.57 with regards to the Retail TV Broadcasting assessment and reiterated in paragraphs 5.20 to 5.22 with regards to the 3CT.

6.53 With regard to 2rn's comments on the NBP, ComReg notes that while there has been some progress with the implementation of the NBP this is (as of the writing of this Decision) in its early stages and much work remains to be done before roll-out targets are met. The NBP aims to bring broadband to 537,596 premises, including 100,000 businesses and farms, and over 600 schools. By the end of 2021 the NBP aims to pass 150,000 premises. Approximately 70,000-100,000 premises will be passed each year thereafter with the final premises to be completed in 2026<sup>159</sup>. Increased broadband availability arising from the roll-out of the NBP will provide greater scope for platforms such as IPTV. However, as RTÉ has acknowledged in its submission, the IPTV market share is currently limited. In this regard RTÉ submit that IPTV services are "poised to increase their market share within the next five to seven years". ComReg note therefore that within the next three to five years IPTV will remain limited. Further, as set out in paragraphs 2.3 to 2.42 of this Decision RTÉ, TG4 and VM have various public service objectives and obligations in terms of the 2009 Broadcasting Act which require them to provide a free to air service to a minimum of 90% of the Republic of Ireland. ComReg will continue to monitor developments in the availability of alternative platforms (particularly broadband infrastructure) and will assess the potential impact in this regard on the scope of demand for Retail TV Broadcasting services and BTS should the need arise and having regard to the materiality of any impacts and with due regard to any legislative changes that may be required.

## Conclusion on SMP in Market A

- 6.54 ComReg has considered Market A in terms of existing competition, potential competition and countervailing buying power to determine whether there is SMP in the market.
- 6.55 2rn is the sole national terrestrial network provider and this has remained unchanged overtime. ComReg is of the view that there are a number of barriers to entry and expansion in this market. These relate to control of infrastructure not easily duplicated, high sunk costs, economies of scale and scope which would be difficult to achieve by a competing entrant and given the nature of vertical integration in this market, market failures may arise for actual/potential downstream competitors of RTÉ. ComReg is of the view that there is no effective constraint on 2rn from potential competitors and insufficient countervailing buying power exists in this market.
- 6.56 In summary, ComReg's conclusions are that:
- (a) 2rn has 100% market share of the relevant market and this has remained stable over time;

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<sup>159</sup> c.f Footnote 106



- (b) 2rn services operate from an extensive range of high tower/mast sites located throughout Ireland, many in strategically located high-sites, which enable almost complete coverage of the population of Ireland. There is no alternative terrestrial network capable of ensuring the same level of service in Ireland for Multiplex Operators and national terrestrial broadcasters;
- (c) Barriers to entry/expansion exist such as high financial (sunk) costs, control of infrastructure not easily replicated, economies of scale and scope, and vertical integration;
- (d) The terrestrial broadcasting market can be influenced to a large degree by the action of RTÉ as a vertically integrated entity. The presence of RTÉ as a vertically integrated entity is an important determination for the level of competition in the market. Access may be limited/foreclosed and/or there may be the potential for charging excessive fees to actual or potential to limit the competitive threat to RTÉ's position in the retail market; and
- (e) Insufficient countervailing buying power exists in this market and so national terrestrial broadcasters and Multiplex Operators do not have the ability to exert significant constraint on their cost or other terms and conditions of supply from 2rn.

## SMP Designation in Market A

6.57 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 27(4) of the Framework Regulations as having SMP.

6.58 Having regard to the conclusions of the above market analysis, ComReg position is that 2rn<sup>160</sup>, the wholly owned subsidiary of RTÉ is hereby designated as having SMP in Market A.

## Assessment of SMP in Market B

6.59 The framework for assessing SMP set out in paragraphs 6.5 to 6.13 also applies to the assessment of SMP in Market B. Of the 5 Submissions received, four Respondents (RTÉ, VM, TG4 and the BAI) agreed with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in Market B. 2rn did not comment.

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<sup>160</sup> 2rn is the trading name of RTE Transmission Network DAC.

6.60 Given the potential for overlap, ComReg combines its assessment of the factors listed in paragraph 6.10 under three broad headings as follows<sup>161</sup>:

- (a) Existing competition;
- (b) Potential competition; and
- (c) Strength of Countervailing Buying Power.

6.61 Other factors which could be used to indicate market power have been considered, but are seen as less relevant in this market, for the reasons outlined below:

- (a) **Technological advantages or superiority:** any advance made by a provider in this market would (from a technological point of view) likely be adopted by others. It is unlikely that technology itself could be used as a sustainable advantage in this market;
- (b) **Easy or privileged access to capital markets/financial resources:** while this may be a potentially relevant factor in this market, it is less clear and predictable than other relevant factors and therefore more difficult to measure on a forward looking basis in this market;
- (c) **Economies of scale and scope:** DTT multiplexes have an equally finite capacity when the same technology is employed. There are currently two PSB DTT multiplexes in operation and the potential for up to four more commercial DTT multiplexes. Approximately 90% to 95% of the annual costs of operating Market B are fixed costs and are those stemming from the use of Market A inputs. This fixed cost is the use of Market A infrastructure by Market B. The remaining c. 5% are Market B specific costs such as support services, management time and help desk functions. ComReg notes that the exit of one broadcaster from the DTT platform could increase the price for all the other broadcasters. Similarly the entry of new broadcasters (e.g., the addition of new channels on DTT multiplexes) would reduce the price for all other broadcasters. This is because the majority of costs to operate the multiplexes are fixed. These costs can be considered common costs to broadcasters, since these costs do not vary with the quantity of broadcasters on the platform. Furthermore, both radio and television programme services can be broadcast via any DTT multiplexes. Therefore, economies of scale and scope are relevant having regard to the above;
- (d) **Product or services diversification:** this is of relatively less importance in this market as bundled offerings do not feature at the wholesale level; and,

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<sup>161</sup> See paragraph 6.14 for a more detail on these factor. The approach set out there in relation to Market A also applies to Market B.

- (e) **A highly developed distribution and sales network:** this factor is likely to be less of a barrier in this wholesale market as wholesale services are purchased by a relatively small number of wholesale customers.

## Existing competition

- 6.62 RTÉ is currently the only operator in this market and operates the PSB Multiplexes. Therefore, RTÉ has 100% market share in Market B.<sup>162</sup>
- 6.63 The spectrum used by RTÉ is licensed by ComReg to RTÉ in accordance with the 2009 Broadcasting Act, while that which can be used by the independent sector is licensed to the BAI, through contracts which it enters into with them.
- 6.64 As there has not been any award of commercial DTT multiplex contracts, the BAI has not yet requested DTT multiplex licences from ComReg. Although the BAI entered into a negotiation process for commercial DTT contracts between 2008 and 2010, there was a failure to negotiate terms and conditions to the satisfaction of both 2rn and potential commercial DTT providers. Commercial DTT was not established at that time.
- 6.65 Currently, it is only via RTÉ that a DTT broadcaster can transmit its broadcasting programme services. RTÉ has two PSB DTT multiplex licences and provides a service that allows for 98% population coverage.
- 6.66 In the discussion of potential competition below, ComReg considers whether the competitive conditions of this market are likely to materially change during the period covered by this review.

## Potential competition

- 6.67 In this section ComReg assesses possible constraints posed by potential competition in Market B. This assessment of potential competition considers whether entry (and expansion) in this market are likely to such an extent that they would constrain RTÉ's ability to act independently of its competitors, customers and consumers.
- 6.68 In the rest of this section ComReg considers the characteristics of the market before coming to its conclusion on whether SMP exists in this market. The criteria as set out in the 2018 SMP Guidelines are considered in this context.

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<sup>162</sup> If a broadcaster wishes to provide programme material for broadcast on RTÉ's DTT platform, there are two-stages it must go through. It must firstly engage with RTÉ as the DTT multiplex licensee and then separately with RTÉNL to have the programme material multiplexed as part of the existing DTT platform subject to the provisions of Section 130 of the 2009 Broadcasting Act.

### Control of infrastructure not easily duplicated

- 6.69 RTÉ currently holds licences for two PSB DTT multiplexes which have been provided in accordance with the relevant provisions under the 2009 Broadcasting Act. Further entry to this market is not possible without acquiring a commercial DTT multiplex contract from the BAI.
- 6.70 The BAI initiated a competitive tender process around 2008 but commercial DTT was not established.
- 6.71 In light of no recent expressed demand for commercial DTT contracts and the uncertainty as to when any new process may be initiated (and the time involved for completion of such a process), effective entry capable of constraining RTÉ would not seem likely to occur during the period covered by this market review.
- 6.72 In the event of the launch of commercial DTT, RTÉ could possibly face direct competition for its own customers (such as TG4 and VM) in this market which may constrain its behaviour towards actual and potential customers. In principle, commercial DTT Multiplex Operators could act as an alternative means of terrestrial transmission for RTÉ's digital customers and therefore they could switch from RTÉ's PSB DTT multiplexes to commercial DTT Multiplex Operators. However, in practical terms this may be more difficult.
- 6.73 While it seems unlikely that a commercial DTT Multiplex Operator, capable of constraining RTÉ, will enter the market during the period of this review. ComReg notes that were this to occur it would need to satisfy VM and TG4's legal commitments (for example, coverage commitments) in order to provide a possible alternative source of supply to RTÉ for these FTA broadcasters.
- 6.74 Both TG4 and VM have legal commitments which they must satisfy to be able to broadcast their programme services. TG4 must be available, as much as reasonably possible, to the whole community of Ireland on a FTA basis while VM 1 and VM 2 must be available to 90% of the population on a FTA basis.
- 6.75 Overall, ComReg is therefore of the view that RTÉ's control of infrastructure not easily duplicated is likely to allow RTÉ to act independently of its competitors, customers and consumers.

### Sunk costs

- 6.76 While the costs associated with the establishment of a DTT multiplex(es) service would not be especially sunk (some of these costs such as staff or marketing may be sunk in the case where a firm exited the market) or as large as it would be for a potential entrant to Market A, there are financial costs involved in such a venture which would be a consideration for any potential entrant. For example to provide for a national service comparable to RTÉ, a commercial DTT operator would need to be broadcast from at least 67 transmission sites to cover circa 98% of the population.

## Vertical integration

- 6.77 In the context of an unregulated upstream wholesale Market A it is ComReg's view that RTÉ, as a vertically integrated entity, through 2rn could foreclose other Multiplex Operators entry into this downstream wholesale Market B. However, in light of ComReg's proposal to impose regulatory obligations on 2rn in upstream wholesale Market A, it could be expected that DTT Multiplex Operator entry to Market B could be more easily facilitated. However, the competitive conditions of Market B may not necessarily improve in tandem.
- 6.78 As already mentioned, there has not been any award of DTT multiplex contracts by the BAI to date and therefore the BAI has not yet requested multiplex licences from ComReg.
- 6.79 Since the unsuccessful commercial DTT negotiation process between 2008 and 2010 there has been no recent demand expressed by potential commercial Multiplex Operators for commercial DTT and it is unclear when a new commercial DTT tender process will be initiated. Furthermore, taking account of the regulatory and other barriers to entry, it does not seem likely that commercial DTT entry capable of constraining RTÉ will be established in the timeframe of this review.
- 6.80 As a vertically integrated entity where RTÉ is the sole operator in this wholesale market as well as having a significant position in the retail market it may leverage its wholesale market power (through limiting access to its multiplexes and/or engaging in discriminatory pricing practices for example) to affect the competitive conditions of the downstream retail market in its own favour to optimise its advertising revenues. Thus it would appear that RTÉ would have sufficient power to act independently of its customers and competitors. ComReg will consider this in the context of countervailing buying power below.

## Countervailing buying power

- 6.81 Currently, RTÉ is the only operator in Market B and for the reasons discussed above, this is unlikely to change within the period of this review. Therefore, to provide DTT services, broadcasters must have access to RTÉ's PSB DTT multiplexes and thus any potential outside option to purchase wholesale services is limited.

- 6.82 The alternative for RTÉ's customers (currently VM and TG4,) would be to threaten to cease terrestrial broadcast transmission. However, this is unlikely in so far as the DTT charges are smaller than the incremental revenues the broadcaster earns from being present on DTT. In addition, VM and TG4 have legal requirements (coverage and FTA broadcasting obligations) which make terrestrial broadcast transmission very important to these broadcasters meeting these requirements. If competing programme services were to cease their activities, this would likely benefit the broadcasting activities of RTÉ as it is a vertically integrated entity that competes in the downstream retail market with other broadcasters for audience market share and advertising revenues.
- 6.83 ComReg does not therefore consider that CBP could be credibly or effectively exercised by DTT customers.

## Conclusion on SMP in Market B

- 6.84 ComReg has considered this market in terms of existing competition, potential competition and countervailing buying power to determine whether there is SMP in the market.
- 6.85 Taken as a whole there are a number of barriers to effective entry and expansion in this market and hence there are limited competitive constraints on RTÉ. These include the process involved in acquiring a commercial DTT multiplex contract, the coverage obligations of Irish terrestrial television broadcasters, and potential switching costs for customers of RTÉ who have entered into contracts with RTÉ. Based on evidence to date ComReg is not aware of any express demand by potential multiplex providers for commercial DTT which would be capable of constraining RTÉ. In light of this and uncertainty as to whether (and if ever) a new commercial DTT contract process will be initiated and time involved in such a process, effective entry would not seem likely to occur in the period of this review. As the sole operator in this market and one which is vertically integrated into the retail market where it competes with other broadcasters, ComReg is of the view that RTÉ has sufficient market power to act independently of competitors, customers and consumers.
- 6.86 In summary, ComReg's conclusions are that:
- (a) RTÉ has 100% share of the relevant market;
  - (b) RTÉ has acquired the licenses for the operation of two PSB DTT multiplexes. There are no alternative commercial DTT Multiplex Operators in this market capable of constraining RTÉ and, on the basis of the evidence to date, this seems unlikely to change during the period covered by this review;
  - (c) As a vertically integrated entity RTÉ competes with other broadcasters in the retail market and is also a wholesale supplier to broadcasters; and
  - (d) Insufficient countervailing buying power exists and so DTT broadcasters do not have the ability to exert a sufficient constraint on RTÉ's behaviour.

## **SMP Designation in Market B**

- 6.87 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 27(4) of the Framework Regulations as having SMP.
- 6.88 Having regard to the conclusions of the above market analysis, ComReg hereby designates RTÉ as having SMP in Market B.



# 7 Competition Problems and Impacts on Competition and Consumers

## Overview

- 7.1 In Section 7 of the Consultation ComReg identified competition problems which, absent regulation, could potentially arise in the Relevant BTS Markets.
- 7.2 Of the five Submissions, three Respondent's (VM, TG4, and BAI) stated that they agreed with ComReg's preliminary conclusions in the Consultation. While RTÉ agreed with ComReg's preliminary conclusions with regards to Market A, RTÉ raised some issues with ComReg's views in respect of Market B. 2rn stated that it does not agree with ComReg's views in respect of Market A. 2rn provided no comments regarding Market B. ComReg addresses the concerns arising from RTÉ and 2rn's submissions directly in this Section 7<sup>163</sup>.
- 7.3 In this section ComReg identifies competition problems which, absent regulation, could potentially arise in the Relevant BTS Markets and, having done so, ComReg proceeds in Section 8 to consider the imposition of appropriate remedies to address the identified competition problems<sup>164</sup>.
- 7.4 In Section 4 of this Decision, ComReg defines two relevant BTS Markets namely; Market A (the market for wholesale access to national terrestrial BTS) and Market B (the market for wholesale access to DTT multiplexing services). In Section 6 of this Decision ComReg set out its view that 2rn has SMP in Market A and that RTÉ has SMP in Market B.
- 7.5 In accordance with Regulation 27(4) of the Framework Regulations, where an undertaking is designated as having SMP on a relevant market, ComReg is required to impose on that undertaking such of the remedies set out in Regulations 9 to 13 of the Access Regulations as it considers appropriate.

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<sup>163</sup> The consideration of respondent's views with regards to Market A is set out in paragraphs 7.31 to 7.34 and paragraphs 7.52 to 7.54 with regards to Market B.

<sup>164</sup> In light of the competition concerns identified in the SMP assessment in the 2013 Decision, ComReg deemed it necessary to impose a range of proportionate *ex ante* regulatory remedies in the Relevant BTS Markets. The assessment carried out in this section of the Consultation is carried out in the context of what competition problems would be likely assuming that such SMP obligations were not in place.

- 7.6 As noted in the European Commission's Explanatory Note to the 2014 Recommendation and similarly espoused in the Explanatory Note to the 2020 Recommendation, the underlying purpose of the *ex ante* regulatory framework is to address competition problems that have their origin in industry structural factors in a systematic and predictable manner. For example, the finding of an absence of effective competition in the Relevant BTS Markets indicates the potential for competition problems to arise over the review period in question, thereby justifying the imposition of *ex ante* regulation.
- 7.7 In the absence of regulation in the Relevant BTS Markets, a Service Provider designated with SMP would have the ability and incentive to influence a range of competition parameters, including prices, innovation, output and the variety or quality of goods and services provided.
- 7.8 ComReg notes that it is necessary neither to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuses in the Relevant BTS Markets. Rather, the purpose of *ex ante* regulation is to prevent the possibility of abuses materialising, given that undertakings have been designated with SMP in the Relevant BTS Markets, and so have both the ability and incentive to engage in exploitative and exclusionary behaviours to the detriment of competition and, ultimately, end users.
- 7.9 Below ComReg sets out its position on competition problems which, absent regulation, could potentially arise in the Relevant BTS Markets:
- (a) Competition Problems – Market A (discussed in paragraphs 7.10 to 7.35 below); and
  - (b) Competition Problems – Market B (discussed in paragraphs 7.36 to 7.55 below).

## Competition Problems – Market A

### Types of Competition Problems

- 7.10 Having regard to the SMP assessments in Section 6, in determining what forms of *ex ante* regulatory remedies are warranted in Market A, ComReg has carried out an assessment of potential competition problems that are likely to arise, assuming SMP regulation is absent and taking account of the structure and characteristics of Market A (and adjacent markets).
- 7.11 ComReg's position is that an SMP undertaking may engage in a range of conducts, for example:
- (a) Exploiting customers or consumers by virtue of its SMP position in the relevant market (as set out in paragraphs 7.13 to 7.19 below); and

- (b) Leveraging market power into adjacent vertically and/or horizontally related markets by engaging in exclusionary practices (as set out in paragraphs 7.20 to 7.30 below).

7.12 In considering the types of competition problem which could arise, ComReg has also been guided by experience in the markets, where relevant. Although it is not necessary *per se* to demonstrate actual abuse, examples of competition problems which have previously arisen, even in the presence of existing regulation, can help ground the analysis in actual experience.

## Exploitative practices

7.13 It is ComReg's position that 2rn is the undertaking with SMP in Market A and, given its presence in a number of adjacent markets<sup>165</sup>, would have the ability and incentive to engage in exploitative practices. Such exploitative practices could include excessive pricing, inefficiency or inertia to the ultimate detriment of end users. These potential concerns are considered below.

### Excessive Pricing

7.14 According to the definition set out in EU competition case law, excessive pricing refers to a situation where the prices charged by a dominant firm (i.e. an undertaking having SMP) are not closely related to the value of the relevant service to the consumer and/or the cost of producing or providing that service.<sup>166</sup> Concerns about excessive pricing arise where, absent regulation, price levels are likely to be persistently high with no effective pressure (e.g. from new entry or innovation) to bring them down to competitive levels over the period of the review.

7.15 2rn has maintained a share of 100% of Market A arising from an absence of existing effective competition, high barriers to entry associated with control over infrastructure not easily replicated and high sunk costs, limited scope for potential effective competition within the market review period and insufficient CBP. Thus, there is insufficient pressure to constrain 2rn from behaving, to an appreciable extent, independent of its competitors, customers and consumers with this enabling 2rn to engage in excessive pricing behaviour in Market A. ComReg considers that 2rn likely has incentives to exploit its Market A customers in this manner as it competes with them (through its parent company RTÉ) in downstream retail and/or wholesale markets.

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<sup>165</sup> Adjacent markets refers to markets which are linked either vertically (i.e., at different levels of the supply chain) or horizontally (for example include complementary products or services). See paragraph 7.20 below)

<sup>166</sup> Case C 27/76 *United Brands v. Commission* [1978] ECR 207, para. 250. In *United Brands* the Court of Justice of the European Union held that: "... charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be... an abuse".

- 7.16 As noted above, 2rn is currently regulated in Market A. Absent such regulation, ComReg considers that prices would not be set by 2rn at a competitive level. Given the ability and incentives for 2rn, as the SMP undertaking, to engage in excessive/exploitative pricing, transparency, price control and related cost accounting obligations are therefore considered justified by ComReg to ensure that prices are set at an appropriate level.

### Inefficiency

- 7.17 A firm with SMP in Market A may also, by virtue of the lack of effective competitive pressure in that market, be insulated from the need to innovate and improve efficiency to stay ahead of rivals. This may limit the development of new technology and/or lead to costlier and less efficient methods of production and consequently higher prices for customers than would otherwise exist under competitive market conditions. This, in turn, is likely to lead to a less rich range of offerings for retail end users than otherwise might occur.
- 7.18 As an SMP operator in Market A, ComReg is of the view that there may be less effective pressure (absent regulation) on 2rn to provide an efficient service than may otherwise be the case. Therefore, delays may arise, for example, in the provisioning of forms of access where broadcasters and Multiplex Operators may express a demand for an access product which is not (or is not effectively) provided. This could impede such broadcasters and Multiplex Operators' ability to compete in related markets and in turn delay the delivery of retail services to end users.
- 7.19 If 2rn were not part of a vertically integrated entity, it may face different incentives to encourage as many customers as it could on its network in order to increase its revenues. However, as its parent company (RTÉ) operates in the downstream retail market, 2rn's incentives regarding the potential negative impact of other programme services on the advertising revenues RTÉ could command may mean that there may be an incentive by 2rn to deter market entry by delaying the provision of broadcast transmission services to third parties or by increasing the costs of their access and carriage or by imposing unreasonable terms and conditions. For example, 2rn might have a limited incentive in keeping network cost to an efficient level, since higher broadcast transmission charges could be passed through to broadcasters and Multiplex Operators which would hinder the development of competition and this could benefit the broadcasting activities of RTÉ.

## Leveraging and Exclusionary Practices

7.20 Another potential competition problem arises when a vertically-integrated operator has SMP in one market which has close links with other adjacent markets either at the same (horizontal) or different (vertical) level in the supply chain. The SMP operator may attempt to leverage its market power into these horizontally- or vertically-related markets. This could enable the SMP operator to strengthen its position or distort competition in those related markets and potentially also reinforce its existing market power in the SMP market in question.

### Vertical leveraging

7.21 Vertical leveraging arises where a vertically integrated operator has dominance at one level in the production or distribution chain, e.g. the wholesale level, and can potentially transfer this market power into downstream wholesale or retail markets where it is also active. This would mean that a vertically integrated operator such as 2rn that has SMP in Market A may have the incentive to use this market power to affect the competitive conditions in related downstream markets, such as the market for Retail TV and Radio Broadcasting services, where competitors rely on the key input provided by the vertically integrated operator 2rn.

### Refusal to deal/denial of access

7.22 Vertical leveraging can manifest as an outright refusal to supply or a constructive refusal to supply. Refusal to supply is particularly relevant when the SMP operator is vertically integrated which facilitates the SMP operator to gain strategic advantage over rivals in the downstream markets. Constructive refusal to supply could include delaying tactics such as protracted negotiations in respect of the supply of new wholesale products or features, discriminatory use or withholding of information, quality discrimination, disproportionate entry criteria as well as unreasonable terms and conditions associated with access. Further examples of potential leveraging behaviour can include creating or exploiting information asymmetries, margin squeeze, and practices aimed generally at raising rivals' costs.<sup>167</sup> ComReg's view is that 2rn, as a vertically integrated operator has the ability (given its SMP position) and incentive (given both it and its parent company RTÉ operate in downstream markets) to engage in these types of behaviours.

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<sup>167</sup> Unlike predatory pricing, certain practices can be employed which unfairly raise a rival's costs and reduce competition and which do not necessarily require the SMP undertaking to incur short run losses. For example, an integrated firm with market power in an upstream market may have incentives to raise the price of the inputs it sells to its downstream rivals, thereby potentially raising their costs and reducing demand for their products. Furthermore, the integrated operator could potentially give priority to its own affiliate at network bottlenecks or apply standards that are easier for its own affiliate to meet than for its downstream competitors. (See Krattenmaker, T.G. and S.C. Salop (1986) "Anticompetitive Exclusion: Raising Rival's Costs To Achieve Power over Price", Yale Law Journal, 96:209-93; Salop, S.C. and D.T. Scheffman (1987), "Cost-Raising Strategies", Journal of Industrial Economics, 36:19-34).

## Non price issues

- 7.23 Where the SMP operator is vertically integrated, potential discriminatory behaviour is possible as it can be difficult to observe that equivalent conditions are provided by the SMP operator to broadcasters and Multiplex Operators in similar circumstances.<sup>168</sup> For example, it may be difficult to compare products used internally with those offered to third parties in the wholesale market, and it may be difficult to compare how products are developed and implemented. A lack of transparency in how products and services are both developed and implemented internally to the SMP operator could make it difficult to demonstrate equivalence and provide the potential and incentive for a means of leveraging market power.
- 7.24 A vertically-integrated SMP operator may act to foreclose wholesale-based competition in the retail market by creating or exploiting information asymmetries.
- 7.25 An example of information asymmetries could include where wholesale broadcasters and Multiplex Operators require service level agreements including metrics on service delivery and fault repair to view the overall performance of 2rn's wholesale product from a provisioning and service assurance perspective. Failure by 2rn to provide such services to wholesale customers could act as a deterrent to entry. Uncertainty for such broadcasters and Multiplex Operators as to the performance and quality of their purchased inputs relative to the services and information made available internally to a potential competitor (RTÉ) could possibly discourage investments in markets dependent upon 2rn's wholesale products.
- 7.26 Information asymmetries may also apply to future planning by the SMP operator. For example, changes by 2rn to its network may have significant implications for broadcasters and Multiplex Operators using its wholesale service and a lack of information and associated uncertainty may impact existing broadcasters and Multiplex Operators or discourage potential entry to the market. Such information asymmetries may lead to a delayed consideration of broadcasters and Multiplex Operators' requirements in turn delaying their ability to respond to downstream market dynamics.

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<sup>168</sup> Regulation 10 (1) (2) of the Access Regulations, states that "The regulator may... impose on an operator obligations of non-discrimination...(a) applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and (b) provides services and information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners."



- 7.27 An SMP operator may also engage in delaying tactics where it does not refuse to supply a certain input to its downstream competitors but the independent broadcasters and Multiplex Operators are supplied at a later point in time compared to its retail affiliate. This could come in various forms such as lengthy negotiations. This may restrict competitor entry and would enable RTÉ to protect its advertising revenues from downstream competitors.
- 7.28 Furthermore, an SMP operator in this market may impose undue requirements on potential competitor customers to prevent entry or expansion. These are any contract terms which are unnecessary for the provision of the upstream product by the SMP operator but raise rivals costs or restrict rivals sales. This type of behaviour could include stipulating unnecessarily onerous or unwarranted requirements for security payments or termination penalties.

### Pricing issues

- 7.29 Vertical leverage may also be apparent in the use of price. RTÉ may have an incentive to minimise the number of broadcasters on the terrestrial network (or their effectiveness) to reduce the potential loss of its advertising revenues which might otherwise occur if more third party broadcasting programme services were made available via terrestrial means<sup>169</sup>. This could occur if, for example, 2rn could devise a tariff structure which would discourage broadcasters' interest in accessing its broadcast transmission network. RTÉ, through 2rn, could favour its own digital programme services and multiplex to other programme services and multiplexes by applying discriminatory charges or by engaging in the practice of margin-squeeze. As a vertically integrated operator which has SMP at the wholesale level and provides a wholesale input on which other operators rely to compete in a downstream market it could price its upstream services in such a way as to impede effective downstream competition by excessively raising its upstream costs or due to an insufficient margin between wholesale and retail prices.
- 7.30 Where an entity is vertically integrated discriminatory pricing practices can manifest and are not easily visible. For example, it may be difficult to compare the prices charged to third parties compared to those charged to its own internal arm.

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<sup>169</sup> This would depend on the extent to which advertising revenue foregone is outweighed by any cost savings that might arise from sharing network costs with a greater number of broadcasters.



## Consideration of Respondents' Views

### Overview of Respondents' Views

- 7.31 Of the five Submissions, four Respondent's (RTÉ, VM, TG4, and BAI) agreed with ComReg's preliminary conclusions in the Consultation with regards to Market A. In its Submission 2rn reiterated its view that the Relevant BTS Markets should not be identified as being susceptible to *ex ante* regulation. Consequently 2rn are of the view that it does not have SMP in Market A.
- 7.32 2rn submitted that if ComReg decided to designate 2rn with SMP then it acknowledged the requirement placed on ComReg to impose appropriate remedies. In this regard 2rn questioned the need for access and transparency remedies on the basis that the other proposed remedies (namely the price control, cost accounting and accounting separation remedies) are not undermined by the absence of transparency and access remedies.

### ComReg's Consideration of Respondents' Views

- 7.33 ComReg does not agree with 2rn's view that the Relevant BTS Markets are not susceptible to *ex ante* regulation and therefore 2rn should not be designated with SMP. ComReg's response in this regard is set out in paragraphs 5.21, 5.22, 6.52 and 6.53 of this Decision.
- 7.34 ComReg does not agree with 2rn that the transparency and access remedies should be removed. ComReg maintains its view that 2rn have the ability and incentive to engage in a range of identified exploitative and/or exclusionary conducts which may impact downstream competition and consumers including the denial or constructive refusal of access. The potential for leveraging of SMP into related markets can occur through information asymmetries, delaying tactics such as protracted negotiations in respect of the provision of access to BTS services or associated facilities, and/or seeking unreasonable terms and conditions to grant access..

## Conclusions on Competition Problems in Market A

- 7.35 In summary, ComReg is of the view that 2rn has the ability and incentive to engage in exploitative and exclusionary behaviours in Market A to the detriment of downstream competition and consequently negatively impact the diversity and breath of programme services available to end users in downstream retail markets.

## Competition Problems – Market B

### Types of Competition Problems

- 7.36 Having regard to the SMP assessments in Section 6, in determining what forms of *ex ante* regulatory remedies are warranted in Market B, ComReg has carried out an assessment of potential competition problems that are likely to arise, assuming SMP regulation is absent and taking account of the structure and characteristics of Market B (and adjacent markets).
- 7.37 An SMP undertaking may engage in a range of conducts, for example:
- (a) Exploiting customers or consumers by virtue of its SMP position in the relevant market (discussed below in paragraphs 7.39 to 7.42), and
  - (b) Leveraging market power into adjacent vertically and/or horizontally related markets by engaging in exclusionary practices (discussed below in paragraphs 7.43 to 7.51).
- 7.38 In considering the types of competition problem which could arise, ComReg has also been guided by experience in the markets, where relevant. Although it is not necessary *per se* to demonstrate actual abuse, examples of competition problems which have previously arisen, even in the presence of existing regulation, can help ground the analysis in actual experience.

### Exploitative practices

- 7.39 It is ComReg's position that RTÉ, as the undertaking with SMP in the Market B, would have the ability and incentive to engage in exploitative practices having regard to its presence in a number of adjacent markets. Such exploitative practices could include excessive pricing, inefficiency or inertia to the ultimate detriment of consumers. These potential concerns are considered below.

#### Excessive Pricing

- 7.40 As noted in paragraph 7.14 above, excessive pricing refers to a situation where the prices charged by a dominant firm (i.e. an undertaking having SMP) are not closely related to the value of the relevant service to the consumer and/or the cost of producing or providing that service. Concerns about excessive pricing arise where, absent regulation, price levels are likely to be persistently high with no effective pressure (e.g. from new entry or innovation) to bring them down to competitive levels over the period of the review.

- 7.41 RTÉ has maintained a market share of 100% of Market B resulting in an absence of existing effective competition. ComReg's view is that there is insufficient pressure to constrain RTÉ from behaving, to an appreciable extent, independent of its customers and competitors. There is also insufficient pressure to prevent RTÉ from engaging in excessive pricing behaviour in Market B. ComReg considers that RTÉ likely has incentives to exploit its Market B customers in this manner as it competes with them in downstream retail and/or wholesale markets.
- 7.42 As noted above, RTÉ is currently regulated in Market B. Absent such regulation, ComReg considers that prices for access to Market B services would not be set by RTÉ at a competitive level. Given the ability and incentives for RTÉ, as the vertically integrated SMP undertaking, to engage in excessive/exploitative pricing, transparency, price control and related cost accounting obligations are therefore considered justified by ComReg to ensure that prices are set at an appropriate level.

## Leveraging and Exclusionary Practices

- 7.43 As noted in paragraph 7.20 above, potential competition problems arise when a vertically-integrated operator has SMP in one market which has links with other adjacent markets either at the same (horizontal) or different (vertical) level in the supply chain. The SMP operator may attempt to leverage its market power into these horizontally- or vertically-related markets. This could enable the SMP operator to strengthen its position or distort competition in those related markets and potentially also reinforce its existing market power in the SMP market in question.

### Vertical leveraging

- 7.44 A vertically integrated operator that is dominant in this market may have the incentive to use this power to affect the competitive conditions in the market for retail broadcasting services. RTÉ has the potential to use its upstream market power in Market B to leverage into the downstream retail market. This is discussed below.

## Refusal to deal/denial of access

- 7.45 An example of vertical leveraging can include refusal to deal. A refusal to deal/denial of access may manifest itself as a constructive denial and not necessarily an outright and categorical refusal to supply. This could include discriminatory use or withholding of information, quality discrimination, disproportionate entry criteria as well as unreasonable terms and conditions associated with access. Further examples of potential leveraging behaviour can include creating or exploiting information asymmetries, and practices aimed generally at raising rivals' costs. ComReg considers that, absent regulation, a number of these types of issues could arise in this market.

## Non price issues

- 7.46 Where the SMP operator is vertically integrated, non-discriminatory conditions and services can be ambiguous. A lack of transparency could make it difficult to demonstrate equivalence and provide the potential and incentive for leveraging market power.
- 7.47 Further, a vertically-integrated SMP operator may act to foreclose wholesale-based competition in the retail market by creating or exploiting information asymmetries.
- 7.48 An example of information asymmetries could include where wholesale customers require service level agreements with regard to service delivery and fault repair to view from a provisioning and service assurance perspective. Failure by RTÉ to meet such requirements could provide the potential for discriminatory behaviour and further, possibly act as a deterrent to potential entry.
- 7.49 Information asymmetries may also apply to future planning by the SMP operator. For example, changes by RTÉ to its wholesale services may have significant implications for DTT broadcasters using its wholesale service and a lack of information and associated uncertainty may discourage undertakings entry to the market.

## Pricing issues

- 7.50 Vertical leverage may also be apparent in the use of price. RTÉ may have the potential to minimise the number of non-RTÉ broadcasting programme services on its multiplexes to reduce the potential loss of its advertising revenues which might otherwise occur if more third party broadcasting programme services were made available in the retail market via terrestrial means. This could occur if, for example, RTÉ could devise a tariff structure which would discourage broadcasters' interest in accessing its multiplexes by, for example, raising the costs of its rivals through discriminatory charges. In this regard RTÉ could also favour its own digital programme services over other programme services by applying discriminatory charges. As a vertically integrated operator which has SMP at the wholesale level and provides a wholesale input on which other

operators rely to compete in a downstream market it could price its upstream services in such a way as to impede effective downstream competition by excessively raising its upstream costs. It is therefore important that tariffs are set on a transparent and non-discriminatory basis.

- 7.51 These issues highlight the importance of establishing a transparent and effective mechanism of accounting separation and transfer charges between the various RTÉ entities so that the costs of access are efficient and its allocation to each customer (RTÉ and competitor broadcasting activities) can be transparently identified.

## Consideration of Respondents' Views

### Overview of Respondents' Views

- 7.52 Of the five Submissions received, three Respondent's (VM, TG4, and BAI) stated that they agreed with ComReg's preliminary conclusions on the competition problems in Market B. RTÉ raised some issues with respect to ComReg's views on Market B competition problems. 2rn provided no comment regarding Market B.
- 7.53 RTÉ submitted that there is no evidence to support a claim of potential excessive pricing by DTT Mux Management. RTÉ submit that it has made significant efforts to develop the DTT platform and to reduce the cost to all broadcasters citing a reduction in annual carriage costs for an SD Channel from approximately €900,000 annually in December 2014 to approximately €800,000 in December 2019.

### ComReg's Consideration of Respondents' Views

- 7.54 ComReg's reiterates that it is required to apply an MGA<sup>170</sup> and therefore its market assessment starts from the assumption that SMP regulation is not present in the specific market under consideration. ComReg remains concerned that there is insufficient pressure to constrain RTÉ from behaving, to an appreciable extent, independent of its customers and competitors and that there is also insufficient pressure to prevent RTÉ from engaging in excessive pricing behaviour in Market B. ComReg has clearly set out above that, absent regulation, RTÉ has both the ability (given, for example, its control over infrastructure not easily duplicated) and incentive (given, for example, it is vertically integrated and competes with downstream undertakings that are also customers of the Market B services) to behave to an appreciable extent, independently of its customers and competitors.

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<sup>170</sup> See paragraph 2.26.

## Conclusion on competition problems in Market B

7.55 In summary, ComReg's position is that, absent regulation, there is the potential ability and incentive for RTÉ as the SMP operator in Market B to engage in actions which could inhibit downstream competition and consequently negatively impact end users in the retail broadcasting market by engaging in exploitative and exclusionary behaviours.

# 8 Approach to Specifying and Implementing Remedies

## Introduction

- 8.1 In Section 8 of the Consultation, ComReg set out its proposed approach to specifying and implementing remedies in the Relevant BTS Markets.
- 8.2 Of the five Submissions received, three Respondents (TG4, BAI and VM) broadly agreed with the proposed remedies in the Relevant BTS Markets. RTÉ and 2rn neither agreed or disagreed. In addition, RTÉ, 2rn, VM, and TG4 raised a number of issues with the proposed remedies, which are addressed below<sup>171</sup>.
- 8.3 In Section 7 of this Decision, ComReg noted that there are a range of competition problems and competition or consumer impacts that, absent regulation, could arise in each of the Relevant BTS Markets within which the 2020 SMP BTS Operators<sup>172</sup>, operate.
- 8.4 This Section 8 considers the appropriate remedies to impose on the 2020 SMP BTS Operators, having taken account of the views of the Respondents, in order to address the competition problems identified.
- 8.5 ComReg has decided to impose the following remedies on the 2020 SMP BTS Operators, with such remedies largely being a continuation of those which had been imposed under the 2013 Decision:
- (a) Transparency obligations;
  - (b) Non Discrimination obligations;
  - (c) Access obligations;
  - (d) Price Control and Cost Accounting obligations; and
  - (e) Accounting separation obligations.

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<sup>171</sup> Respondents' views on transparency remedies in Market A are considered at paragraph 8.76 to 8.85 and in Market B at paragraphs 8.332 to 8.340.

Respondents' views on non- Discrimination remedies in Market A are considered at paragraph 8.100 and in Market B at paragraphs 8.358 to 8.368 .

Respondents' views on access remedies in Market A are considered at paragraphs 8.146 to 8.149 and in Market B at 8.408 to 8.418.

Respondents' views on price Control and Cost Accounting remedies are considered at paragraph 8.205 to 8.218 and in Market B at paragraphs 8.510 to 8.529.

Respondents' views on Accounting Separation remedies in Market A are considered at 8.292 to 8.295 and in Market B at paragraphs 8.568 to 8.571.

<sup>172</sup> ComReg has designated 2rn with SMP in Market A and RTÉ with SMP in Market B. Together 2rn and RTÉ are referred to as the '**2020 SMP BTS Operators**'.



- 8.6 In Section 7 above ComReg identified a range of competition problems and competition/consumer impacts that, absent regulation, could arise in the Relevant BTS Markets. In this section, ComReg now considers the imposition of appropriate and proportionate remedies to mitigate such competition problems as follows:
- (a) The legal framework for imposing remedies (discussed in paragraphs 8.7 to 8.12 below);
  - (b) Option of no regulation in the Relevant BTS Markets (discussed in paragraphs 8.13 to 8.18 below);
  - (c) Existing remedies imposed under the 2013 Decision (discussed in paragraphs 8.19 to 8.34 below);
  - (d) Regulatory remedies in Market A relating to transparency, non-discrimination, access, price control, cost accounting and accounting separation (discussed in paragraphs 8.35 to 8.297 below); and
  - (e) Regulatory remedies in Market B relating to transparency, non-discrimination, access, price control, cost accounting and accounting separation (discussed in paragraphs 8.298 to 8.573 below).

## Legal Framework for Imposing Remedies

- 8.7 Having regard to the competition problems identified in Section 7, in this Section 8 ComReg sets out obligations which ComReg considers appropriate and proportionate to impose on the 2020 SMP BTS Operators in the Relevant BTS Markets. In accordance with Regulation 8(1) of the Access Regulations, where a Service Provider is designated as having SMP on a relevant market, ComReg is required to impose on that Service Provider such obligations as it considers appropriate, as set out in Regulations 9 to 13 of the Access Regulations. In this regard, the obligations that may be imposed by ComReg on SMP undertakings relate to:
- (a) Transparency;
  - (b) Non-Discrimination;
  - (c) Access;
  - (d) Price Control and Cost Accounting; and
  - (e) Accounting Separation.
- 8.8 In addition, Regulation 8(6) of the Access Regulations provides that any obligations imposed must be:
- (a) Based on the nature of the problem identified;
  - (b) Proportionate and justified in the light of the objectives laid down in Section 12 of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations; and

- (c) Only imposed following public consultation and notification of the draft measures to the European Commission, BEREC and other NRAs, in accordance with Regulation 12 of the Framework Regulations.
- 8.9 Regulations 12(1) and 12(4) of the Access Regulations also provide statutory criteria that ComReg must take into account before imposing access obligations on an SMP undertaking. These criteria include, inter alia, examining the technical and economic viability of using or installing competing facilities; the feasibility of providing access; the initial investment outlay by the undertaking; and the need to safeguard competition in the long term.
- 8.10 Regulations 13(2) and (3) of the Access Regulations provide that ComReg is also required to take into account:
- (a) The investment made by the SMP operator which ComReg considers relevant, allowing that operator a reasonable rate of return on adequate capital employed<sup>173</sup>, taking into account any risks involved specific to a particular new network investment project; and
  - (b) Ensuring that any cost recovery mechanism or pricing methodology that ComReg imposes serves to promote efficiency and sustainable competition, and maximises consumer benefits.
- 8.11 The considerations set out in paragraphs 8.7 to 8.10 above are taken into account, as appropriate, when assessing what obligations to impose and are also discussed in the context of the Regulatory Impact Assessment ('RIA') set out in Section 9.
- 8.12 In considering the imposition of appropriate remedies, ComReg also takes into account:
- (a) Any relevant comments letters issued by the European Commission to NRAs pursuant to Articles 7 and 7a of the Framework Directive regarding its review of regulatory measures notified under the EU consultation mechanism for electronic communications services (the '**Comments Letters**'); and
  - (b) The European Commission's 2005 Accounting Separation and Cost Accounting Recommendation<sup>174</sup>.

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<sup>173</sup> See Cost of Capital in Mobile Telecommunications, Fixed Telecommunications and Broadcasting (Market A and Market B) ComReg Decision and Response to Consultation, ComReg Document 14/136 19/54, published 18/12/2014. Available at <https://www.comreg.ie/csv/downloads/ComReg14136.pdf?v=2.4.9>

<sup>174</sup> European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC) ('2005 Accounting Separation and Cost Accounting Recommendation').

## Option of No Regulation in the Relevant BTS Markets

- 8.13 ComReg has considered whether the option of regulatory forbearance is appropriate in the Relevant BTS Markets.
- 8.14 Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations require ComReg to impose at least some level of regulation on undertakings designated as having SMP. In Section 6, ComReg set out its position that the Relevant BTS Markets are not effectively competitive (or likely to become effectively competitive within the timeframe covered by this review). In Section 7, ComReg identified a range of competition problems that could occur in these markets absent regulation.
- 8.15 In view of this, absent the imposition of any remedies within the Relevant BTS Markets, it is ComReg's position that these markets would not likely function effectively.
- 8.16 It is ComReg's position that the option of regulatory forbearance in the Relevant BTS Markets is not, therefore, appropriate or justified. The relevant issue to be considered, therefore, relates to what form of regulation is appropriate, in particular, which of the remedies under the Access Regulations are appropriate having regard to the particular circumstances of such markets and the associated competition problems. ComReg sets out its position on these issues below.
- 8.17 The detail of the specific obligation(s) are set out in the Decision Instruments ('DI(s)') contained in Annex: 4 and Annex: 5 of this Decision. These are considered proportionate based on the nature of the actual and potential competition problems identified in this report, and justified in light of the objectives laid down in section 12 of the Communications Regulation Act, 2002 (as amended).
- 8.18 ComReg will closely monitor relevant developments (if any) in the market over the period of the current review, to assess whether the obligation(s) remain appropriate.

## Existing Remedies

### Existing Market A Remedies

- 8.19 In its 2013 Decision ComReg imposed the following, non-exhaustive list of obligations on 2rn (then RTÉNL) in Market A.

- 8.20 **Transparency Obligations**<sup>175</sup>: requirements to publish a Reference Offer and Service Level Agreements ('SLAs'). 2rn's Reference Offer was to include at least the following:
- (a) A description of the relevant offerings broken down into components according to market needs;
  - (b) A description of the technical specifications and network characteristics of the Access being offered;
  - (c) A description of the associated terms and conditions for supply and use, including prices, which shall include a detailed description of the tariff model and how it operates to derive such prices.
- 8.21 2rn also had an obligation imposed on it to publish all SLAs (and any updates) on its publicly available website, network characteristics, terms and conditions for supply and use, and prices.
- 8.22 **Non-Discrimination Obligations**<sup>176</sup>: requirements to apply equivalent conditions in equivalent circumstances to Broadcast Operators<sup>177</sup>. In this regard, 2rn was required to:
- (a) Apply equivalent conditions in equivalent circumstances to other Broadcast Operators providing equivalent services;
  - (b) Ensure that all services (including Associated Facilities) and information are provided to other Broadcast Operators under the same conditions and of the same quality as the services and information that it provides to itself or to its subsidiaries or partners, including RTÉ;
  - (c) Ensure that all services and information are provided to other Broadcast Operators at the same time as such services and/or information are made available by RTÉNL (now 2rn) to itself or to its subsidiaries or partners, including RTÉ.
- 8.23 **Access Obligations**<sup>178</sup>: requirements to meet all reasonable requests from Broadcast Operators for the provision of access; to grant Broadcast Operators access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) including Associated Facilities, which includes, but is not limited to the items below and requirements to meet all reasonable requests from Broadcast Operators for access to such on an unbundled / unmanaged basis;

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<sup>175</sup> See paragraphs 10.1 to 10.9 in ComReg document 13/71.

<sup>176</sup> See paragraphs 9.1 to 9.3 in ComReg document 13/71.

<sup>177</sup> For the purposes of this Decision and the consideration of proposed remedies in Market A Broadcast Operator means a multiplex contractor, a national sound broadcasting contractor and RTÉ.

<sup>178</sup> See paragraphs 7.1 to 7.4 in the 2013 Decision and 8.1 to 8.3 relating to Conditions attached to the Access obligations.

- (a) The provision of co-location for the transmitter equipment;
- (b) The provision of power and the backup power supply for the transmitter and associated equipment;
- (c) The provision of telemetry services;
- (d) The provision of access to the antenna combiner and feeder to enable the connection of the transmitter equipment to the combiner;
- (e) The provision of access to the microwave distribution system; and
- (f) The provision of support services.

8.24 **Price Control and Cost Accounting Obligations**<sup>179</sup>: requirements that Access is provided under a cost oriented price control based on Historical Cost Accounting ('HCA') and Fully Distributed Cost ('FDC') methodology<sup>180</sup>.

8.25 **Accounting Separation Obligations**<sup>181</sup>: requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.

## Existing Market B Remedies

8.26 In the 2013 Decision, ComReg imposed the following obligations on RTÉ in Market B.

8.27 **Transparency Obligations**<sup>182</sup>: requirements to publish a Reference Offer and SLAs. RTÉ's Reference Offer was to include at least the following:

- (a) A description of the relevant offerings broken down into components according to market needs;
- (b) A description of the technical specifications and network characteristics of the Access being offered;
- (c) A description of the associated terms and conditions for supply and use, including prices, which shall include a detailed description of the tariff model and how it operates to derive such prices.

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<sup>179</sup> See paragraphs 12.1 to 12.4 in the 2013 Decision.

<sup>180</sup> Under the HCA basis, the operator recovers costs actually incurred in providing the products, services or associated facilities, plus a normal rate of return on the investment. The HCAs are based on the actual reported financial results of an operator for a given period which has expired. The results from the HCAs should be directly reconcilable with the statutory financial statements of the operator. The FDC methodology allocates all the operator's costs from their financial information to all the services, products or regulated operations of the company.

<sup>181</sup> See paragraphs 11.1 in the 2013 Decision.

<sup>182</sup> See paragraphs 10.1 to 10.9 in the Decision Instrument for Market B in the 2013 Decision.

- 8.28 RTÉ was required to publish all SLAs (and any updates) on its publicly available website (or such other publicly available website as may be agreed by ComReg).
- 8.29 **Non-Discrimination Obligations**<sup>183</sup>: requirements to apply equivalent conditions in equivalent circumstances to Broadcasters. RTÉ is required to:
- (a) Apply equivalent conditions in equivalent circumstances to other Broadcasters providing equivalent services;
  - (b) Ensure that all services (including Associated Services and Associated Facilities) and information are provided to other Broadcasters under the same conditions and of the same quality as the services and information that RTÉ provides to itself or to its subsidiaries or partners;
  - (c) Ensure that all such services and information shall be provided to other Broadcasters at the same time as the service(s) and/or information are made available by RTÉ to itself or its subsidiaries or partners.
- 8.30 **Access Obligations**<sup>184</sup>: requirements to meet all reasonable requests from Broadcasters<sup>185</sup> for the provision of access, and to:
- (a) give Broadcasters Access to multiplexes and Associated Facilities;
  - (b) negotiate in good faith with Broadcasters requesting Access;
  - (c) not withdraw, without the prior approval of ComReg, Access to services and facilities already granted;
  - (d) grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services;
  - (e) provide co-location or other forms of Associated Facilities sharing where relevant.
- 8.31 There are further conditions which were attached to the Access Obligations which state that RTÉ is required to:
- (a) Conclude, maintain and keep updated, as appropriate, legally binding SLAs with broadcasters that shall include, but shall not be limited to, the maintenance of the SLA requirements;

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<sup>183</sup> See paragraphs 9.1 to 9.3 in the Decision Instrument for Market B in the 2013 Decision.

<sup>184</sup> See paragraphs 7.1 to 7.2 in the Decision Instrument for Market B in the 2013 Decision

<sup>185</sup> For the definition of 'Broadcaster' see section 2 (Definitions and Interpretation) of the 2013 Decision Instrument for Market B, in Appendix E of the 2013 Decision. In terms of the 2009 Broadcasting Act, "broadcaster" means a person who supplies a compilation of programme material for the purpose of its being transmitted, relayed or distributed as a broadcasting service (whether that person transmits, relays or distributes that material as such a service or not).

- (b) Negotiate in good faith with broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs;
  - (c) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter of negotiation between RTÉ and broadcasters and recovery of service credits shall be, in the first instance, a matter for the Broadcasters and RTÉ;
  - (d) Ensure that SLAs detail how service credits, when they occur, are calculated, to include the provision of an example calculation;
  - (e) Ensure payment of service credits, when they occur, shall be made in a timely and efficient manner.
- 8.32 Where a request for provision of Access, or a request for provision of information is refused or granted only in part, RTÉ is required to provide the objective criteria and reasons for such refusal, or partial grant, to the Broadcaster which made the request, in a fair, reasonable and timely manner.
- 8.33 **Price Control and Cost Accounting Obligations**<sup>186</sup> included requirements that Access is provided under a cost oriented price control based on a HCA, and FDC costing methodology.
- 8.34 **Accounting Separation Obligations**<sup>187</sup> included requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.

## Remedies in Market A

- 8.35 ComReg now sets out its position regarding remedies that it is imposing upon 2rn in Market A. These include:
- (a) Transparency obligations (discussed in paragraphs 8.50 to 8.89 below);
  - (b) Non-discrimination obligations (discussed in paragraphs 8.90 to 8.104 below);
  - (c) Access obligations (discussed in paragraphs 8.105 to 8.152 below);
  - (d) Price Control and Cost Accounting obligations (discussed in paragraphs in paragraphs 8.153 to 8.221 below); and
  - (e) Accounting separation obligations (discussed in paragraphs 8.222 to 8.297 below).

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<sup>186</sup> See paragraphs 12.1 to 12.4 in the Decision Instrument for Market B in the 2013 Decision.

<sup>187</sup> See paragraphs 11.1 in the Decision Instrument for Market B in the 2013 Decision.



- 8.36 Prior to discussing the above, ComReg first discusses the relevance, if any, of the provisions of other legislation, given it may impact upon the overall approach to remedies.

### Relevance of Provisions of other Legislation

- 8.37 The question arises as to whether the 2009 Broadcasting Act provides a regulatory framework such that any competition concerns that may occur, absent regulation, would be addressed through the provisions of the 2009 Broadcasting Act.
- 8.38 Section 108 of the 2009 Broadcasting Act concerns, *inter alia*, the exploitation of commercial opportunities by RTÉ and TG4, and states that such exploitation shall be operated in an efficient manner and be used to subsidise its public service objects. Transactions entered into between public service objects and the exploitation of commercial opportunities must be on an arm's length basis.
- 8.39 Section 109 of the 2009 Broadcasting Act sets out general accounting procedures for 'a corporation' and requires RTÉ and TG4 to maintain financial records and accounts and sets out consequent auditing, financial transparency and reporting obligations. Section 109(9)(b) provides that a corporation shall, after the end of each financial year, send to the Minister a statement in respect of the total revenue and costs derived by the corporation in that financial year. That statement to the Minister shall distinguish between monies received or expended on (a) activities in pursuance of its public service objectives, and (b) activities in pursuance of its exploitation of commercial opportunities objectives.
- 8.40 Section 115 of the 2009 Broadcasting Act provides that the Minister for Environment, Climate and Communications ('the Minister') may, at the request of the BAI and after consultation with RTÉ, require RTÉ to co-operate with a holder of a sound broadcasting contract in the use of any mast, tower, site or other installation or facility needed in connection with the provision of transmission facilities for sound broadcasting services under the sound broadcasting contract. It also states that a sound broadcaster shall make to RTÉ such periodical or other payments in respect of any facilities as the Minister, after consultation with RTÉ and the BAI, directs.
- 8.41 Consistent with ComReg's position in the 2013 Decision, ComReg's position remains that the above provisions of 2009 Broadcasting Act do not adequately address the potential competition problems which, absent SMP regulation, could arise in Market A (such as those relating to lack of transparency, potential discrimination on price and non-price terms, constructive denial of access and inefficient pricing issues). Neither would such provisions of the 2009 Broadcasting Act address the identified competition problems in a targeted and proportionate manner such as could be addressed under an *ex ante* SMP regulatory approach that seeks to address SMP related competition concerns having regard to the policy objectives set out in Regulation 16 of the Framework Regulations 2011 and Regulation 12 of the Communications Regulation Act 2002 (as amended).

- 8.42 Insofar as price controls are concerned, unlike the non-specific payment related provisions of section 115 of the 2009 Broadcasting Act (which relate to the power of the Minister to direct a sound broadcaster to make certain payments to be made to RTÉ), the imposition of *ex ante* SMP regulatory price controls in accordance with Regulation 13 of the Access Regulations 2011 would seek to ensure that the appropriate cost recovery mechanism is put in place to ensure an undertaking does not charge, for example, excessive prices and to do so in a manner which serves to promote efficiency and sustainable competition and maximises consumer benefits.
- 8.43 Unlike the above provisions of the 2009 Broadcasting Act, *ex ante* SMP regulation has the benefit of specifying well defined obligations tailored to target, in advance, potential competition problems in accordance with the regulatory framework and can, by reacting to changes in market circumstances, provide regulatory stability and predictability in a market which is characterised by high and non-transitory entry barriers.
- 8.44 *Ex ante* SMP regulatory measures, unlike the above provisions of the 2009 Broadcasting Act, coupled with enforcement capabilities, also provide the necessary mechanisms to deal with questions regarding regulatory compliance on an ongoing basis (either by investigation on an own-initiative basis or in response to complaints / disputes received from undertakings). *Ex ante* regulation also provides both regulatory certainty and predictability to market participants.
- 8.45 Insofar as the specific provisions of sections 108 and 109 of the 2009 Broadcasting Act relate to Market A, ComReg considers that these are aimed at securing accountability for expenditure of public monies and protecting against any inappropriate use of public funds. These provisions are not designed to address issues associated with the potential anti-competitive exercise of SMP per se, and neither of these provisions would result in full transparency of internal pricing across RTÉ and 2rn in the same manner as is envisaged under the electronic communications regulatory framework (and in the transparency obligations now set out in this Decision).
- 8.46 Section 115 of the 2009 Broadcasting Act does not necessarily imply that a cost-oriented (and efficient) price control could be put in place by the Minister and, as such, it is ComReg's position that it would not necessarily resolve potential excessive or other pricing problems.
- 8.47 Further, application of section 109 of the 2009 Broadcasting Act, which sets out the general accounting procedures for "a corporation", defined in the Act as meaning RTÉ or TG4 or both, as the case may be, would not necessarily result in transparent internal transfer pricing, in the same manner as would an accounting separation obligation imposed by ComReg under the regulatory framework.

- 8.48 Therefore, in the context of a vertically integrated entity that provides broadcasting transmission facilities to actual or potential competitors, the provisions of the 2009 Broadcasting Act do not remove the need for *ex ante* regulation. *Ex ante* regulation has the benefit of well-defined characteristics under the regulatory framework and can provide stability and assurance to markets characterised by high and persistent entry barriers through using a variety of approaches that are methodical, and well understood.
- 8.49 ComReg now considers below the imposition of appropriate and proportionate obligations on 2rn in Market A.

## Transparency remedies in Market A.

### Overview

- 8.50 Regulation 9 of the Access Regulations provides that ComReg may, inter alia, specify obligations to ensure transparency in relation to access or interconnection which require a Service Provider designated with SMP to make public specified information such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any conditions limiting access to, or use of, services and applications where such conditions are permitted by law.
- 8.51 Transparency obligations can be standalone, but can also support other obligations being imposed and, as evidenced from the above, usually relate to requirements to make specified information publicly available.
- 8.52 ComReg set out at paragraphs 8.20 to 8.21 above the existing transparency obligations imposed on 2rn in Market A.

### Transparency Remedies in Market A

- 8.53 In Section 7, ComReg identified that 2rn has the ability and incentive to engage in a range of exploitative and/or exclusionary conducts which may impact downstream competition and consumers. The potential for leveraging of SMP into related markets can occur through information asymmetries, delaying tactics such as protracted negotiations in respect of the provision of access to BTS services or associated facilities, and/or seeking unreasonable terms and conditions to grant access. ComReg's position is that the following transparency obligations should be imposed:
- (a) Requirement to publish a reference offer;
  - (b) Requirement to publish information about products and services; and
  - (c) Requirement to publish a service level agreement ('**SLA**').

- 8.54 As noted at Recital 16 of the Access Directive, transparency of terms and conditions for access and interconnection, including prices, serves to speed up negotiations, avoid disputes and give confidence to market players that a service is being provided on non-discriminatory terms. Openness and transparency of technical interfaces can also be particularly important in ensuring interoperability. Transparency on prices (and changes to prices) provides the necessary clarity to buyers of Market A BTS services in order that they can consider impacts on the structure or level of prices. Transparency also provides the means to demonstrate that access is provided in a non-discriminatory manner.
- 8.55 In Market A, 2rn could provide less favourable terms and conditions of access to RTÉ's downstream competitors than to RTÉ itself. Furthermore, broadcasters and Multiplex Operators require agreed levels of service which may not be forthcoming or inferior to those provided to RTÉ. For example, a lack of transparency on SLAs provided to RTÉ vis-à-vis other broadcasters and Multiplex Operators could make it difficult to demonstrate that discrimination is not occurring.
- 8.56 Also, 2rn could foreclose competition in Market A by limiting or withholding information as uncertainty could potentially discourage investments in markets dependent on 2rn's wholesale products.
- 8.57 A transparency obligation is also required to monitor and ensure the effectiveness of any price control obligations and to support any accounting separation obligations, as this would allow the calculation of costs and prices (i.e. internal price transfers) to be rendered visible. This would also allow ComReg and industry to monitor the compliance of 2rn's pricing behaviour with any non-discrimination obligations, and address potential competition problems relating to cross subsidisation, excessive pricing, price discrimination and the application of margin squeezes.
- 8.58 Transparency can be applied on its own but it usually supports other obligations. It is unlikely that the provision of a transparency measure alone would be sufficient to address potential competition problems that have been identified. Transparency serves the purpose of ensuring that access and pricing behaviour are observable.
- 8.59 2rn has been subject to a transparency obligation in Market A pursuant to the 2013 Decision.
- 8.60 ComReg's position is that, transparency obligations are necessary, both to allow monitoring and visibility of how 2rn is meeting its obligations, and to provide information which broadcasters and Multiplex Operators may use to make a decision to enter a downstream market, including ultimately retail markets. The details of this obligation are specified in legal form in the Market A DI at Annex: 4

8.61 To support the non-discrimination obligations (discussed below) and to ensure that market participants have adequate visibility of the conditions and quality of the wholesale service offered, ComReg will impose a number of publication requirements. These relate to the publication of a reference offer, publish separated accounts, publication of information about products and services, and publication of SLAs to support the access obligations.

#### Requirement to Publish a Reference Offer

8.62 It is ComReg's position that a Reference Offer should be published on 2rn's publicly available website which should contain at least a description of all relevant offerings broken down into components according to market needs, a description of the technical specifications and network characteristics of the Access being offered, the mechanism of pricing for Access and approaching 2rn for Access, and a description of the associated terms and conditions for supply and use, including prices, to 2rn's network infrastructure. It is important to note that this Reference Offer does not represent an exhaustive list of the services which might be the subject of a reasonable request.

8.63 As part of this Reference Offer, in order to aid transparency and support the obligations of non-discrimination ComReg requires 2rn to continue to publish its tariffs and a description of how such tariffs are derived in a similar form and content to that currently being published by 2rn, and that this continues to be made available on its website. ComReg may consider refinements, additions or amendments are required to this tariff model documentation to improve transparency.

8.64 It is ComReg's position that the tariff model documentation shall include details on:

- (a) Sources of information used in the tariff model (including financial and engineering information);
- (b) Description of main costs;
- (c) Description of main assets categories;
- (d) Description of main cost drivers;
- (e) Details of assumptions made;
- (f) The basis of calculation of any returns/margins; and,
- (g) An explanation of any material changes the assumptions/cost drivers in the tariff model from prior years.

8.65 The obligation to publish a Reference Offer gives potential purchasers of Market A services detail on the supply characteristics and terms and conditions and prices of Access. This means that such parties will have an understanding of the type of services and the characteristics and prices of these services on offer.

- 8.66 Its purpose is to provide a sufficient degree of certainty to allow broadcasters and Multiplex Operators to plan and run their operations efficiently, but does not prevent them, having regard to the Access obligations discussed below, from submitting bespoke requests or requesting additional services where circumstances suggest it.
- 8.67 Any potential for discussion on other terms that may emerge would, in the first instance, be subject to commercial negotiation with a right for either party to bring a dispute<sup>188</sup> about such terms to ComReg for resolution where agreement cannot be reached. Any such disputes would be considered in light of the obligations set out in this Decision.
- 8.68 It is ComReg's position that specific obligations are required to be imposed on 2rn regarding any changes that may be made to the Reference Offer. The mechanism being imposed in relation to this requires that all changes, including changes to prices, and the introduction of new services and facilities must be published or otherwise communicated to Broadcasters and Multiplex Operators in a timely and transparent fashion.
- 8.69 To ensure the effectiveness of this transparency obligation, any changes to the reference offer must also not be implemented without prior notification to ComReg, broadcasters and Multiplex Operators. Furthermore, ComReg may issue directions requiring 2rn to make changes to the reference offer or to publish information from time to time where appropriate for ensuring the effective operation of this obligation. Such changes would be consulted on, as appropriate, and imposed pursuant to a direction in accordance with Regulation 18 of the Access Regulations.
- 8.70 2rn is being required to publish changes to the Reference Offer and any changes to wholesale prices (including prices for new services and facilities) at least two months before they come into effect, and notify ComReg of such changes an additional one month before publication. This would mean that, unless otherwise agreed by ComReg, ComReg would be notified at least three months before changes were implemented, to be followed by publication by 2rn at least two months before their implementation.

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<sup>188</sup>See ComReg Decision D03/10 which sets out ComReg's' roles and the steps involved in bringing a dispute. In accordance with Regulation 31(2) of the Framework Regulations ComReg is obliged to publish its dispute resolution procedures and to ensure that all investigations and determinations are handled in accordance with these procedures. The dispute resolution procedures are also governed by the requirements of Section 12 of the Communications Regulations Act, 2002 and Article 8 of the Framework Directive. ComReg in exercise of its functions under the Communications Regulations Act, 2002 and pursuant to its obligation under Regulation 31(2) of the Framework Regulations has published procedures for the resolution of disputes. <https://www.comreg.ie/publication/response-to-consultation-document-no-0985-dispute-resolution-procedures-framework-regulations>.

- 8.71 In order to offer the greatest flexibility to 2rn, other market players and ultimately consumers, it is ComReg's position that provision is made for ComReg to extend or reduce this period where appropriate on a case-by-case basis. For example, in the case of significant changes to products or prices ComReg reserves the right to extend the publication and notification periods beyond the two-month period if appropriate and necessary on a case-by-case basis.

#### Requirement to publish information about products and services

- 8.72 It is ComReg's position that, as part of the transparency obligation, 2rn is required to publish any reasonable information or data which broadcasters and Multiplex Operators may require in order to be able to compete effectively based on 2rn Market A inputs. This could include, for example, accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.
- 8.73 The need for this may arise where broadcasters and Multiplex Operators require more granular information than would be available via the reference offer discussed above.

#### Requirement to Publish SLAs

- 8.74 ComReg's position is that 2rn should be obliged to publish SLAs on its publicly available website.
- 8.75 ComReg considers that publication of SLAs provides more transparency and assurances to ComReg and industry that 2rn is meeting its non-discrimination obligations. As ComReg does not consider that SLAs would contain any commercially sensitive information, ComReg considers this requirement is proportionate.

### **Consideration of Respondents' Views regarding the Transparency remedies in Market A**

#### Overview of Respondents' Views

- 8.76 Of the five Submissions received, three Respondents (the BAI, TG4 and VM) agreed with ComReg's preliminary conclusions on the transparency remedy. RTÉ did not agree or disagree with the transparency remedies. 2rn disagreed with the requirement for a Transparency remedy,
- 8.77 VM, TG4 and 2rn's comments are considered by ComReg in paragraphs 8.80 to 8.85 below<sup>189</sup>.

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<sup>189</sup> VM, and RTÉ's comments regarding the transparency remedies with regards to Market B are discussed at paragraphs 8.333 to 8.340.



- 8.78 **TG4** submitted that greater transparency is needed, regarding how costs are allocated and how wholesale charges are derived. It added that there is a need for full visibility of how costs are incurred by 2rn and how these are attributable to the services provided. TG4 further questions how operational costs are incurred by 2rn and whether fixed costs are efficiently incurred. e.g. salaries, property taxes, depreciation. It also submitted that the remedies proposed for Market A should include a requirement for an independent review of 2rn's costs incurred (both fixed and incremental) and their allocation to the relevant services.
- 8.79 2rn stated that ComReg should not apply a transparency remedy as there is no evidence of its necessity and 2rn considered that other proposed remedies would not be undermined by the absence of a transparency remedy.

### ComReg's Consideration of Respondents' Views

- 8.80 ComReg notes TG4's views regarding how costs are incurred and attributed, as outlined above at paragraph 8.78. ComReg's position is that TG4's concerns are addressed through 2rn meeting the transparency obligations that ComReg is imposing. In this regard ComReg notes that 2rn must make information available on the following:
- (a) Presentation of accounts (discussed in paragraphs 8.241 to 8.266 in this Decision);
  - (b) Transfer charging mechanisms (discussed in 8.267 to 8.269 in this Decision);
  - (c) Allocation of costs (discussed in paragraphs 8.270 to 8.271 in this Decision)
  - (d) Audit (discussed in paragraphs 8.272 to 8.282 in this Decision); and
  - (e) Other documentation (discussed in paragraphs 8.283 to 8.290 in this Decision).
- 8.81 ComReg further notes that 2rn must publish accounting<sup>190</sup> documentation, which includes 2rn's Regulated Accounts and the primary accounting documents which outline how costs are allocated. Having regard to the analysis set out at paragraph 8.229 to 8.301 of this Decision, it is ComReg's position that the obligation to publish a reference offer gives potential purchasers of Market A services a reasonable level of detail on the supply characteristics and terms and conditions and prices of Access.

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<sup>190</sup> <https://www.2rn.ie/accounting-documentation/>

- 8.82 It is also ComReg's position that such information and documentation provides a sufficient degree of certainty to allow broadcasters and Multiplex Operators to plan and run their operations efficiently. Market A accounts are audited annually by an independent auditor, with the auditor being appointed by 2rn (and RTÉ) following consultation with ComReg. As part of the process a tri-partite arrangement is in place between 2rn, the independent auditor and ComReg whereby the auditor "owes a duty of care" to ComReg<sup>191</sup>. Similar arrangements are in place in other regulated markets.
- 8.83 ComReg has also proposed to impose obligations on 2rn requiring them to negotiate in good faith with Broadcasters requesting Access. Furthermore, as part of the conditions attached to the Access obligation, ComReg has imposed obligations governing fairness, reasonableness and timeliness to ensure that legally binding SLAs are appropriately concluded and implemented, including as mentioned above a requirement to negotiate in good faith with Broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs.
- 8.84 As outlined in this Decision at paragraphs 8.128 to 8.136, ComReg notes that the obligation to negotiate in good faith means that the responsibility rests with 2rn to demonstrate that its approach to negotiation with undertakings is done in good faith and that any unmet access requests must be shown to have been unreasonable.
- 8.85 ComReg disagrees with 2rn's view that the transparency remedies are not required. ComReg has, having regard to the competition problems identified in Section 7, justified the need for transparency obligations in paragraphs 8.50 to 8.58 above.

### **Overall conclusion on the imposition of Transparency obligations in Market A.**

- 8.86 Having regard to the analysis set out at paragraphs 8.53 to 8.85 above, it is ComReg's position that 2rn should be subject to the range of identified transparency obligations.
- 8.87 ComReg has also considered whether transparency obligations alone would be sufficient to address the competition problems identified in Section 7 and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a transparency obligation.

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<sup>191</sup> A similar arrangement is in place for Market B.

- 8.88 ComReg considers that the imposition of the above transparency obligations is both proportionate and justified, having regard to the competition problems identified in Section 7. Therefore it is ComReg's view that 2rn should have transparency obligations imposed upon them.
- 8.89 The Transparency Obligations are set out in legal form in the DI in Annex: 4.

## **Non-Discrimination Remedies in Market A.**

### **Overview**

- 8.90 As noted at Recital 17 of the Access Directive, the principle behind non-discrimination is to ensure that undertakings with SMP do not distort competition, particularly where they are vertically-integrated and supply services to undertakings with whom they compete on downstream markets.
- 8.91 Regulation 10 of the Access Regulations provides that ComReg may impose non-discrimination remedies in relation to access or interconnection on a Service Provider designated with SMP, in particular to ensure that it:
- (a) Applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; and
  - (b) Provides services and information to others under the same conditions and of the same quality as it provides for its own services or those of its subsidiaries or partners.
- 8.92 Non-discrimination obligations can be standalone, and can also support other obligations, such as those relating to access, transparency and price control.
- 8.93 In general, non-discrimination requires that the SMP operator apply equivalent conditions in equivalent circumstances to other broadcasters and Multiplex Operators providing equivalent services and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. Thus, third parties should not be treated less favourably than the 2020 SMP BTS Operators own internal operations.
- 8.94 ComReg set out at paragraph 8.22 above the existing non-discrimination obligations have been imposed on 2rn in Market A under the 2013 Decision.

### **Non – Discrimination remedies for Market A**

- 8.95 ComReg is imposing the following non-discrimination obligations on 2rn. In this regard 2rn is required to:
- (a) Apply equivalent conditions in equivalent circumstances to other Broadcast Operators providing equivalent services;

- (b) Ensure that all services (including Associated Facilities) and information are provided to other Broadcast Operators under the same conditions and of the same quality as the services and information that 2rn provides to itself or to its subsidiaries or partners, including RTÉ; and
- (c) Ensure that all services and information are provided to other Broadcast Operators at the same time as such services and/or information are made available by 2rn to itself or to its subsidiaries or partners, including RTÉ.

- 8.96 It is ComReg's position that non-discrimination obligations are a necessary support for access to 2rn's network. The aim of a non-discrimination obligation is to ensure that 2rn does not discriminate in its supply of services and information either between broadcasters and/or Multiplex Operators, as well as between its provision of services and information to its own downstream arm. Absent such an obligation 2rn could potentially discriminate in favour of RTÉ, for example, by providing products to broadcasters and Multiplex Operators which were not of the same quality or pricing as those supplied to RTÉ. The non-discrimination obligation therefore supports the objective of promoting the development of sustainable downstream competition to the ultimate benefit of end users.
- 8.97 This obligation could be imposed by itself but usually supports other regulatory obligations such as access, transparency and price control. Given the potential to discriminate between RTÉ and other broadcasters and Multiplex Operators on the terms and conditions of access, quality of service, and price, the obligation of non-discrimination is required to ensure competition problems do not arise.
- 8.98 ComReg notes that this obligation is a proportionate and reasonable approach taking into account potential commercial sensitivities surrounding the provision of information and services to other broadcasters and to other potential Multiplex Operators should they emerge.
- 8.99 To ensure that broadcasters and Multiplex Operators are in the same position as RTÉ, with respect to the provision of information and services, such information and services should be provided to them at the same time 2rn provides it to RTÉ.

## Consideration of Respondents' Views regarding the Non-Discrimination remedies in Market A.

### Overview of Respondents' Views

8.100 Of the five Submissions received, three Respondents (TG4, the BAI and VM) agreed with ComReg's preliminary conclusions on the non-discrimination remedies. 2rn and RTÉ did not agree or disagree with the non-discrimination remedies. TG4<sup>192</sup> offered additional comments which are discussed in Market B at paragraphs 8.362 to 8.363 and 8.365 to 8.368 given they are more appropriate to this market.

### Overall Conclusions on the Non-Discrimination Obligations in Market A

8.101 Having regard to the analysis set out at paragraphs 8.90 to 8.100 ComReg is imposing the identified non-discrimination obligations on 2rn.

8.102 ComReg considers that the imposition of the above non-discrimination obligations is both proportionate and justified, having regard to the competition problems identified in Section 7. Therefore 2rn is subject to non-discrimination obligations.

8.103 ComReg has also considered whether non-discrimination obligations alone (or with the transparency obligations above) would be sufficient to address the competition problems identified in Section 7 and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a non-discrimination obligation.

8.104 The non-discrimination obligations set out in paragraphs 8.90 to 8.100 above are set out in legal form in the DI in Annex: 4

## Access Remedies in Market A

### Overview

8.105 Regulation 12(1) of the Access Regulations provides that ComReg may, in accordance with Regulation 8 of the Access Regulations, impose on an operator obligations to meet reasonable requests for access to, and use of, specific network elements and Associated Facilities where ComReg considers that the denial of such access, or the imposition by operators of unreasonable terms and conditions having similar effect, would:

- (a) Hinder the emergence of a sustainable competitive retail market,
- (b) Not be in the interests of end users, and

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<sup>192</sup> TG4 commented on the non-discrimination obligation in Market B, see paragraphs 8.362 to 8.363 and 8.365 to 8.368.

- (c) Otherwise hinder the objectives set out in Section 12 of the Communications Regulation Act 2002 (as amended).

8.106 Regulations 12(2)(a) to (j) and Regulation 12(3) of the Access Regulations provide that ComReg can impose, where appropriate, additional access obligations and may attach conditions covering fairness, reasonableness and timeliness to those access obligations.

8.107 Pursuant to Regulation 12(4) of the Access Regulations, when considering whether to impose the obligations referred to in paragraphs (1) and (2) of Regulation 12 and, in particular, when assessing whether such obligations would be proportionate to the objectives set out in Section 12 of the Communications Regulation Act 2002 (as amended), ComReg takes the following factors into account:

- (a) The technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection and access involved;
- (b) The feasibility of providing the access, in relation to the capacity available;
- (c) The initial investment by the facility owner, bearing in mind the risks involved in making the investment;
- (d) The need to safeguard competition in the long-term;
- (e) Where appropriate, any relevant intellectual property rights; and
- (f) The provision of pan-European services.

8.108 ComReg set out at paragraphs 8.23 above the existing Market A Access obligations imposed on 2rn in Market A.

### **Access obligations in Market A**

8.109 ComReg considers it necessary to impose a range of access obligations upon 2rn which are ultimately intended to facilitate the development of sustainable competition in downstream markets. As discussed further below, these obligations are as follows:

- (a) Requirement to meet reasonable requests for Access to Market A products, services and associated facilities;
- (b) Requirements to provide specific forms of access;
- (c) Requirements to meet various conditions attached to the access obligations;
- (d) Requirement not to withdraw access to services and facilities already granted;
- (e) Requirement to grant access in a fair, reasonable and timely manner;
- (f) Requirement to provide SLAs; and

- (g) Requirement to provide objective criteria for any refusal or part refusal of access.

- 8.110 All of the access obligations that ComReg is imposing on 2rn in Market A effectively results in a continuation of 2rn's offer of the existing Market A products, services and facilities in accordance with the product descriptions and terms and conditions of supply or use, as specified in the current version of the 2rn reference offer, and in addition, in accordance with the obligations discussed elsewhere in this Decision. These are discussed below.
- 8.111 Given the importance of access to the non-replicable network infrastructure of 2rn, ComReg's views on access remedies are based in the particular market structure, and the ability and incentive of 2rn to exert market power, by engaging in particular competition problems as outlined in section 7. In this regard 2rn has the ability and incentive to refuse to supply Market A services to Access Seekers, either actually or constructively, or to provide these services on discriminatory or unreasonable terms and conditions (including in relation to price or non-price means) and this would likely hinder the development of sustainable competition in the downstream markets. This would ultimately be detrimental to the interests of end users, and would be contrary to the objectives set out in Section 12 of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations.
- 8.112 ComReg's position is that there are likely to continue to be differences in bargaining power between 2rn and access seekers, particularly given the absence of widely available alternative sources of supply within the timeframe of this review period.
- 8.113 Absent the presence of effective access remedies, ComReg would be left to address any such refusal by 2rn to supply Market A services either through its general dispute resolution or compliance functions, all of which would occur after the fact, take time to resolve, be specific to the bilateral circumstances between the relevant parties and not thereby contributing to regulatory certainty amongst market players. As a consequence, this could be damaging to competition and ultimately end users. Such case-by-case interventions by ComReg would also be inefficient and ineffective in resolving the broader competition problem of denial/delayed access. Additionally, ComReg could seek to use its *ex-post* competition law powers. However, such powers could ultimately result in a finding by an Irish court that an undertaking has abused its dominant position, but not necessarily require access to be provided as an outcome to any such finding. Similar to the reasons above, a competition law approach would also take significant time to resolve, be specific to the relevant circumstances of the case and not contribute to regulatory certainty amongst market players.



8.114 Overall, therefore, ComReg considers that dispute resolution (which can be of relevance in resolving access and other issues in certain circumstances) and ex-post competition law approaches would not be effective in resolving issues concerning denial of access in Market A.

8.115 ComReg must consider a range of statutory criteria when imposing access obligations. These are discussed further below.

### Consideration of statutory criteria on access obligations

8.116 In paragraph 8.9 above, ComReg set out a range of statutory criteria that ComReg must consider when imposing access obligations. These criteria are considered below having regard to the access obligations set out in paragraphs 8.117 to 8.145 below. ComReg has taken the following into account:

- (a) *Technical and economic viability of using or installing competing facilities:* ComReg has considered the viability of competing alternatives to the terrestrial transmission facilities of 2rn. ComReg notes that access to build new sites could prove to be problematic due to potential environmental and planning issues, making it difficult to replicate 2rn's current network and coverage area (97% population).
- (b) *Feasibility of providing access in relation to capacity available:* ComReg is not aware of any significant constraints limiting 2rn from providing access to its network for national and quasi-national sound broadcasters or Multiplex Operators.
- (c) *The initial investment of the facility owner:* As per Regulation 13(2) of the Access Regulations, ComReg's approach to imposing access remedies in the market is based on principles that, among others, allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs.
- (d) *The need to safeguard competition:* Competition in the downstream markets, including retail broadcasting market depends on effective regulation in the relevant wholesale market(s). ComReg considers that the range of remedies discussed in this Decision is needed due to 2rn's market power in Market A, in order to contribute to the development of downstream competition to the benefit of end users.
- (e) *Intellectual property rights:* ComReg's view is that intellectual property rights are not a significant concern in this market.

- (f) *Pan-European services*: Regulation of the broadcasting transmission market is dependent on national circumstances. While many NRAs have designated SMP, or found the 3CT to be met in some sub markets<sup>193</sup> of their broadcasting transmission market, other NRAs have deemed the market to be effectively competitive and thus not warranting ex-ante regulation. ComReg considers that pan-European considerations are of less relevance to Market A given national circumstances and differing conditions across broadcasting environments in other EU Member States.

### Requirement to meet Reasonable Requests for Access to Market A Products, Services and Associated Facilities

8.117 ComReg's position is that, pursuant to Regulation 12(1) of the Access Regulations that 2rn is to be required to meet all reasonable requests from Broadcast Operators for the provision of access to Market A products, services and associated facilities. ComReg considers it necessary to impose a range of access obligations upon 2rn that are ultimately intended to facilitate the development of sustainable competition in downstream markets. This includes meeting all reasonable requests from Broadcast Operators for Access on an unbundled/unmanaged basis whereby access to any element of a fully managed Broadcast Transmission Service (including Broadcast Distribution Service discussed below) may be sought by Broadcast Operators on a disaggregated basis.

### Requirements to provide specific forms of access

- 8.118 2rn is to be required to provide and grant Broadcast Operators and Multiplex Operators access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) including Associated Facilities, which includes, but is not limited to:
- (a) the provision of co-location for the transmitter equipment;
  - (b) the provision of power and the backup power supply for the transmitter and associated equipment;
  - (c) the provision of telemetry services;
  - (d) the provision of access to the antenna combiner and feeder to enable the connection of the transmitter equipment to the combiner;
  - (e) the provision of access to the microwave distribution system;
  - (f) the provision of support services.

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<sup>193</sup> For example, in its 2017 Market Review, KommAustria identified three different markets, which were all found to be national in scope: 1. The wholesale market for the "transmission of analogue terrestrial (FM) radio broadcasting signals to end users". 2. The wholesale market for the "multiplexing of broadcasting signals via the platforms MUX A and MUX B". 3. The wholesale market for "the transmission of digital terrestrial TV broadcasting signals to end users".

- 8.119 Network access, including access to associated facilities, provided as either a fully managed or unmanaged service or a combination of both at the customer's request, means (but is not limited to) access to 2rn's sites and buildings, masts and antenna systems as is necessary to enable the provision of broadcasting transmission and distribution services. This would include where applicable, access to allow for the installation and maintenance of broadcast transmission and distribution and related equipment and the connection of such equipment to power and other essential services.
- 8.120 Given this meaning, the provision of the following access services is to cover, as either a fully managed or unmanaged service or combination of both:
- (a) Access to allow for the installation and maintenance of broadcast transmission and/or distribution and related equipment (including provision of access to permit installation by third parties);
  - (b) Access for the connection of such equipment to power and other essential services;
  - (c) Access to sites for the use or establishment of common or exclusive building accommodation; and,
  - (d) Access to and use of shared or shareable broadcast equipment comprising combiners, feeders, data lines, antennas, transmitters and self-contained equipment housing.
- 8.121 As national and quasi-national radio Broadcasters Operators and Multiplex Operators are reliant on broadcast transmission infrastructure provided by 2rn for delivery of their services it is appropriate to ensure that effective access is provided.
- 8.122 An access obligation can be justified as a means of increasing competition but this must be balanced against the rights of an infrastructure owner to exploit its infrastructure for its own benefit.
- 8.123 As per Recital 19 of the Access Directive, imposition of an access obligation that increases competition in the short term should not be imposed if it reduces incentives for competitors to invest in alternative facilities that will secure more competition in the long term in the relevant market. Given the high and non-transitory barriers to entry ComReg does not believe that investment in alternative infrastructure capable of constraining 2rn is likely within the timeframe of this review.
- 8.124 Given potential exclusionary behaviour as previously discussed, ComReg considers that an access remedy is justified and required in this market.

- 8.125 As discussed in Sections 7, while there are legislative provisions that may overlap with some elements of *ex ante* regulation, for example, section 115 of the 2009 Broadcasting Act<sup>194</sup>, ComReg does not consider that these provide the necessary conditions for access which are applicable under *ex ante* regulation and in light of identified SMP related competition problems. For example, to counter the potential for the SMP operator to employ a tactical refusal of access ComReg can impose conditions which support the provision of timely and efficient access, such as the implementation of SLAs, and fair, reasonable and timely access. This can include the provision to have in place legally binding SLAs and to provide access to associated facilities on fair and reasonable terms.
- 8.126 Pursuant to Regulation 12(1) of the Access Regulations and in accordance with section 115 of the 2009 Broadcasting Act, ComReg imposes an obligation on 2rn to provide access to its terrestrial broadcasting transmission network including broadcast distribution and associated facilities in a fair and reasonable and timely manner, and on non-discriminatory terms and conditions (including charges) to broadcasters who have secured a national or quasi-national radio broadcasting contract from the BAI for the provision of terrestrial analogue radio broadcasting services and Multiplex Operators who have secured a multiplex contract for the establishment, maintenance and operation of a multiplex(es). This is required in order to facilitate sustainable downstream competition.
- 8.127 This obligation allows for the use of 2rn facilities but does not allow for building and erecting of third party towers and masts on 2rn sites as ComReg does not consider this reasonable or proportionate. ComReg's position is that the conditions associated with the access obligations in this Decision are sufficient for Broadcaster Operators' and Multiplex Operators' needs and should enable competition to develop in downstream markets.

### **Conditions attached to the access obligation**

#### **Obligation to negotiate in good faith**

- 8.128 Given the potential for an express or constructive refusal to supply, ComReg is imposing an obligation requiring that 2rn must negotiate in good faith with broadcasters and Multiplex Operators requesting access to its network and services. ComReg notes that the obligation to negotiate in good faith implies that the responsibility rests with 2rn to demonstrate that its approach to negotiation with broadcasters and Multiplex Operators was done in good faith and that any unmet access requests can be shown to be unreasonable.
- 8.129 Recital 19 of the Access Directive states in relation to access requests to the SMP operator that;

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<sup>194</sup> <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/html>

*“..such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity.”*

8.130 Therefore, it is ComReg’s position that when an access request is refused, the objective criteria for refusal should be provided in reasonable detail and in a timely manner to the party making the access request.

8.131 In addition, it is ComReg’s position that an obligation to negotiate in good faith also includes, but is not be limited to, negotiations in relation to the conclusion of fit-for-purpose and legally binding SLAs.

#### Obligation not to withdraw access to services and facilities already granted

8.132 ComReg considers that 2rn is to be subject to an obligation not to withdraw access to services and facilities already granted without the prior approval of ComReg. Changes by 2rn to its network may have significant implications for broadcasters and Multiplex Operators using its broadcast transmission and broadcast distribution services and ultimately retail end users of their services. Each occasion will be considered on a case-by-case basis as there may be circumstances where different timeframes may be appropriate.

8.133 The need for an obligation not to withdraw access to services and facilities already granted without the prior approval of ComReg has to balance the requirement for broadcasters and Multiplex Operators to have some certainty over the future of their own investments against the requirement to support network development by 2rn. Lack of information regarding changes by 2rn to its network may have significant implications for broadcasters and Multiplex Operators which use its broadcast transmission and broadcast distribution services.

8.134 2rn may propose to withdraw access where demand for certain network services/facilities becomes redundant over time. ComReg would propose to assess any request by 2rn to withdraw access to such existing services/facilities on a case-by-case basis.

8.135 While mindful of the need to support network development, ComReg is of the view that any such withdrawal of access should be flagged sufficiently in advance so as to give broadcasters and Multiplex Operator’s adequate notice of the impending change. The purpose of this is to allow time for alternative supply arrangements or alternative services to be put in place so as to minimise potential adverse effects on downstream competition. Another consideration for ComReg in such cases would be to minimise potential adverse impacts on end users of services relying on the withdrawn facility.

#### Obligation to grant access in a fair, reasonable and timely manner

8.136 Conditions covering fairness, reasonableness and timeliness can be attached to the access obligation which aim to protect the integrity of the access obligation against more strategic rather than outright attempts of access denial e.g. delays in provisioning of access which may discourage potential entry.

8.137 In assessing the scope for competition problems to arise in the market in section 7, ComReg identified the potential for an SMP operator to engage in a constructive refusal to supply e.g. through delaying tactics, discriminatory use or withholding of information, disproportionate entry criteria as well as unreasonable terms and conditions associated with access. ComReg thus imposes that a condition should be attached to the access obligations which would oblige 2rn to grant access to its transmission and distribution network infrastructure and associated facilities in a fair, reasonable and timely manner.

#### Service Level Agreements (SLAs)

8.138 To ensure that conditions of access are provided on fair, reasonable terms and in a timely manner, ComReg is attaching conditions to the access obligations to ensure that legally binding SLAs are appropriately concluded and implemented.

8.139 As part of 2rn's regulatory obligations imposed under the 2013 Decision, 2rn was required to make available to all parties with which 2rn has contractual arrangements and make available to ComReg, details of the technical specifications, network characteristics and terms and conditions of supply, under a service level agreement which ComReg may oblige 2rn to make publicly available.

8.140 Furthermore, ComReg has decided that, for the purpose of clarity and to provide certainty to stakeholders, the list of parameters included as part of that SLA obligation should be included as part of the SLA obligation as well. These are set out in Annex: 4 as an annex to the Market A DI.

8.141 ComReg has also decided to impose a specific provision requiring that 2rn is be obliged to negotiate in good faith with Broadcasters Operators and Multiplex Operators in relation to the conclusion of legally binding and fit-for-purpose SLAs.

8.142 As has been noted in sections 6 and 7 of this Decision, 2rn has the ability and the incentive to engage in anti-competitive practices to restrict or distort competition in downstream markets in order to benefit the broadcasting activities of its parent RTÉ. This could include issues related to quality of service, where failure to provide guaranteed quality of service may deter downstream market entry and expansion. Therefore, ComReg is imposing an obligation such that SLAs must be provided to deter such behaviour. ComReg considers that absent regulation, 2rn may not be incentivised to meet any conditions of an agreed SLA, without some level of compensation to wholesale customers, should the SLA be breached.

- 8.143 Therefore, ComReg is imposing a specific obligation to ensure that the SLA should specify a level of compensation (service credits) that adequately compensates the customer for a breach of the SLA. For example, this may occur where there is a failure to deliver or repair a service appropriately within a prescribed time as described in the SLA. This measure would provide 2rn with an incentive to deliver and maintain its broadcast transmission and distribution service to a pre-defined and pre-agreed level of performance or otherwise compensate its customer accordingly. The process of compensation should not be burdensome and the methodology used and calculation of SLA credits should be clearly explained by 2rn in the SLA with examples. To ensure the effectiveness of this obligation, ComReg has decided to impose a requirement that the payment of any service credits should be made in a timely and efficient manner.
- 8.144 Given the potential competition problems identified in this Decision relating to discrimination, ComReg is of the view that certain quality guarantees are appropriate in respect of 2rn's provisioning of its transmission network services. Such assurances are also commonplace in contractual agreements between suppliers and their customers.

#### [Obligation to provide objective criteria for any refusal or part refusal of access](#)

- 8.145 ComReg is also imposing requirements that 2rn should be obliged to provide objective criteria for refusing a request, or only partly meeting a request, to the broadcaster and Multiplex Operator which has made the request. This is considered proportionate and justified in light of the ability and incentives for 2rn to refuse to supply to RTÉ's competitors and the associated potential competitive and consumer impacts on related markets. ComReg would thus expect that 2rn's response should be fair, reasonable and timely.

### **Consideration of Respondents' Views Regarding the Access Remedies in Market A**

#### [Overview of Respondents' Views](#)

- 8.146 Of the five Submissions received three Respondents (the BAI, VM, and TG4) agreed with ComReg's preliminary conclusions on the access remedies. RTÉ neither agreed nor disagreed and 2rn disagreed with the need for an access remedy.
- 8.147 VM and RTÉ's comments are considered below at paragraphs 8.409 to 8.418, in the section concerning Market B remedies, as they are considered more appropriate to this market.
- 8.148 2rn indicated that access remedies were not required as there is no evidence of a necessity for these remedies. It also noted that other proposed remedies are not undermined by the absence of an access remedy.



### ComReg's Consideration of Respondents' Views

8.149 ComReg disagrees with 2rn, that the access remedy is not required. 2rn did not provide sufficient or adequate reasoning as to why the access remedies were not required. The analysis of the competition problems outlined in section 7, at paragraphs 7.13 to 7.30, and at 8.111 to 8.114 above, clearly justify the rationale for the imposition of such obligations. Therefore, ComReg remains of the view that the Access remedies are required.

### **Overall conclusion on the Access Remedies for Market A.**

8.150 Having regard to the analysis set out at paragraphs 8.117 to 8.149 above, ComReg imposes the above Access obligations on 2rn.

8.151 ComReg's position is that obligations to provide access to BTS services and associated facilities are both proportionate and justified. ComReg has considered whether obligations other than those relating to access would, in themselves, resolve the competition problems identified. ComReg does not consider this to be the case. The imposition of the above access obligations alone would also not resolve issues such as excessive pricing, discrimination (on price or quality grounds) or ensure transparency of terms and conditions of access.

8.152 The Access obligations set out in paragraphs 8.109 to 8.149 above are set out in legal form in the DI in Annex: 4.

## **Price Control and Cost Accounting remedies in Market A**

### **Overview**

8.153 Regulation 13 of the Access Regulations provides that ComReg may impose on an SMP operator obligations relating to cost recovery and price controls. These include obligations for both cost orientation of prices and cost accounting systems, for the provision of specific types of access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or apply a price squeeze to the detriment of end users.

8.154 In imposing any such obligations, ComReg is required to:

- (a) Take into account any investment made by the SMP Service Provider which ComReg considers relevant and allow that Service Provider a reasonable rate of return on adequate capital employed, taking into account any risks specific to a new investment network project; and,
- (b) Ensure that any cost recovery mechanism or pricing methodology that ComReg imposes serves to promote efficiency and sustainable competition, and maximises consumer benefits.

- 8.155 Accordingly, the purpose of price control and cost accounting obligations is to ensure that prices charged are not excessive (or cause a margin squeeze) and promote efficiency and sustainable retail competition, while maximising consumer benefits.
- 8.156 ComReg set out at paragraph 8.24 above the existing Price Control and Cost Accounting obligations imposed on 2rn in Market A under the 2013 Decision.

### Price control and Cost Accounting Remedies in Market A

- 8.157 2rn is currently subject to *ex ante* regulatory obligations of price control and cost accounting. Given the persistent risk of price-related competition problems deriving from an SMP position in the market, ComReg considers that the imposition of a price control and cost accounting obligation is appropriate and proportionate.
- 8.158 For example, RTÉ by way of 2rn would have the ability and incentive to price excessively and/or to deter entry/expansion of broadcasters and potential Multiplex Operators. RTÉ might also have a limited incentive in keeping network costs to an efficient level, since higher transmission charges would hinder the development of competition (as such costs have to be borne by users of 2rn's network and impact on their cost structures) and this could benefit the broadcasting activity of RTÉ. These issues have already been discussed in section 7 concerning competition problems.
- 8.159 ComReg considers that it is necessary to impose a price control and cost accounting obligation on 2rn as this is the only way to ensure that prices are an actual reflection of efficiently incurred costs while at the same time allowing for an appropriate return on investment.
- 8.160 Regulatory intervention may be relatively light, such as an obligation that prices are reasonable, or heavier, such that prices are cost oriented to provide full justification for prices where competition is not strong enough to prevent excessive pricing. The method used should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and end user benefit.
- 8.161 ComReg has aimed to ensure that this obligation is effective but also that this obligation is not unnecessarily onerous on 2rn and so with that in mind, among the potential options for price control implementation ComReg considers cost orientation to be the most appropriate one. When applied on its own, cost orientation would typically allow the regulated company greater flexibility in relation to the setting of tariffs, as long as the company can demonstrate that the tariffs are cost-reflective and are on fair, reasonable and non-discriminatory terms.

- 8.162 As noted at paragraph 8.162 and 8.163 above, ComReg also takes account of Regulation 13(2) of the Access Regulations which notes that, when imposing obligations under Regulation 13(1), ComReg should take into account any relevant investments made by the operator and allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by other operators while also ensuring that the SMP operator makes a reasonable return on its efficient investment.
- 8.163 The burden of proof to demonstrate that charges are derived from costs including a reasonable rate of return on investment rests with the SMP operator. Following a direction from ComReg, as per Regulation 13(4) of the Access Regulations, an operator may be required to provide full justification for its price and may, where appropriate, require prices to be adjusted. For the purpose of setting a cost oriented price in the future, ComReg has the option to choose from a number of cost models to calculate appropriate charges so long as it promotes efficiency, competition and end user benefit. Were ComReg to leave the choice to the SMP operator itself it would likely reduce its effectiveness, contribution to competition and end user benefit.
- 8.164 It should be noted that while the tariffs chargeable by 2rn are maximum tariffs it can charge reduced tariffs so long as these are applied on a non-discriminatory basis.
- 8.165 Where a cost accounting system is mandated to support price control, a description of the cost accounting system must be made public where at least the main categories under which costs are grouped and the rules used for the allocation of costs are provided.
- 8.166 The tariffs charged by 2rn are currently subject to price control and cost accounting obligations.
- 8.167 These tariffs are derived through a tariff model owned and operated by 2rn. The tariff model allocates operating costs and capital costs to broadcasting customers based on a series of assumptions and calculations. The cost data for the tariff models is derived from information provided by 2rn and reviewed by ComReg.

- 8.168 The Market A tariff model has not been provided to Market A customers for their own independent assessment. The tariff model contains commercially sensitive and confidential data the publication of which could have a negative impact upon 2rn. However, it should be noted that the tariff model has been reviewed by ComReg as part of ongoing assessment of 2rn's adherence to its regulatory obligations. 2rn submits the tariff model annually to ComReg as well as reconciliation statements to 2rn's regulatory accounts. These reconciliations include details on the fixed asset register and also how tariffs derived from the tariff model are comparable to the regulatory accounts. This, together with the published accounting documentation enables ComReg understand the cost flows and derivation of tariffs. In addition ComReg regularly conducts site visits to 2rn sites which provides it with further insight into the infrastructure deployed and the allocation of costs.
- 8.169 In the interests of transparency and non-discrimination it is necessary for Market A customers to understand the basis for the tariffs they are being charged. While certain information relating to the tariff model is provided on 2rn's website, Market A customers have suggested to ComReg that they believe it provides limited visibility and that there is limited ability for them to query any aspect of the tariffs or the inputs and assumptions used to derive the tariffs. Furthermore, as discussed earlier in this Decision, there is no suitable alternative infrastructure available nor, in ComReg's opinion, is there likely to be in the timeframe of this review, for the broadcast transmission of national terrestrial broadcasters' and Multiplex Operators' broadcasting services. Therefore, if dissatisfied with the tariffs charged by 2rn, broadcasters and Multiplex Operators cannot switch to an alternative provider.
- 8.170 Currently 2rn publishes tariffs on its website which it expects to remain in force for a period of 12 months. If 2rn considers that due to a change in circumstances that tariffs need to be amended during the period, it must apply to ComReg for permission to amend them. This requires one month's notice be provided to ComReg and two months' notice provided to industry in accordance with the transparency obligations discussed earlier.
- 8.171 Often, ComReg includes provisions within its price control obligations to allow for interim reviews of prices during the period of a price control. This is to provide for situations where there are significant changes to underlying assumptions or input data. If significant changes are required ComReg may consult publicly to ensure transparency and to continue regulatory certainty.
- 8.172 Pursuant to Regulation 13(1) of the Access Regulations ComReg may ".....impose on an operator ...*obligations for cost orientation of prices and obligations concerning cost accounting systems....*"
- 8.173 ComReg, in accordance with Regulation 13(1) has decided that 2rn be subject to the following obligations:

- (a) A price control obligation of cost orientation (discussed at paragraphs 8.174 to 8.199); and
- (b) A cost accounting obligation (discussed at paragraphs 8.200 to 8.204).

### Price control obligations

- 8.174 Given the view that 2rn holds SMP in Market A ComReg considers that there is a need for a price control obligation to ensure that the SMP operator sets appropriate wholesale prices such that effective wholesale and retail competition is facilitated.
- 8.175 ComReg's position is that, absent an appropriate price control obligation, 2rn would, for example, have the ability and incentive to set excessive prices and/or margin squeeze in the wholesale market which would potentially harm competition from broadcasters and Multiplex Operators relying on 2rn's wholesale services. ComReg thus considers it appropriate and justified to impose a price control obligation on 2rn to guard against such potential excessive pricing and margin squeeze.
- 8.176 RTÉ's vertically integrated structure across broadcasting and transmission network activities (which includes 2rn) is important when considering the pricing principles that should be followed in setting tariffs, and in determining such charges.
- 8.177 As noted in sections 6 and 7, an operator with SMP in this market may engage in excessive or discriminatory pricing activities which would require *ex ante* regulation.
- 8.178 Sections 6 and 7 highlighted the importance of ensuring that tariffs are set on a transparent and non-discriminatory basis.
- 8.179 The pricing mechanism applied to set tariffs will need to ensure that these incentives discussed above do not become a reality, in order to ensure a level playing field for all broadcasters and not disadvantage Irish viewers and listeners.
- 8.180 The tariffs charged, both internally and externally, should be transparent, and non-discriminatory. This needs to apply both in the context of:
- (a) Analogue radio (FM and LW bands);
  - (b) Market A services provided to Multiplex Operators in Market B
  - (c) Non-broadcasting services which are not regulated.

### Pricing Methodologies

- 8.181 ComReg has a number of options available to it in terms of achieving its regulatory objectives which takes into account the current demand and supply situation in the relevant market, technological advancements and the data available to ComReg.

- 8.182 ComReg has set out below the different methods for determining cost (which are set out in Annex 2 in the Consultation). These include:
- (a) Retail minus (discussed at paragraphs A2.3 in the Consultation);
  - (b) Reasonable costs (discussed at paragraphs A2.4 to A2.6 in the Consultation); and
  - (c) Cost orientation (discussed at paragraphs A2.7 to A2.14, in the Consultation).
- 8.183 Further to the different cost methods, ComReg has also set out in Annex 2 of the Consultation the options that are available and is of the view that the relevant options to determine an appropriate costing methodology can be summarised as follows:
- (a) Historic costs or current costs (discussed at paragraphs A2.17 to A2.23, in the Consultation);
  - (b) Top-down (“**TD**”) model, bottom-up (“**BU**”) model or hybrid model (discussed at paragraphs A2.24 to A2.35, in the Consultation); and
  - (c) Long run incremental costs (“**LRIC**”) or fully distributed costs (“**FDC**”) (discussed at paragraphs A2.36 to A2.46, in the Consultation).
- 8.184 In practice, there are several mechanisms that are generally used to determine regulated prices, which are consistent with the following:
- (a) Maximising consumer welfare;
  - (b) Ensuring 2rn recovers its efficiently incurred costs;
  - (c) Avoiding any cost over-recovery by 2rn; and
  - (d) Encouraging efficient investment in infrastructure.
- 8.185 ComReg is of the view that a price control based upon cost is the most appropriate approach to prevent competition problems such as excessive pricing, while taking into account the four considerations above.
- 8.186 Consumer welfare can be maximised by ensuring that the tariffs charged to broadcasters and Multiplex Operators are reflective of the cost incurred by 2rn in providing the service. This means that broadcasters’ and Multiplex Operators’ resources are not unnecessarily diverted away from broadcasting to paying for unreasonable wholesale tariffs. This allows broadcasters and Multiplex Operators to provide a wider range of services to consumers through content or additional channels.
- 8.187 By ensuring that 2rn only recovers its efficiently incurred costs broadcasters and Multiplex Operators are not being required to pay for inappropriate investment decisions or excess costs for which there would be no benefit.

- 8.188 The avoidance of potential cost over-recoveries by 2rn also ensures that tariffs are not excessive and that ultimately there is not a transfer of resources from Market A customers to 2rn.
- 8.189 Investment in capital intensive industries is often rewarded through a return on capital. The return on capital tends to only be applied to efficiently incurred investment. Therefore if inefficient investment is made no return is awarded.
- 8.190 Economic regulators generally use the Weighted Average Cost of Capital (“**WACC**”) as the most appropriate measure of the returns that investors require before they will invest in a business. The WACC determines the normal level of profit that must be earned by a business if it is to continue to attract funds in a market where financial resources have many alternative uses. It represents the rate of return a company should earn on its invested capital in order to provide sufficient returns to the investors who are financing the investment. The calculation of an appropriate WACC has been assessed by ComReg, in ComReg Decision D10/20, ComReg Document No. 20/96<sup>195</sup>.
- 8.191 Economic regulators tend not to use returns on operating costs as a means of financing the costs of regulated companies. Returns on operating costs would not incentivise efficiencies in regulated companies because the higher the operating costs the higher the return. One of ComReg’s aims and objectives is the encouragement of efficient investment.
- 8.192 ComReg is of the view that this approach should be followed in this market.
- 8.193 The use of cost is also a practical means of setting tariffs. Most of the information that ComReg considers might be necessary to set tariffs can be found in the accounting records of 2rn. ComReg is of the view that the use of this data provides a robust basis for tariffs but would also be subject to further regulatory scrutiny. ComReg is also of the view that the use of 2rn’s own data minimises the regulatory burden on 2rn.
- 8.194 ComReg is of the view that Fully Distributed Cost<sup>196</sup> (**FDC**) is the preferred cost accounting methodology for the setting of Market A tariffs combined with a Top Down<sup>197</sup> (**TD**) cost model (with appropriate efficiency adjustments). It is recommended that this approach is used as the basis of setting tariffs in Market A as it mirrors the price that 2rn incurred in rolling out its network.

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<sup>195</sup> Review of Weighted Average Cost of Capital (WACC) <https://www.comreg.ie/publication/review-of-weighted-average-cost-of-capital>

<sup>196</sup> See 8.191 a to b above.

<sup>197</sup> *ibid*



- 8.195 In setting the timeframe for tariffs, ComReg must reflect the necessity for 2rn to recover its efficiently incurred costs while at the same time providing certainty on the tariffs purchasers of wholesale services will be charged. When doing so ComReg bases the regulated tariffs on financial data adjusted for certain economic forecasts. This is to avoid possible fluctuations in the tariffs. These economic forecasts cover both supply and demand factors.
- 8.196 ComReg must determine the likely usage of 2rn's infrastructure over the timeframe of the review including new users or possible exits from the market by service providers using the infrastructure. If the timeframe is too short, regular updating of tariffs would be required creating uncertainty for all.
- 8.197 ComReg must also dimension the expected expenditure on the network over the timeframe of the review. For capital expenditure, ComReg must dimension what level of investment would be required over the timeframe of the review; the shorter the timeframe the lower the likelihood of significant capital expenditure. However, if there are consecutive short term reviews there may come a point where significant expenditure is required causing a spike in tariffs. Aligned to this is the need to have appropriate asset lives applied to the capital expenditure. Where asset lives are too short investment would be recovered over too short a period resulting in higher tariffs. Where asset lives are too long 2rn would be required to wait too long to recover its investment and this may affect further investment in its network. Currently 2rn's asset lives reference ComReg Document No. 09/65<sup>198</sup>.
- 8.198 Operating costs must also be considered to ensure that they reflect the costs of operating the network over the period of the review. This ensures that fluctuations in costs (e.g. additional costs for severe weather, voluntary redundancy schemes) are removed. The major cost categories reflected in the Market A tariffs are:
- (a) Depreciation;
  - (b) Electricity consumption;
  - (c) Payroll charges and costs associated with travel and subsistence; and
  - (d) WACC.

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<sup>198</sup> Review of the regulatory asset lives of Eircom Limited

8.199 As mentioned elsewhere in this Decision, 2rn currently updates its tariffs annually, whereas the BAI tends to grant contracts for a period of 7 to 10 years. When determining timeframes for other regulated industries ComReg often allows for interim review periods. These take account of possible unforeseen fluctuations in underlying data and assumptions used to determine tariffs. However, experience has shown that there are minimal fluctuations in 2rn tariffs from one year to the next. As there are few significant changes to the users of the assets the cost allocations associated with the capital investment tend not to vary significantly. Changes to operating costs have tended to relate to inflationary type pressures mainly. Costs associated with the 700MHz migration which are being funded by DCCAIE are excluded from the tariff model.

### Cost accounting Obligations

8.200 The obligation to maintain appropriate cost accounting systems generally supports the obligations of price control and accounting separation, and can assist ComReg in monitoring the obligation of non-discrimination. ComReg imposes 2rn to maintain appropriate cost accounting systems in respect of wholesale products, services or facilities.

8.201 To support the effective operation of a price control obligation, it is necessary for 2rn to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. A key part of this process is the stage which identifies those parts of the underlying activities or network components that directly support, or are consumed by, those particular services or products. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product.

8.202 The division of services and products, and the corresponding costs, capital employed and revenues between the different services and products should be reflected in costing systems, and coherence and integrity of information should be assured. Where such particular costs form part of the cost of an SMP service, ComReg needs to have visibility as to the basis of and amount of allocation across all services.

8.203 The main cost drivers previously identified by 2rn include:

- (a) Mast occupancy studies which identify what proportion of services utilise the masts and towers. This has been supported by third party review;
- (b) Electricity consumption which is linked to the metering of services; and
- (c) Pay related costs which are allocated to services depending on time spent.

8.204 At a high level, tariffs for the Market A customers are derived based on consumption of each of these three cost drivers.

## Consideration of Respondents' Views Regarding the Price Control and Cost Accounting Remedies in Market A

### Overview of Respondents' Views

- 8.205 Of the five Submissions received, three Respondents (the BAI, TG4 and VM) agreed with ComReg's preliminary conclusions on the pricing remedies. RTÉ and 2rn neither agreed or disagreed with the pricing remedies.
- 8.206 VM, RTÉ and TG4 commented on the pricing methodology, price controls and the tariff model. VM and RTÉ's views are considered, in Market B, at paragraphs 8.569 below. Virgin Media's views regarding the WACC are considered below.
- 8.207 TG4 suggested that the price level set by 2rn remains excessively high as there is no incentive to strictly control costs. It further indicated that a tariff model based on the apportionment of incurred costs plus a profit margin encourages inefficiency and, therefore, excessive charges. The higher the costs attributable to BTS in Market A, the greater the level of profit this creates. It further stated that while it can be argued that RTÉ is paying its allocated share of transmission costs under the tariff model, this is offset by the substantial profits generated by adding a margin to costs as 2rn's profits are consolidated into the RTÉ Group accounts.
- 8.208 TG4 indicated that this can only be addressed through a root and branch review of the existing operation of 2rn with a view to generating efficiencies in labour costs and other inputs. It suggested that this needs to be addressed as part of this market review by way of an independent audit of 2rn's underlying asset base and other costs and work practices.
- 8.209 TG4 does not agree that a cost-orientation price control approach be adopted in this instance. TG4 further submits that a cost-orientation approach might work in some cases of SMP but not one where 2rn's parent is its major customer and can effectively recover excessive transmission charges by way of consolidation of 2rn's profits in the Group accounts.
- 8.210 TG4 refers to paragraph 8.146 in the Consultation, noting that customers do not have full visibility of the Market A Tariff Model. TG4 considered it is particularly disadvantaged as it has no direct contractual relationship with 2rn for transmission charges. TG4 noted that it pays a portion of RTÉ's transmission charge as part of the tariff it pays for access to one of the two multiplexes in Market B. TG4 suggested that while the tariff model apportions costs, it does not regulate the actual cost inputs, which potentially facilitates inefficiencies.

- 8.211 TG4 also stated that a price control based on costs as set out in paragraph 8.166<sup>199</sup> of the Consultation is a good option but TG4 wishes to see an independent review of the existing fixed asset base, and a review of operational practices and staffing levels to determine the appropriate level of other costs. At present, costs and cost drivers are unknown and are withheld from customers on the basis of commercial sensitivity.
- 8.212 TG4 submit that the analysis of market costs confirms that DTT in Ireland is very expensive. It submitted that this suggests that it is imperative that a detailed analysis of 2rn's asset base be undertaken as well as an independent review of its operations and practices to determine where efficiencies could be generated. TG4 also submit that it confirms TG4's view that DTT will cease to be a primary distribution technology for broadcasters once broadband has been rolled out nationally. TG4 submit that DTT is an expensive distribution system and will likely only continue for a further 10-15 years (2030-2035).
- 8.213 TG4 submit that the efficiencies identified in paragraph 8.433 of the Consultation have not gone far enough. TG4 further submit that in order to meet its universal coverage obligations, RTÉ was obliged to implement a satellite solution (Saorsat also managed by 2rn) to augment coverage lost by the removal of multiple small relay sites. TG4 submit that, the apparent efficiencies derived from switching off tiny sites have been more than offset by the addition of Saorsat.
- 8.214 VM referred to the WACC, noting that more transparency around the actual WACC in Markets A and B would be welcome.

### ComReg's Consideration of Respondents' Views

- 8.215 ComReg notes TG4's comments above regarding cost allocation. As noted at paragraph 8.211, the three main cost drivers in Market A are Mast Occupancy, Activity Reports and Electricity consumption, these costs are monitored and reviewed, regularly. These are described in more detail in the Accounting Documentation published by 2rn annually. The following is a summary of these cost drivers and how they are reviewed:
- (a) **Mast occupancy:** Each year 2rn conducts "climb downs" on its masts. This is to determine what equipment is carried on each mast and therefore what amount of the mast it occupies. It takes in to account the height on the mast and its wind loading. Through this 2rn can determine what cost each piece of equipment drives on the mast. To aid it with its review 2rn has contracted a consultant to review the mast occupancy annually. While they do not climb down the masts they attend at several sites, monitor the activities and check the processes employed by 2rn to ensure the studies are accurate.

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<sup>199</sup> 8.185 of this Decision

- (b) **Activity reports:** Activity reports record the resources allocated by 2rn to its various services and tend to be reviewed by independent auditors as part of the annual audit.
- (c) **Electricity consumption:** 2rn has installed electricity metres at many of its sites. This means that a service is charged for the cost of electricity it has consumed.
- (d) The costs of Saorsat are excluded from the Market A tariffs.

8.216 ComReg also has regular interaction with 2rn regarding costs.

- (a) **Accounting separation:** as noted in this document 2rn both publishes Regulated Accounts which are audited by an independent auditor but who also owes a duty of care to ComReg by way of a tripartite agreement.
- (b) **AFD:** As part of the AFD 2rn submits an annual copy of its fixed asset register to ComReg.
- (c) **Tariff Model:** at the same time 2rn submits its Tariff Model to ComReg. As these tariffs are largely derived from the costs recorded in the Regulated Accounts a comparison between the two can be made.
- (d) **Site visits:** ComReg regularly conducts site visits to 2rn sites throughout the country. This enables it to gain a greater understanding of the network infrastructure. Apart from the site visits ComReg also has regular engagement with 2rn management.

8.217 In addition, ComReg notes the strict non pricing remedies of transparency and non-discrimination which are in place. ComReg notes further that, as part of the considerations of the transparency remedy at 8.80, 2rn is obliged as a regulated entity to adhere to the obligations imposed on it by ComReg.

8.218 ComReg has considered VM's comments above and confirms that if required<sup>200</sup>, the WACC will be updated annually going forward<sup>201</sup>.

### **Overall conclusion for the imposition of the Price Control and Cost Accounting Remedies in Market A.**

8.219 Having regard to the analysis set out at paragraphs 8.153 to 8.218 above, ComReg imposes the following Price Control and Cost Accounting obligations on 2rn:

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<sup>200</sup> The WACC will be reviewed annually and will reflex any necessary changes, which will then be applied.

<sup>201</sup> See ComReg Document 20/96

- (a) A price control and cost accounting obligations of cost oriented price control based on a HCA and FDC methodology. Further detail regarding the price control and cost accounting obligations are outline in Annex: 4 below.

8.220 ComReg's position is that price control obligations alone would not be sufficient to address the competition problems identified in Section 7, therefore ComReg imposes an additional Accounting Separation remedy.

8.221 The Price Control and Cost Accounting Obligations set out in paragraphs 8.153 to 8.204 above are set out in legal form in the DI in Annex: 4.

## Accounting Separation remedies in Market A.

### Overview

8.222 In accordance with Regulation 11 of the Access Regulations, ComReg can require an operator which is vertically-integrated to make transparent its wholesale prices and its internal transfer prices, to ensure compliance with any non-discrimination obligation imposed or, where necessary, to prevent unfair cross-subsidisation.

8.223 An accounting separation obligation can also reinforce cost accounting and transparency obligations as it can help to ensure that costs are neither over- nor under-recovered and help disclose possible competition problems by making visible the wholesale prices and internal transfer prices of an SMP Service Provider's services.

8.224 ComReg set out at paragraph 8.25 above the existing accounting separation obligations, imposed on 2rn in Market A.

### Accounting Separation Remedies for Market A.

8.225 This obligation is put in place to specifically support the obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations. In Section 7, ComReg has identified potential competition problems associated with possible price-related leveraging such as excessive pricing which highlights the importance of establishing a transparent and effective mechanism of accounting separation and transfer charges between the various RTÉ entities so that costs and its allocation to each customer (RTÉ and competitor broadcasting activities) are efficient and can be transparently identified.

8.226 Separated accounts help disclose such possible competition problems and make visible the wholesale and internal transfer prices of a dominant operator's services thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on 2rn to maintain separated accounts.

- 8.227 The main objective of accounting separation is to make non-discrimination and cost-orientation transparent by showing cross-subsidisation between products and thereby enable one to identify unfair cross-subsidisation. In requiring separated accounts for the main products and services, this creates more transparency on internal transfer pricing and repartition of common and joint costs.
- 8.228 It is ComReg's position that the imposition of the obligation of accounting separation on 2rn would support each of these obligations.
- 8.229 As RTÉ should ensure that it conducts its commercial activities such as those of 2rn under market conditions it is important that the costs incurred by the commercial subsidiaries should be the minimum overhead costs allocated to the accounts of these subsidiaries.
- 8.230 ComReg notes sections 108 and 109 of the 2009 Broadcasting Act. Section 108 provides that all transactions entered into by a corporation, as between the activities arising from (a) its public service objectives, and (b) its exploitation of commercial opportunities, shall be made at arm's length and on commercial terms. At the direction of the Minister, a report on compliance with this requirement shall be made by the Compliance Committee of the BAI.
- 8.231 Section 109 of the 2009 Broadcasting Act sets out the general accounting procedures for "a corporation", defined in the Act as meaning RTÉ or TG4 or both, as the case may be. These accounting procedures include the requirement for a corporation to prepare and submit audited accounts to the Minister as required. The BAI, at the direction of the Minister and having consulted with the corporation, shall prepare and publish guidance for the corporation as regards the cost accounting principles and methods to be considered in preparing a statement made in respect of public funding paid to it under section 123 of the 2009 Broadcasting Act. In particular, section 109(9)(b) provides that a corporation shall, after the end of each financial year, send to the Minister a statement in respect of the total revenue and costs derived by the corporation in that financial year. That statement to the Minister shall distinguish between monies received or expended on (a) activities in pursuance of its public service objectives, and (b) activities in pursuance of its exploitation of commercial opportunities objective.
- 8.232 The above provisions of the 2009 Broadcasting Act appear to be aimed at securing accountability for expenditure of public monies and protecting against inappropriate use of public funds. These provisions are not designed to address issues of SMP per se, and neither provision would, in ComReg's view, result in full transparency of internal pricing in the same manner as under the electronic communications regulatory framework.



8.233 ComReg has previously imposed the obligation of Accounting Separation in other markets (telecoms and postal) on Eircom (ComReg document No. 10/67<sup>202</sup>) and on An Post (ComReg document No.17/06<sup>203</sup>) respectively. Furthermore, under the terms of a Concession Agreement between the Minister for the Environment, Climate and Communications, and BT, BT as the provider of emergency call answering services (“ECAS”) is required to prepare and have audited separated accounts for its ECAS operation and submit these to ComReg (in confidence).

#### Current reporting requirements of RTÉ (including 2rn)

8.234 RTÉ is a vertically integrated operator in that it provides wholesale services as well as offering retail services and thereby competing with other broadcasters. RTÉ is also a statutory corporation established under legislation while 2rn is an incorporated company with limited liability and is a 100% wholly owned subsidiary of RTÉ.

8.235 2rn annually files statutory financial statements with the Companies Registration Office. Statutory financial statements tend to be used to comply with companies’ legal obligations, such as compliance with taxation requirements and Companies Registration Office filing requirements. While they are also used to report the financial performance at a given point of time the information contained within them is usually not sufficiently granular in detail to support regulatory decisions.

8.236 RTÉ also publishes an annual report, which contains audited financial statements of the RTÉ Group. These financial statements include the reporting of the internal transfer charges between 2rn and other RTÉ integrated business divisions. These internal charges are removed on consolidation of RTÉ’s activities thereby reflecting the amount RTÉ charges third parties for use of its broadcasting network. However, the annual report does not differentiate between the broadcasting and non-broadcasting customers using its network or between regulated and non-regulated activities. Therefore, the level of detail provided in the RTÉ annual report is insufficient for ComReg when conducting regulatory reviews.

8.237 As a result, the current form of publicly available financial statements for RTÉ and 2rn do not provide sufficient transparency or financial data of a sufficient level of granularity which would assist ComReg in its regulatory objectives.

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<sup>202</sup> <https://www.comreg.ie/publication/response-to-consultation-document-no-0975-and-final-direction-and-decision-accounting-separation-and-cost-accounting-review-of-eircom-limited>

<sup>203</sup> <https://www.comreg.ie/publication/universal-postal-service-accounting-obligations-2017-accounting-direction>

8.238 Separated accounts are more granular in detail than statutory financial statements and often contain confidential and commercially sensitive information and can therefore assist regulators in meeting regulatory objectives. Separated accounts also enable regulators to understand whether or not there are potential cross-subsidisation or competition issues arising from incorrect or inappropriate cost allocations. The information contained within them is presented in a form to meet regulatory needs which often is not comparable to statutory reporting requirements.

### Main Accounting Separation Obligations

8.239 ComReg requires that 2rn submit separated accounts in a format which assists ComReg in discharging its regulatory functions. This will require financial data to be presented that reflects the broadcasting and non-broadcasting elements of 2rn's business for Market A.

8.240 The main requirements to be included in the obligation of accounting separation are:

- (a) Presentation of accounts (discussed in paragraphs 8.241 to 8.266);
- (b) Transfer charging mechanism (discussed in paragraphs 8.267 to 8.269);
- (c) Allocation of costs (discussed in paragraphs 8.270 to 8.271);
- (d) Audit (discussed in paragraphs 8.272 to 8.282); and
- (e) Documentation (discussed in paragraphs 8.283 to 8.290).

### Presentation of accounts

8.241 In this Decision, ComReg does not prescribe a particular format for separated accounts because the prescription of a particular format at this point could render the accounts inflexible at a future date should requirements change.

8.242 Instead ComReg intends to discuss with 2rn its regulatory requirements in the presentation of financial data. Therefore, as requirements for financial data change over time this will allow ComReg adopt a flexible approach when requesting this data. It will also ensure that 2rn's financial accounting systems can produce the required information in a cost effective and timely manner. This is similar to the approach ComReg has adopted with Eircom, An Post and BT (as the ECAS provider) in other markets or in the case of BT under a Concession Agreement with DECC. This is also the process ComReg has adopted with 2rn previously.

8.243 ComReg is conscious of not imposing an unnecessary burden upon 2rn in terms of the accounting separation obligation. ComReg therefore is endeavouring to utilise as much information as contained within the current accounting systems of 2rn while at the same time meeting its own regulatory requirements. As set out under the 2013 Decision, the separated accounts will draw substantially upon information contained with the statutory accounts of 2rn.

8.244 However, ComReg's position is that the separated accounts should include the following:

- (a) Regulated Accounts;
- (b) Additional Financial Data ("AFD"); and,
- (c) Accounting Documentation.

8.245 ComReg requires that 2rn submit separated accounts to ComReg within four months of the end of its financial year unless otherwise agreed by ComReg.

### **Regulated Accounts**

8.246 ComReg requires that the Regulated Accounts would be audited annually by an independent auditor and published on 2rn's website. They would show financial data similar in nature to that of the statutory financial statements.

8.247 While the tariffs charged to non-broadcast and local broadcast customers will not be subject to regulation, ComReg, for completeness and reconciliation purposes, requires details of the revenues and expenses of these. ComReg currently receives similar information from other regulated entities as part of their accounting separation obligations.

8.248 Due to the commercial sensitivity of much of the underlying data it may not be possible to provide further analysis in the Regulated Accounts. However, ComReg considers that, where necessary, it should receive financial data of a more granular nature as part of the AFD (and this is discussed further below, commencing at paragraph 8.257).

8.249 ComReg's position is that the Regulated Accounts should contain the following information:

- (a) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts;
- (b) Income Statement and Balance Sheet; and;
- (c) Notes to the Regulated Accounts (where required).

8.250 The Regulated Accounts would be accompanied by:

- (a) A signed statement from the directors of 2rn acknowledging their responsibilities for the preparation of the regulated accounts and confirming their compliance with the requirements of the Decision Instrument in this respect;
- (b) A report and opinion by an Auditor on the regulated accounts and 2rn's compliance with the requirements of this Decision Instrument, in respect of the preparation of the regulated accounts; and,
- (c) The Income statement should provide details on the underlying relevant cost categories. 2rn should discuss these cost categories with ComReg in advance of the publication of the Regulated Accounts.

- 8.251 Where necessary 2rn can provide additional information as part of the separated accounts if it considers it necessary to do so. For example, it has previously disclosed the trajectory of the returns in the separated accounts. This additional information may not be subject to an independent audit but does allow the user of the separated accounts a greater appreciation of returns over an extended period of time. However, its purpose, content and format should be discussed with ComReg in advance of publication.
- 8.252 These classifications could be amended by ComReg from time to time as required. If ComReg requires further details on any of the cost categories it can request this as part of the AFD (see below) as this information is likely to be confidential and commercially sensitive.
- 8.253 The Balance Sheet should be prepared in a format similar to that used for statutory reporting purposes.
- 8.254 The notes to the Regulated Accounts will differ, in some respects, to the notes produced for the statutory financial statements with the notes to the Regulated Accounts reflecting ComReg's regulatory requirements.
- 8.255 ComReg considers that it is important that the Regulated Accounts be accompanied by a directors' responsibility statement. This will ensure that the directors acknowledge their responsibilities for ensuring that the Regulated Accounts are compliant with the Decision Instrument.
- 8.256 While the specific requirements of any audit are discussed below (see paragraph 8.281) ComReg considers that the Regulated Accounts must be independently audited and that the audit opinion reflects whether or not they are 'fairly presented in accordance with' ("FPIA") the Accounting Documentation. If the type of audit opinion is varied this should be agreed in advance with ComReg.

**Additional Financial Data ("AFD")**

- 8.257 ComReg's position is that it is necessary, in the interests of transparency and non-discrimination, to obtain certain detailed information below the market level as it is typically below the market level that wholesale prices and internal transfer charges are determined. However, much of the information at this level would be of a commercially sensitive and confidential nature the publication of which could have a detrimental effect on 2rn. Therefore, ComReg requires 2rn to submit to it AFD for material regulated services and products (as determined by ComReg), in confidence and as required by ComReg.
- 8.258 Previously, the following AFD had been provided to ComReg by 2rn:
- (a) A reconciliation of the fixed asset register for regulatory purposes vis-à-vis that used for statutory purposes; and
  - (b) A comparison of the revenues reported in the separated accounts with the tariffs derived from the Tariff Model. ComReg also receives annually a copy of the Tariff Model.

- 8.259 A review of the fixed asset register allows ComReg to understand the asset base used in the Tariff Model. As the Tariff Model uses information derived from the separated accounts the comparison of revenues provides a level of assurance between the two.
- 8.260 When necessary ComReg is of the view that the AFD for broadcasting services may be audited by a qualified independent body (which may include a registered Auditor). The nature of the audit may vary compared to that required on the Regulated Accounts. For example, some audits may be on Income and Expenditure accounts while others may be on specific cost drivers.
- 8.261 As more granular information is sought at the AFD level it may become more difficult to obtain an opinion from a registered Auditor (without incurring substantial cost). Therefore it may be more appropriate to obtain an opinion from a qualified independent body (such as a broadcast engineer, or economist) rather than a registered Auditor. This could apply for example where ComReg required assurance over a particular cost driver.
- 8.262 If ComReg considers that an audit is required on the AFD it will discuss these requirements with 2rn before the end of its financial period.
- 8.263 ComReg notes that while the costs of operating and maintaining the PSB DTT multiplexes are incurred by 2rn, the licences for these DTT multiplexes are held by RTÉ.
- 8.264 At present 2rn issues RTÉ with invoices for the cost of operating and maintaining the DTT multiplex(es). Therefore, when issuing invoices in relation to these DTT multiplex(es), 2rn does not differentiate between RTÉ's own usage and that of third parties.
- 8.265 RTÉ calculates the cost per broadcaster for the use of the DTT multiplex(es) and charges the broadcasters accordingly. This relates to both RTÉ's own usage and that of third party broadcasters. Therefore details on the revenues and costs associated with the DTT multiplexes are not obtained here but in Market B.

#### **Documentation**

- 8.266 While the requirement for 2rn to document its systems is discussed further below (see paragraph 8.283), ComReg considers that it should be in the format of Accounting Documentation (which will be publicly available on the 2rn website).

#### **Transfer charging mechanism**

- 8.267 ComReg requires 2rn to clearly identify how it accounts for transfer charges with RTÉ and its subsidiaries and to report this to ComReg. This would be reflected in both the content of the Regulated Accounts and AFD as well as through its description in the Primary Accounting Documentation. Due to the level of detail in the publicly available Primary Accounting Documentation, ComReg no longer requires the submission of more detailed Secondary Accounting Documentation.

8.268 A well-defined, transparent and verifiable transfer charging system is necessary to demonstrate non-discrimination and to calculate internal costs and revenues. 2rn would be required to ensure that the tariffs it charges RTÉ and its subsidiaries are prepared on the same basis as those that it charges to third parties. If there are any differences in the basis of preparation of tariffs these would have to be explained to ComReg.

8.269 This information will assist ComReg in monitoring 2rn's compliance with the relevant non-discrimination obligations with regard to wholesale prices as well as its internal transfer charges. This will also help to detect and prevent unfair cross subsidisation.

### **Allocation of costs**

8.270 Separated accounts will enable ComReg to assess 2rn's compliance with the Price Control and Cost Accounting obligations. While these obligations are discussed in more detail above, ComReg considers that these should include:

- (a) Cost causality;
- (b) Objectivity;
- (c) Transparency; and
- (d) Consistency.

8.271 Separated accounts will further ensure that:

- (a) Only those activities which cause costs to be incurred, either directly or indirectly, are allocated the costs;
- (b) Costs are objectively applied and no one gains a benefit at the expense of another;
- (c) The way costs are allocated is applied consistently from year to year; and
- (d) Transparency is achieved as cost methodologies and documentation has to be published.

### **Audit**

8.272 As noted above ComReg considers that it should seek to have 2rn's Regulated Accounts audited by an Auditor. In doing so it considers that the associated audit opinion be addressed to ComReg and 2rn whereby both will be owed a "duty of care" from the Auditors. This will provide assurance as to whether or not the Regulated Accounts are compliant with the relevant parts of ComReg's Decision Instrument and thereby enable ComReg to place reliance on them. This process has been in place with 2rn following the 2013 Decision.

- 8.273 As has been noted above, ComReg has imposed an obligation of accounting separation on Eircom and An Post in other markets. The Auditors of the Regulated Accounts owe a duty of care to both ComReg and the regulated entities. While no obligation of accounting separation has been imposed upon BT (as ECAS provider), ComReg is also owed a duty of care by its Auditor in the audit report of the ECAS financial statements.
- 8.274 The duty of care is contained in letters of engagement signed by ComReg, the regulated entities and the Auditors, and is reflected in the wording of the audit reports.
- 8.275 In determining what level of audit opinion is provided on 2rn's Regulated Accounts ComReg is of the view that an FPIA audit opinion would be the most appropriate as it is similar to a "True and Fair" audit opinion on statutory financial statements. No changes to the level of the audit opinion can be made without the prior approval of ComReg.

**"Fairly presents in accordance with" audit opinion**

- 8.276 ComReg considers that an unqualified "Fairly presents in accordance with" audit opinion in connection with the regulatory audits would provide it with a reasonable level of assurance that the Regulated Accounts as a whole have been drawn up in accordance with the applicable Decision Instrument. In the context of the Decision Instrument this would mean that they are free from material misstatement.
- 8.277 It should be noted that the obligations according to which the Regulated Accounts have to be prepared is specific to the particular circumstances in this market, taking account of the legislative and regulatory environment in which 2rn operates.
- 8.278 ComReg is of the view that a "Fairly presents in accordance with" audit opinion would therefore provide it with reasonable but not absolute assurance that the Regulated Accounts, taken as a whole, have been drawn up in accordance with the prescribed Decision Instrument, and only in the context of that Decision Instrument, and are free from material misstatement.
- 8.279 Therefore in providing an unqualified "Fairly presents in accordance with" audit opinion the auditor would consider, inter alia, whether:
- (a) The reasonableness of the apportionment methodologies;
  - (b) The objectivity of the selection of those methodologies; and,
  - (c) The appropriateness and robustness of the data sources supporting the apportionments.

**"Properly prepared in accordance with" audit opinion**

- 8.280 Where a "Fairly presents in accordance with" audit opinion may not be either necessary or obtainable a "Properly prepared in accordance with" audit opinion may be appropriate instead.



- 8.281 A “*Fairly presents in accordance with*” audit opinion may not be necessary where a higher level of assurance is not required by ComReg. For example, ComReg might not require the Auditor to form an opinion on the reasonableness of the apportionment methodologies but instead seek an opinion that the prescribed methodologies have been correctly applied. In other instances a “*Fairly presents in accordance with*” audit opinion may not be obtainable depending on the nature of the audit to be undertaken.
- 8.282 Therefore when applying a “*Properly prepared in accordance with*” audit opinion the accounting framework must be articulated in sufficient detail to allow the auditor to report, inter alia, whether:
- (a) The Regulated accounts and/or the AFD have been compiled with in accordance with that framework; and,
  - (b) That there are no material issues of note regarding services and products;
  - (c) Where it is considered necessary a change to a “*Properly prepared in accordance with*” audit opinion can only take place with the prior approval of ComReg.

### **Documentation**

- 8.283 ComReg’s position is that 2rn should be required to provide Accounting Documentation.
- 8.284 In accordance with the Access Regulations, where an obligation of cost accounting is imposed, the regulated entity must publish a description of its cost accounting system which shows at least the main categories under which costs are grouped and the rules used for the allocation of costs.
- 8.285 Where a regulated entity has a price control obligation this also assists with the burden of proof that charges are derived from costs including a reasonable rate of return on investment, which lies with the regulated entity concerned.
- 8.286 ComReg requires 2rn to publish a description of its cost accounting systems. ComReg requires that this would be published within four months of the end of 2rn’s financial year or at a time as agreed by ComReg.
- 8.287 Associated with the obligation of cost accounting is the requirement for 2rn to document its cost accounting systems. It is important for ComReg to understand how costs are allocated by 2rn between regulated and non-regulated activities and within regulated activities to RTÉ and third parties.

- 8.288 It is not intended that the documentation by 2rn of its cost accounting systems be open ended. Therefore, ComReg imposes that 2rn addresses the more material aspects that drive costs within its regulatory accounting process, such as mast occupancy, electricity consumption and activity reports. This approach, which is consistent with accounting separation obligations imposed by ComReg on other regulated entities, should address ComReg's regulatory needs and be proportionate to 2rn.
- 8.289 While this is a continuation with the existing obligation ComReg may discuss with 2rn its requirements in this regard. However, at a minimum ComReg would require sufficient documentation from 2rn which would identify the main cost categories in its Regulated Accounts including:
- (a) The primary sources of financial information;
    - (i) 2rn's own operating costs;
    - (ii) Transfer charges from other RTÉ activities;
    - (iii) The basis for the asset lives applied;
    - (iv) How fixed asset investment is recorded.
  - (b) The main assumptions / cost drivers used to allocate these costs to regulated and non-regulated activities and within regulated activities; and
  - (c) How 2rn applies the Regulatory Accounting Principles within its cost accounting systems.
- 8.290 ComReg is therefore imposing a requirement that 2rn maintain sufficient accounting separation documentation to ensure the above principles are applied in a non-discriminatory manner and that this is transparent to industry. Appropriate separated accounts would be submitted to ComReg within four months of the end of 2rn's financial year or at a time as otherwise may be agreed by ComReg.
- 8.291 As noted above the revenues in the separated accounts are comparable to tariffs derived from the Tariff Model. Therefore, much of the information contained in the accounting documentation, which is published by 2rn on its website, is also directly relevant to the Tariff Model.

## **Consideration of Respondents' Views regarding the Accounting Separation remedy for Market A**

### **Overview of Respondents' Views**

- 8.292 Of the five Submissions received two Respondents (the BAI and VM) agreed with ComReg's preliminary conclusions on the accounting separation remedies. TG4 broadly agrees with the accounting separation remedies. RTÉ and 2rn neither agreed or disagreed with the accounting separation remedies.

8.293 Although in agreement with the accounting separation remedy, VM indicated that it is concerned by what it sees is a lack of transparency in the financial structure between RTÉ and 2rn and the allocation of costs and transfer charging mechanisms. This is an area that VM suggested that ComReg should review.

### ComReg's Consideration of Respondents' Views

8.294 ComReg has considered VM's views about the accounting separation remedy. ComReg's position is that VM's concerns are addressed sufficiently through the imposition on 2rn of the price control and cost accounting and the accounting separation obligations for the reasons outlined above. ComReg requires that 2rn submit separated accounts in a format which assists ComReg in discharging its regulatory functions. This will require financial data to be presented that reflects the broadcasting and non-broadcasting elements of 2rn's business for Market A. In this regard, ComReg notes that 2rn must make the following information available:

- (a) Presentation of accounts (discussed in paragraphs 8.241 to 8.266 above);
- (b) Transfer charging mechanism (discussed in paragraphs 8.267 to 8.269 above);
- (c) Allocation of costs (discussed in paragraphs 8.270 to 8.271 above);
- (d) Audit (discussed in paragraphs 8.272 to 8.282 above); and
- (e) Other Documentation (discussed in paragraphs 8.283 to 8.291 above).

8.295 Given the analysis set out at 8.241 to 8.290, ComReg remains of the view that the accounting separation and transparency obligations is sufficient to adequately address any potential anti-competitive behaviours as outlined in Section 7.

### **Overall conclusion on the Accounting Separation in Market A.**

8.296 Having regard to the analysis set out above at paragraphs 8.222 to 8.291. ComReg will continue to impose an accounting separation obligation on 2rn; this includes requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.

8.297 The Accounting Separation obligations set out in paragraphs 8.222 to 8.291 above are also set out in legal form in the Decision Instrument in Annex: 4.

## **Remedies in Market B**

8.298 Having summarised the existing remedies in paragraphs 8.26 to 8.34 above ComReg now sets out its position regarding remedies that it is imposing upon RTÉ in Market B. These include:

- (a) Transparency obligations (discussed in paragraphs 8.308 to 8.344 below);
- (b) Non-discrimination obligations (discussed in paragraphs 8.345 to 8.372 below);

- (c) Access obligations (discussed in paragraphs 8.373 to 8.420 below);
- (d) Price Control and Cost Accounting obligations (discussed in paragraphs 8.421 to 8.532 below) and;
- (e) Accounting separation obligations (discussed in paragraphs 8.533 to 8.573).

8.299 Prior to discussing the above, ComReg first discusses the relevance, if any, of the provisions of other legislation, given it may impact upon the overall approach to remedies.

## Provisions of other legislation

8.300 The sections of the 2009 Broadcasting Act that ComReg considers to be of most relevance to the analysis of Market B are:

- (a) Section 108, as described in paragraph 8.38 of this Decision;
- (b) Section 109, as described in paragraph 8.39 of this Decision; and
- (c) Section 130 is also of relevance to the analysis of Market B and provides that the following TV programme services are carried on RTÉ's PSB DTT multiplex(es):
  - (i) RTÉ One and RTÉ Two;
  - (ii) TG4;
  - (iii) The Houses of the Oireachtas Channel (where required by the Minister);
  - (iv) The Irish Film Channel (where required by the Minister);
  - (v) Other TV services having the character of a public service as may be designated by the Minister (this applies to VM 1 and VM 2); and
  - (vi) The TV programme service provided under the TV programme service contract by the TV programme service contractor (this applies to VM 3).

8.301 Insofar as section 130 of the 2009 Broadcasting Act is concerned, this provides that the Minister, after consultation with ComReg, RTÉ and the TV programme services listed in paragraph (c) above, may also direct that payments be made by the aforementioned TV programme services (other than RTÉ One and RTÉ Two) to RTÉ for the broadcasting of their programme services on the national PSB DTT multiplexes established, maintained and operated by RTÉ.

8.302 These TV programme services may request an increase in capacity for the carriage of their programme services if they do not consider that the digital capacity employed by RTÉ on its PSB DTT multiplex(es) is adequate and the Minister may, on request, direct RTÉ to employ a specific amount of digital capacity.

- 8.303 ComReg's view, in particular in light of its experience and knowledge of regulating other electronic communications markets, is that the provisions of the 2009 Broadcasting Act, in particular sections 108, 109 and 130, do not adequately address the potential competition problems which, absent SMP regulation, could arise in Market B.
- 8.304 Insofar as sections 108 and 109 are concerned, the discussion in paragraphs 8.38 and 8.39 in this Decision (in the context of the relevance of sections to Market A) are equally relevant to Market B and hence, ComReg does not repeat this analysis here.
- 8.305 ComReg's views set out in paragraph 8.126 of this Decision, with respect to section 115 of the 2009 Broadcasting Act, equally apply to section 130 insofar as they relate to access and pricing. As such, ComReg's view is that:
- (a) The 2009 Broadcasting Act does not adequately address SMP related competition problems in an effective or efficient manner or would not likely provide sufficient regulatory certainty and predictability to market participants;
  - (b) Section 130 of the 2009 Broadcasting Act does not necessarily imply a cost-oriented (and efficient) price control could be put in place and, as such, would not necessarily resolve potential excessive pricing problems;
  - (c) ComReg also has experience and knowledge of regulating other electronic communications markets to address SMP related competition problems (such as price control decisions and disputes), such that *ex ante* SMP regulation is likely to be more effective and efficient in addressing, in a timely manner, competition concerns (related to pricing for example) than would otherwise be the case under section 130 of the 2009 Broadcasting Act;
  - (d) In terms of access, the provisions of the 2009 Broadcasting Act do not adequately address the identified SMP related competition problems in an effective manner which would provide necessary regulatory certainty or counter potential constructive refusals of access such as granting access in a fair, reasonable and timely manner and to negotiate in good faith for example; and
  - (e) The provisions of the 2009 Broadcasting Act relevant to Market B are more akin to *ex post* intervention and as such may not provide sufficient predictability to market participants in a manner which would promote efficiency, sustainable competition and maximise consumer benefits.
- 8.306 Given the above, ComReg does not consider the provisions of the 2009 Broadcasting Act to be sufficient to address potential SMP related competition problems.

8.307 As part of the 3CT assessment ComReg notes the distinct legal and structural characteristics of entry conditions to Market B, assuming the presence of Market A SMP regulation. Having regard to the nature of barriers to entry and the competitive dynamics of Market B, ComReg notes that irrespective of whether *ex ante* regulatory obligations are applied to upstream Market A, the competitive conditions of Market B would not necessarily evolve towards effective competition in the timeframe of this review.

## Transparency Remedies in Market B

### Overview

8.308 As outlined at paragraphs 8.50 to 8.51 above Regulation 9 of the Access Regulations provides that ComReg may, inter alia, specify obligations to ensure transparency in relation to access or interconnection which require a Service Provider designated with SMP to make public specified information such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any conditions limiting access to, or use of, services and applications where such conditions are permitted by law.

8.309 Transparency obligations can be standalone, but can also support other obligations being imposed and, as evidenced from the above, usually relate to requirements to make specified information publicly available.

8.310 ComReg set out at paragraphs 8.27 to 8.28 above existing transparency obligations imposed on RTÉ in Market B.

### Transparency Remedies

8.311 Transparency supports the monitoring of the non-discrimination obligation. In order for such remedies to be effective there is a requirement that there is transparency otherwise ComReg and industry players would have no assurance that there was no discrimination by RTÉ towards third parties.

8.312 In Market B, RTÉ could provide less favourable terms and conditions of access to downstream competitors than to itself. Furthermore, broadcasters require levels of service which may not be forthcoming or inferior to that provided to RTÉ. A lack of transparency on service levels provided to RTÉ vis-à-vis other broadcasters could make it difficult to demonstrate that discrimination is not occurring.

8.313 Also, RTÉ could foreclose competition in Market B through exploiting information availability as uncertainty could potentially discourage investments in markets dependent on RTÉ's wholesale products.

- 8.314 A transparency obligation is also required to monitor and ensure the effectiveness of any price control obligations and to support any accounting separation obligations, as this would allow the calculation of costs and prices (i.e. internal price transfers) to be rendered visible. This would also allow ComReg and industry to monitor the compliance of RTÉ's pricing behaviour with any non-discrimination obligations, and address potential competition problems relating to excessive pricing and price discrimination.
- 8.315 As set out in Regulation 9(1) of the Access Regulations, transparency obligations may be used in relation to;
- “..interconnection, access or both interconnection and access, requiring such operator to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices”.*
- 8.316 Transparency can be applied on its own but it usually supports other obligations. Transparency serves the purpose of ensuring that access and pricing behaviour are observable.
- 8.317 ComReg is of the opinion that transparency obligations are necessary, both to allow monitoring and visibility of how RTÉ is meeting its obligations, and to provide information which broadcasters may use to make a decision to enter the retail market. The specific detail of this obligation is discussed below.
- 8.318 To support the non-discrimination obligations and to ensure that market participants have adequate visibility of the conditions and quality of the wholesale service offered, ComReg imposes a number of publication requirements. ComReg's view is that the following transparency obligations should be imposed:
- (a) Requirement to publish a Reference Offer;
  - (b) Requirement to publish information about products and services; and
  - (c) Requirement to publish a service level agreement (**'SLA'**).

#### [Publication of a Reference Offer](#)

- 8.319 ComReg is imposing an obligation requiring that RTÉ must publish a Reference Offer on its website which should contain at least a description of all relevant offerings broken down into components according to market needs, a description of the technical specifications and network characteristics of the access being offered, the mechanism for approaching RTÉ for access, and a description of the associated terms and conditions for supply and use, including prices, to RTÉ's DTT multiplexing service. It is important to note that this Reference Offer does not represent an exhaustive list of the services which might be the subject of a reasonable request.



- 8.320 The obligation requiring the publication of a Reference Offer gives potential entrants more detail on the supply characteristics and terms and conditions and prices of access before they approach RTÉ. This means that third parties will have an understanding of the type of services and the characteristics and prices of services on offer before engaging with RTÉ thereby facilitating more timely and effective access to RTÉ's Market B services which otherwise may be constructively denied or delayed due to a lack of information.
- 8.321 Its purpose is to provide a sufficient degree of certainty to allow broadcasters to plan and run their operations efficiently, but does not prevent them from submitting bespoke requests or requesting additional services where circumstances suggest it.
- 8.322 Any terms not covered by the reference offer would, in the first instance, be subject to commercial negotiation with a right for either party to bring a dispute about such terms to ComReg for resolution.
- 8.323 RTÉ must continue to publish its Reference Offer. RTÉ is obliged to keep the Reference Offer publicly available and up-to-date on its website.
- 8.324 ComReg is also imposing an obligation on RTÉ regarding any changes to the Reference Offer. The mechanism provides for all proposed changes, including changes to prices, and the introduction of new services and facilities to be published or otherwise communicated to broadcasters in a timely and transparent fashion.
- 8.325 To ensure the effectiveness of this transparency obligation, it is ComReg's position that any proposed changes to the Reference Offer should not be implemented without prior notification to ComReg and broadcasters. Furthermore, ComReg has continued the flexibility to issue directions requiring RTÉ to make changes to the Reference Offer or to publish information from time to time where appropriate for ensuring the effective operation of this obligation. Such changes would be consulted on, as appropriate, and imposed pursuant to a direction in accordance with Regulation 18 of the Access Regulations.
- 8.326 RTÉ is required to publish proposed changes to the Reference Offer and any proposed changes to wholesale prices (including prices for new services and facilities) at least two months before they come into effect, and to notify ComReg of such proposed changes an additional one month before this. This would mean that ComReg would be notified at least three months before proposed changes were implemented, to be followed by publication at least two months before implementation.

8.327 In order to offer the greatest flexibility to RTÉ, other market players and ultimately consumers, ComReg may extend or reduce this period where appropriate on a case-by-case basis. For example, in the case of significant changes to products or prices, ComReg reserves the right to extend the publication and notification periods beyond the two-month period if appropriate and necessary on a case-by-case basis.

#### Publication of information about products and services

8.328 ComReg has decided that, as part of the transparency obligation, RTÉ is required to publish any reasonable information or data which an undertaking may require in order to be able to compete effectively based on RTÉ inputs. This could include, for example, accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.

8.329 The need for this may arise where broadcasters require more granular information than is available via the Reference Offer discussed above.

#### Publication of SLAs

8.330 As noted, under the Access obligation (at paragraph 8.400 to 8.406 of this Decision), ComReg has included as a condition of RTÉ's access obligation that RTÉ is to be obliged to negotiate, conclude and implement SLAs. ComReg has further decided that a transparency obligation is required to ensure that SLAs are kept up-to-date and published on RTÉ's website. The justification for SLAs, in the context of the Access obligation, relates to where the failure to provide an agreed level of service could act as a means to deter entry of potential competitors or as a means to discriminate against potential competitors and the transparency obligation further supports the effective application (i.e. monitoring) of this Access obligation.

8.331 ComReg considers that publication of SLAs would provide more transparency and assurance to ComReg and industry in demonstrating non-discrimination obligations are being adhered to. As ComReg does not consider that SLAs would contain any commercially sensitive information, ComReg considers that publication is proportionate.

### **ComReg's Consideration of Respondents' Views regarding the Transparency remedy in Market B**

#### Overview of Respondents' Views

8.332 Of the five Submissions received, three Respondents (the BAI, TG4 and VM) agreed with ComReg's preliminary conclusions on the transparency remedy. RTÉ did not agree or disagree with the proposed transparency remedies. 2rn disagreed with the need for a transparency obligation, this is discussed above, in Market A at 8.79 and 8.85 above.

- 8.333 VM note that RTÉ must publish any changes to their Reference Offer at least 2 months in advance of the changes coming into force, and submit that there should be industry consultation regarding the terms and conditions in the Reference Offer. In this regard VM submitted that RTE are unwilling to negotiate bilaterally on the basis that equivalent conditions should apply to all Broadcasters availing of services and facilities. In order to address this concern VM propose an open forum for discussion<sup>204</sup>.
- 8.334 RTÉ commented on the Reference Offer, specifically in relation to disputes, noting that it is unclear on the steps involved in bringing a dispute. RTÉ submitted that more clarity regarding the steps involved in any proposed dispute mechanism is required, particularly ComReg's role and responsibilities and rights of enforcement. In addition, it is suggested that any proposed appeals mechanism should be clarified.
- 8.335 RTÉ commented on the requirement to negotiate in good faith and submitted that it should have the ability to withdraw access, where a broadcaster is in material breach of the agreement or Reference Offer. RTÉ outlined that appropriate notice should be provided by RTÉ prior to such action and ComReg's dispute resolution process initiated promptly, if requested, by the Broadcaster. RTÉ added that;

*"It should be clearly identified that non-payment or substantial debt payment is a material breach."*<sup>205</sup>

### ComReg's Consideration of Respondents' Views

- 8.336 With reference to VM's comments regarding the negotiation of the terms of the Reference Offer, ComReg notes that VM (and any other Broadcaster) is not precluded from entering into bilateral negotiations with RTÉ regarding potential changes to the Reference Offer, albeit that any terms and conditions agreed upon must be offered on a non-discriminatory basis. ComReg notes that such a process will be subject to negotiation with a right for either party to bring a dispute about such terms to ComReg for resolution, having regard to the specific regulatory obligations imposed under this Decision.
- 8.337 ComReg's position is that RTÉ is required to negotiate in good faith with Broadcasters requesting Access. As outlined in this Decision at paragraphs 8.396 to 8.398, ComReg notes that this means that the responsibility rests with RTÉ to demonstrate that its approach to negotiations with undertakings is done in good faith and that any unmet access requests must be shown to have been unreasonable, based on objective considerations.

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<sup>204</sup> See page 6 of VM's submission to Consultation 20/31.

<sup>205</sup> See page 24 of RTÉ's submission to Consultation 20/31.

- 8.338 ComReg notes that it is open to access seekers to make requests to RTÉ which would have to be assessed by RTÉ in line with its obligations. If refused by RTÉ then the Broadcaster can raise a dispute. Similarly RTÉ may raise a dispute.
- 8.339 Furthermore, as part of the conditions attached to the access obligation, ComReg has imposed obligations governing fairness, reasonableness and timeliness, including requirements that RTÉ ensure that legally binding SLAs are appropriately concluded and implemented and, as mentioned above, a requirement to negotiate in good faith with Broadcasters in relation to the conclusion of such legally binding and fit-for-purpose SLAs.
- 8.340 The existing dispute resolution process, which is available to Broadcasters is defined in ComReg Decision D03/10<sup>206</sup> which sets out ComReg's' roles<sup>207</sup> and the steps involved in bringing a dispute<sup>208</sup>. To assist understanding, the procedures are illustrated in a flowchart together with a Dispute Resolution Procedures timeline in Annex B of ComReg Decision D03/10.

### Overall conclusions on the transparency obligations.

- 8.341 Having regard to the analysis set out at paragraphs 8.311 to 8.340 above, ComReg concludes that RTÉ must be subject to the transparency obligations set out in paragraphs 8.311 to 8.340 above.
- 8.342 ComReg has also considered whether transparency obligations alone would be sufficient to address the competition problems identified in Section 7 and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a transparency obligation.
- 8.343 ComReg considers that the imposition of the above transparency obligations is both proportionate and justified, having regard to the competition problems identified in Section 7. ComReg therefore has decided to impose transparency obligations on RTÉ.
- 8.344 The transparency obligations set out in paragraphs 8.308 to 8.340 above are set out in legal form in the DI in Annex: 5.

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<sup>206</sup><https://www.comreg.ie/publication/response-to-consultation-document-no-0985-dispute-resolution-procedures-framework-regulations>.

<sup>207</sup> In accordance with Regulation 31(2) of the Framework Regulations ComReg is obliged to publish its dispute resolution procedures and to ensure that all investigations and determinations are handled in accordance with these procedures. The dispute resolution procedures are also governed by the requirements of Section 12 of the Communications Regulations Act, 2002 and Article 8 of the Framework Directive. ComReg in exercise of its functions under the Communications Regulations Act, 2002 and pursuant to its obligation under Regulation 31(2) of the Framework Regulations has published procedures for the resolution of disputes.

<sup>208</sup> ComReg presented a seven step procedure to resolve disputes.

## Non-Discrimination Remedies in Market B

### Overview

- 8.345 As outlined at paragraphs 8.90 to 8.93 above recital 17 of the Access Directive states that, the principle behind non-discrimination is to ensure that undertakings with SMP do not distort competition, particularly where they are vertically-integrated and supply services to undertakings with whom they compete on downstream markets.
- 8.346 Regulation 10 of the Access Regulations provides that ComReg may impose non-discrimination remedies in relation to access or interconnection on a Service Provider designated with SMP, in particular to ensure that it:
- (a) Applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; and
  - (b) Provides services and information to others under the same conditions and of the same quality as it provides for its own services or those of its subsidiaries or partners.
- 8.347 Non-discrimination obligations can be standalone, and can also support other obligations, such as those relating to access, transparency and price control.
- 8.348 In general, non-discrimination requires that the SMP operator apply equivalent conditions in equivalent circumstances to other broadcasters and Multiplex Operators providing equivalent services and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. Thus, third parties should not be treated less favourably than the SMP operator's own internal operations.
- 8.349 ComReg set out at paragraphs 8.29 above the existing non-discrimination obligations imposed on RTÉ in Market B.

### Non Discrimination Remedies.

- 8.350 In general, non-discrimination requires that the SMP operator apply equivalent conditions in equivalent circumstances to other broadcasters providing equivalent services and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. Thus, third parties should not be treated less favourably than the SMP operator's own internal operations.

- 8.351 ComReg's position is that a non-discrimination obligation is a necessary support for access to a multiplexing service from RTÉ in this wholesale market. The aim of a non-discrimination obligation is to ensure that RTÉ does not discriminate between broadcasters, such as between RTÉ itself and other broadcasters. If RTÉ were only required to provide access, it could potentially discriminate in favour of RTÉ, for example, by providing products to broadcasters which were not of the same quality or pricing as those supplied to RTÉ. The non-discrimination obligation therefore supports the objective of promoting the development of sustainable competition which should be to the benefit of end users.
- 8.352 ComReg, in discussions with broadcasters has been informed that there is concern from them that prices they are, or were proposed to be charged, were excessive and at least prohibitive and it was not visible as to how the charges relate to their cost of use. It is therefore important to ensure that there is no discrimination in prices charged to actual or potential entrants, to ensure that there is not over-recovery relative to the degree of recovery from RTÉ.
- 8.353 This obligation could be imposed by itself but usually supports other regulatory obligations such as access, transparency and price control. Given the potential to discriminate between RTÉ and other broadcasters on the terms and conditions of access, quality of service, and price, the obligation of non-discrimination is required to ensure competition problems do not arise.

*Obligation to apply equivalent conditions in equivalent circumstances, and to ensure that services and information are provided under the same conditions and of the same quality*

- 8.354 ComReg recognises there may be commercial sensitivity surrounding the provision of information and services by RTÉ to broadcasters and therefore concludes that it is reasonable to restrict the obligation regarding non-discrimination to the provision of services and information to a broadcaster who has already agreed a Reference Offer with RTÉ. ComReg does not consider it proportionate or justified to expect RTÉ to make available commercially sensitive information to all market players, irrespective of whether or not they rely on RTÉ supplied wholesale inputs to compete.
- 8.355 ComReg suggests that this obligation is a proportionate and reasonable approach taking into account potential commercial sensitivities surrounding the provision of information and services to other broadcasters and Multiplex Operators.
- 8.356 To ensure that broadcasters are in the same position as RTÉ, with respect to the provision of information and services, such information and services should be provided at the same time to RTÉ.

*SLAs*

- 8.357 ComReg considers that RTÉ should also ensure that it offers SLAs to broadcasters in accordance with its obligations relating to non-discrimination.

## Consideration of Respondents' Views regarding the non-discrimination remedy for Market B

### Overview of Respondents' Views

- 8.358 Of the five Submissions received, three Respondent's (the BAI, TG4 and VM) agreed with ComReg's preliminary conclusions on the non-discrimination remedy. 2rn and RTÉ did not agree or disagree with the non-discrimination remedies.
- 8.359 TG4 and RTÉ offer additional comments regarding the non-discrimination remedy which are considered below.
- 8.360 RTÉ submits that the proposed non-discrimination remedies are overly restrictive and prevents the platform from providing competitive conditions of carriage.
- 8.361 RTÉ further requests that ComReg reviews its position at section 8.305<sup>209</sup> in the Consultation and that ComReg introduce a more flexible regulatory approach which would be attractive to new entrants in the market (Broadcasters and/or channels). It is submitted that such flexibility could be managed on a timed basis or on a classification basis as agreed with ComReg. This could then be published in advance in a Reference Offer in line with existing transparency requirements. This form of regulatory approach has been adopted in other markets.
- 8.362 TG4 is concerned that a situation could arise whereby 2rn favours its parent's (RTÉ's) channels and prioritises bit-rate allocations to the detriment of TG4's picture quality. TG4 adds that this is particularly a concern as RTÉ's two primary services are carried in HD quality which demands greater bandwidth and TG4's programme content is carried in SD quality. TG4 submit that there should be a requirement to ensure that bit-rate allocations and service priorities on each multiplex are fair and equitable.
- 8.363 TG4 submitted that there should also be independent validation of dynamic bit-rate allocations so that all broadcasters can be confident that they are not being disadvantaged in any way.

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<sup>209</sup> ComReg suggests that this obligation is a proportionate and reasonable approach taking into account potential commercial sensitivities surrounding the provision of information and services to other broadcasters and multiplex operators



### ComReg's Consideration of Respondents' Views

8.364 ComReg disagrees with RTÉ that the non-discrimination remedy as now outlined at 8.350 to 8.357 of this Decision, is overly restrictive. RTÉ is not precluded from negotiating with any Broadcast Operator and, as outlined above must offer terms on a non-discriminatory basis. ComReg notes that the requirement for non-discrimination does not preclude bilateral negotiations from taking place. However, RTÉ is obliged to ensure that any terms that are agreed do not discriminate against other Broadcast Operators. ComReg notes further that prices are set at a maximum level and that RTÉ is not precluded from setting prices below the maximum.

8.365 ComReg has considered TG4's view and, as outlined at paragraph 8.354 to 8.356 of this Decision, notes that 2rn is obliged under the existing obligations to act in a non-discriminatory manner:

*"...in general, non-discrimination requires that the SMP operator apply equivalent conditions in equivalent circumstances to other broadcasters and multiplex operators providing equivalent services and provides services and information to others under the same conditions and of the same quality as it provides for its own services .*

8.366 2rn is required to have in place and publish SLAs which may further address this issue.

8.367 Having regard to TG4's views above, ComReg considers that the non-discrimination obligations outlined in paragraphs 8.345 to 8.357 are both proportionate and justified. It is open to TG4 to present any evidence of alleged discrimination on the part of 2rn and the matter may be investigated by ComReg, as appropriate. ComReg further considers that the obligation along with other obligations are sufficient to ensure non-discriminatory behaviour.

8.368 ComReg considers that the non-discrimination obligations set out in paragraphs 8.350 to 8.362 are both proportionate and justified, having regard to the competition problems identified in Section 7.

### **Overall conclusions on the non-discrimination remedies in Market B.**

8.369 Having regard to the analysis set out at paragraphs 8.345 to 8.368 above, ComReg imposes the following non-discrimination obligations on RTÉ:

- (a) Apply equivalent conditions in equivalent circumstances to other Broadcasters providing equivalent services;
- (b) Ensure that all services (including Associated Services and Associated Facilities) and information are provided to other Broadcasters under the same conditions and of the same quality as the services and information that RTÉ provides to itself or to its subsidiaries or partners; and

- (c) Ensure that all such services and information shall be provided to other Broadcasters at the same time as the service(s) and/or information are made available by RTÉ to itself or its subsidiaries or partners.

8.370 ComReg has also considered whether non-discrimination obligations alone would be sufficient to address the competition problems identified in Section 7 and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a non-discrimination obligation.

8.371 ComReg considers that the imposition of the above non-discrimination obligations is both proportionate and justified, having regard to the competition problems identified in Section 7. ComReg therefore concludes that RTÉ must have non-discrimination obligations imposed upon them.

8.372 The non-discrimination obligations set out in paragraphs 8.350 to 8.357 above are set out in legal form in the DI in Annex: 5.

## Access Remedies in Market B

### Overview

8.373 As outlined at paragraphs 8.109 to 8.116 above, Regulation 12(1) of the Access Regulations provides that ComReg may, in accordance with Regulation 8 of the Access Regulations, impose on an operator obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities where ComReg considers that the denial of such access, or the imposition by operators of unreasonable terms and conditions having similar effect, would:

- (a) Not be in the interests of end users, and
- (b) Otherwise hinder the objectives set out in Section 12 of the Communications Regulation Act 2002 (as amended).

8.374 Regulations 12(2)(a) to (j) and Regulation 12(3) of the Access Regulations provide that ComReg can impose, where appropriate, additional access obligations and may attach conditions covering fairness, reasonableness and timeliness to those access obligations.

8.375 Pursuant to Regulation 12(4) of the Access Regulations, when considering whether to impose the obligations referred to in paragraphs (1) and (2) of Regulation 12 and, in particular, when assessing whether such obligations would be proportionate to the objectives set out in Section 12 of the Communications Regulation Act 2002 (as amended), ComReg takes the following factors into account:

- (a) The technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection and access involved;

- (b) The feasibility of providing the access, in relation to the capacity available;
- (c) The initial investment by the facility owner, bearing in mind the risks involved in making the investment;
- (d) The need to safeguard competition in the long-term;
- (e) Where appropriate, any relevant intellectual property rights; and
- (f) The provision of pan-European services.

8.376 ComReg set out at paragraphs 8.30 to 8.32 above the existing Market B access remedies imposed on RTÉ.

### **Access Obligations in Market B.**

8.377 Having regard to the identified competition problems in Section 7 ComReg now sets out obligations which ComReg considers appropriate and proportionate for Market B. As discussed further below, these obligations are as follows:

- (a) Requirement to meet reasonable requests for Access to Market B products, services and associated facilities;
- (b) Requirements to meet various conditions attached to the access obligations;
- (c) Requirement not to withdraw access to services and facilities already granted;
- (d) Requirement to grant access in a fair, reasonable and timely manner;
- (e) Requirement to provide SLAs; and
- (f) Requirement to provide objective criteria for any refusal or part refusal of access.

8.378 ComReg notes that although RTÉ holds the licences for the PSB multiplex(es) it is RTÉ's network arm, 2rn, who maintains and operates the multiplexing process for RTÉ. If a broadcaster wishes to provide programme material for broadcast on RTÉ's DTT platform, there are two-stages it must go through. It must firstly engage with RTÉ as the DTT multiplex licensee and then separately with 2rn to have the programme material multiplexed as part of the existing DTT platform subject to the provisions of section 130 of the 2009 Broadcasting Act. It should be noted that ComReg is not proposing to impose obligations over all of RTÉ services, only those relating to Market B.

8.379 Pursuant to Regulation 12(4) of the Access Regulations, when considering whether to impose obligations referred to in paragraphs (1) and (2) of Regulation 12 and, in particular, when assessing whether such obligations would be proportionate to the objectives set out in section 12 of the Communications Regulation Acts 2002 (as amended), ComReg has taken the following into account:

- (a) *Technical and economic viability of using or installing competing facilities:* ComReg has considered the viability of competing alternatives to RTÉ's PSB DTT multiplexes. ComReg's SMP analysis in section 6 indicates that, based on the evidence to date, it does not anticipate alternative DTT multiplex operators in the timeframe of this review which would be capable of constraining RTÉ's dominance in Market B.
- (b) *Feasibility of providing access in relation to capacity available:* Capacity for the provision of terrestrial services is constrained by the finite amount of spectrum available for a national service in bands allocated to broadcasting. The spectrum used by RTÉ for DTT is licensed by ComReg and ComReg has issued two DTT multiplex licenses to RTÉ in accordance with section 132 of the 2009 Broadcasting Act. Capacity for more television programme services on one of these PSB DTT multiplexes is limited; however, there is capacity on the second PSB DTT multiplex for the carriage of additional programme services.
- (c) *The initial investment of the facility owner:* As per Regulation 13(2) of the Access Regulations, ComReg's approach to imposing access remedies in the market is based on principles that, among others, allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs.
- (d) *The need to safeguard competition:* Competition in the retail broadcasting market depends on effective regulation in the relevant wholesale market(s). ComReg believes that the range of remedies discussed in this Decision is needed to contribute to the development of competition and to benefit end users, due to RTÉ's dominance in Market B.
- (e) *Intellectual property rights:* ComReg's view is that intellectual property rights are not a significant concern in this market.
- (f) *Provision of pan-European services:* Regulation of broadcasting transmission services is dependent on national circumstances. While many NRAs have designated SMP, or found the 3CT to be met in part(s) of their broadcasting transmission market, other NRAs have deemed the market to be effectively competitive and thus not warranting ex-ante regulation. ComReg is of the view that the principles applied by ComReg in this Decision adhere to the European Commission's 2014 Recommendation and 2020 Recommendation.

[Obligation to meet all reasonable requests for the provision of access, including associated facilities](#)

- 8.380 Under Regulation 12(1) of the Access Regulations, ComReg may, in accordance with Regulation 8 of the Access Regulations, and in light of the finding of SMP and potential competition problems, impose obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities. Such an obligation would be imposed where ComReg considers that the denial of such access or the imposition by operators of unreasonable terms and conditions having a similar effect, would hinder the emergence of a sustainable competitive retail market, would not be in the interests of end users and would otherwise hinder the objectives set out in section 12 of the Communications Regulation Act 2002.
- 8.381 As DTT broadcasters are reliant on RTE's PSB DTT multiplexes for delivery of their programme services it is appropriate to ensure that effective access is provided.
- 8.382 This access obligation can be justified as a means of increasing competition in the retail market, but this must balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit.
- 8.383 As per Recital 19 of the Access Directive, imposition of access obligations that increase competition in the short term should not be imposed if it reduces incentives for competitors to invest in alternative facilities that will secure more competition in the long term in the relevant market. Given the high and non-transitory barriers to entry ComReg does not believe that investment in effective alternative infrastructure is likely within the timeframe of this review.
- 8.384 Given the potential exclusionary behaviour as previously discussed ComReg is of the view that an access remedy is required in this market.
- 8.385 As discussed in 8.304 to 8.311, while there are legislative provisions under the 2009 Broadcasting Act which may address some elements of ex ante regulation ComReg does not believe that these are sufficient.
- 8.386 The legislative provisions under the 2009 Broadcasting Act do not provide the same necessary protections available under ex ante regulation such as granting access in a fair, reasonable and timely manner, or negotiating in good faith for example. If these conditions of the access obligation were not in place, there could be the potential to engage in behaviour which could otherwise result in a constructive refusal of supply through delaying the provision of its wholesale services to broadcasters for example.

- 8.387 Pursuant to Regulation 12(a) of the Access Regulations and in accordance with section 130(1) of the 2009 Broadcasting Act, RTE should meet all reasonable requests from broadcasters in the context of section 130 of the 2009 Broadcasting Act (excluding section 130(1)(e) of the 2009 Broadcasting Act) for the provision of Access<sup>210</sup> including Associated Facilities and Associated Services. ComReg position is that, to facilitate sustainable downstream competition, an obligation be imposed on RTÉ to provide access to all reasonable requests to be carried on a multiplex and therefore purchase a multiplexing service in accordance with section 130 of the 2009 Broadcasting Act, in a reasonable and timely manner, and on non-discriminatory terms and conditions (including charges).
- 8.388 For the avoidance of doubt, this specification is not intended to represent an exhaustive list of the services which may be subject to a reasonable request for access to services contained in Market B. Furthermore, in accordance with Regulation 2 of the Access Regulations, access includes Access to Associated Facilities and Associated Services.
- 8.389 Without trying to limit the scope of defining such access, the meaning which is detailed in the Decision Instrument in Annex: 5 means wholesale access to any multiplex operated and maintained by RTÉ for the purposes of DTT and is synonymous with the market. Multiplex access means:
- “Access to an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public. For the purpose of this Consultation multiplexing services are taken to have the same meaning.”*
- 8.390 The specific detail of this obligation is set out in legal form in the DI in Annex: 5.

### Conditions attached to the access obligation

#### Obligation to negotiate in good faith

- 8.391 Given the potential for constructive refusal to supply, ComReg imposes an obligation that RTÉ should negotiate in good faith with broadcasters requesting access to its multiplexing service. ComReg notes that the obligation to negotiate in good faith implies that the responsibility rests with RTÉ to demonstrate that its approach to negotiation with undertakings was done in good faith and that any unmet access requests can be shown to be unreasonable.

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<sup>210</sup> In order to support and complement the 2009 Broadcasting Act, taking into account RTÉ's public service obligations under the 2009 Broadcasting Act. These are residual services at RTÉ's discretion, based on spare capacity allowable only if, inter alia, all PSB obligations are fulfilled.

- 8.392 Recital 19 of the Access Directive states in relation to access requests to the SMP operator that “such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity.” ComReg therefore imposes that when an access request is refused, the objective criteria for refusal should be provided in reasonable detail and in a timely manner to the party making the access request.
- 8.393 In addition, ComReg is imposing an obligation requiring RTÉ to negotiate in good faith which also includes, but is not limited to, negotiations in relation to the conclusion of fit-for-purpose and legally binding SLAs.

#### Obligation not to withdraw access to services and facilities already granted

- 8.394 The need for an obligation not to withdraw access to services and facilities already granted without the prior approval of ComReg has to balance the requirement for undertakings to have some certainty over the future of their own investments against the requirement to support network development.
- 8.395 Lack of information regarding changes by RTÉ relating to its wholesale service may have significant implications for its customers. This justifies an obligation under which RTÉ should not withdraw access to services and facilities already granted, and should not diminish the service level already granted, except with the prior approval of ComReg.
- 8.396 ComReg would propose to assess any request by RTÉ to withdraw access to such existing services/facilities on a case-by-case basis.
- 8.397 While mindful of the need to support network development, ComReg is of the view that any such withdrawal of access should be flagged sufficiently in advance so as to give broadcasters adequate notice of the impending change. The purpose of this is to allow time for alternative supply arrangements or alternative services to be put in place so as to minimise potential adverse effects on downstream competition. Another consideration for ComReg in such cases would be to minimise potential adverse impacts on end users of services relying on the withdrawn facility.

#### Obligation to grant access in a fair, reasonable and timely manner

- 8.398 ComReg is of the view that there is the potential for RTÉ to engage in constructive as opposed outright refusal to supply. Therefore, ComReg believes that a condition should be attached to the access obligation which would oblige RTÉ to grant access to its DTT multiplexing services in a fair, reasonable and timely manner.



8.399 In assessing the scope for competition problems to arise in the market in section 6 and 7 above, ComReg identified the potential for an SMP operator to engage in a constructive refusal to supply e.g. through disproportionate entry and unreasonable terms and conditions associated with access. ComReg thus imposes that a condition should be attached to the access obligations which would oblige RTÉ to grant access to its multiplexing service in a fair, reasonable and timely manner.

### Service Level Agreements

8.400 To ensure that conditions of access are provided on fair, reasonable terms and in a timely manner, ComReg will attach conditions to the access obligation to ensure that legally binding SLAs are appropriately concluded and implemented.

8.401 As part of 2rn's regulatory obligations following ComReg's 2013 Decision, as detailed in ComReg Decision D11/13, 2rn has an obligation to make available to all parties with which 2rn has contractual arrangements and make available to ComReg, details of the technical specifications, network characteristics and terms and conditions of supply, under a Service Level Agreement which ComReg may oblige 2rn to make publicly available. ComReg imposes that an obligation to provide SLAs should be imposed on RTÉ in this wholesale market.

8.402 ComReg imposes that, for the purpose of clarity and to provide certainty to industry, the list of parameters included as part of that SLA obligation should be included as part of the SLA obligation in this market. These are provided in Annex: 5 of this Decision in the DI.

8.403 ComReg also imposes to make a specific provision that RTÉ should be obliged to negotiate in good faith with broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs.

8.404 As has been noted in section 7 of this Decision, RTÉ has the ability and incentive engage in anti-competitive practices to discourage downstream market entry in order to benefit its broadcasting activities. This could include issues related to quality of service, where failure to provide guaranteed quality of service may deter market entry and expansion. Therefore, it is ComReg's view that SLAs should be provided by RTÉ in this market to deter such behaviour. ComReg's view is that absent regulation, RTÉ may not be incentivised to meet any conditions of an agreed SLA, without some level of compensation to wholesale customers, should the SLA be breached.

- 8.405 Therefore, ComReg imposes a specific obligation to ensure that the SLA should specify a level of compensation (service credits) that adequately compensate the customer for a breach of the SLA. For example, this may occur where there is a failure to deliver or repair a service appropriately within a prescribed time as described in the SLA. This measure would provide RTÉ with an incentive to deliver and maintain its DTT multiplexing services to a pre-defined and pre-agreed level of performance or otherwise compensate its customer accordingly. The process of compensation should not be burdensome and the methodology used and calculation of SLA credits should be clearly explained by RTÉ in the SLA, with examples. To ensure the effectiveness of this obligation, it is ComReg's view that the payment of any service credits should be made in a timely and efficient manner.
- 8.406 Given the potential competition problems identified in this Decision relating to discrimination, ComReg is of the view that certain quality guarantees are appropriate in respect of RTÉ's provisioning of its multiplexing services. Such assurances are also commonplace in contractual agreements between suppliers and their customers.

#### Obligation to provide objective criteria for any refusal or part refusal of access.

- 8.407 ComReg also imposes that RTÉ should be obliged to provide objective criteria for refusing a request, or only partly meeting a request, to the broadcaster which has made the request. This is considered proportionate and justified in light of the ability and incentives for the SMP provider to refuse to supply to its competitors and the associated potential competitive and consumer impacts on related markets. ComReg would thus expect that RTÉ's response should be fair, reasonable and timely.

### **Consideration of Respondents' Views regarding the Access remedy for Market B**

#### Overview of Respondents' Views

- 8.408 Of the five Submissions received, three Respondents (the BAI, TG4 and VM) agreed with ComReg's preliminary conclusions on the Access remedies. RTÉ neither agreed nor disagreed and 2rn disagreed with the need for an Access remedy.
- 8.409 VM commented on the SLA and RTÉ commented on specifics of the SLA, regarding the need to negotiate in good faith and RTÉ's right to withdraw in the event of a breach.
- 8.410 There are a range of SLAs in place in Markets A and B and VM would like to see a more rigorous process around the achievement of these SLAs to ensure information is provided to impacted broadcasters in a timely manner, particularly in relation to outages that affect their network.

- 8.411 RTÉ are of the view that it should be clearly prescribed that broadcasters who avail of Market B services and the SLA are subject to the terms and conditions of the Reference Offer until the negotiations in good faith are concluded.
- 8.412 RTÉ noted the proposed obligation to negotiate in good faith and requested clarification on the extent allowable for any such negotiation, taking into account the other proposed remedies particularly the non-discrimination remedy.
- 8.413 RTÉ submitted that it should have the ability to withdraw access, where the broadcaster is in material breach of the agreement or Reference Offer. Appropriate notice should be provided by RTÉ prior to such action and a prompt ComReg dispute resolution process could be initiated, if requested, by the Broadcaster. According to RTÉ it should be clearly identified that non-payment or substantial debt payment is a material breach.
- 8.414 RTÉ also submitted that ComReg has not taken into account the legislative obligation identified in section 8.259 (c) of the Consultation, particularly points (v) and (vi). RTÉ is obliged to provide access to certain specified broadcasters and if this access is denied then the proposals at section 8.281 or an appeal to the Minister provide mechanisms for resolution.

#### ComReg's Consideration of Respondents' Views

- 8.415 ComReg has considered VM's comments above at paragraph 8.410, regarding SLAs. ComReg notes that it is imposing an obligation on 2rn and RTÉ to meet reasonable requests for access, as outlined at paragraphs 8.380 to 8.390. Certain terms and conditions are attached to the access obligation at outlined at paragraph 8.391 to 8.393 in this Decision. These include conditions concerning reasonableness and timeliness, including, to ensure that legally binding SLAs are appropriately concluded and implemented, including a requirement to negotiate in good faith with Broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs.<sup>211</sup>
- 8.416 As noted at paragraph 8.391 of this Decision, RTÉ is obliged to negotiate in good faith with Broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs. The Access obligation and its additional conditions oblige 2rn and RTÉ to comply with all the conditions set out in this Decision. See paragraphs 8.397 to 8.398 which outlines the conditions attached to the access remedy.
- 8.417 ComReg notes RTÉ's comments regarding the access obligation and regard for other legislation and as outlined above at paragraph 8.48;

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<sup>211</sup> See paragraph 8.391 above regarding the requirement to negotiate in good faith.

*“.....in the context of a vertically integrated entity that provides broadcasting transmission facilities to actual or potential competitors, the provisions of the 2009 Broadcasting Act do not remove the need for ex ante regulation. Ex ante regulation has the benefit of well-defined characteristics under the regulatory framework and can provide stability and assurance to markets characterised by high and persistent entry barriers through using a variety of approaches that are methodical, and well understood.”*

8.418 Therefore, ComReg disagrees with RTÉ that ComReg has not taken into account the legislative obligations and remains of the view that the provisions in the 2009 Broadcasting Act do not remove the need for *ex ante* regulation.

### **Overall Conclusion on Access Remedies in Market B.**

8.419 ComReg’s position is that the obligations to provide access to BTS services and associated facilities are both proportionate and justified. ComReg has considered whether obligations other than those relating to access would, in themselves, resolve the competition problems identified. ComReg does not consider this to be the case. The imposition of the above access obligations alone would also not resolve issues such as excessive pricing, discrimination (on price or quality grounds) or ensure transparency.

8.420 The access obligations set out in paragraphs 8.377 to 8.407 above are set out in legal form in the DI in Annex: 5.

## **Price Control and Cost Accounting Remedies in Market B.**

### **Overview**

8.421 As outlined at paragraphs 8.153 to 8.156, Regulation 13 of the Access Regulations provides that ComReg may impose on a Service Provider obligations relating to cost recovery and price controls. These include obligations for both cost orientation of prices and cost accounting systems, for the provision of specific types of access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or apply a price squeeze to the detriment of end users.

8.422 In imposing any such obligations, ComReg is required to:

- (a) Take into account any investment made by the SMP Service Provider which ComReg considers relevant and allow that Service Provider a reasonable rate of return on adequate capital employed, taking into account any risks specific to a new investment network project, and
- (b) Ensure that any cost recovery mechanism or pricing methodology that ComReg imposes serves to promote efficiency and sustainable competition, and maximises consumer benefits.

- 8.423 Accordingly, the purpose of price control and cost accounting obligations is to ensure that prices charged are not excessive (or cause a margin squeeze) and promote efficiency and sustainable retail competition, while maximising consumer benefits.
- 8.424 ComReg set out at paragraph 8.33 the existing Price Control and Cost Accounting obligations imposed on RTÉ in Market B.

### Price control and cost accounting remedies

- 8.425 Section 130 of the 2009 Broadcasting Act states that the Minister may direct periodic payments from TG4, the Commission of the Houses of the Oireachtas, the Irish Film Board, other television services having the character of a public service as may be designated by the Minister, and the television service programme contractor (TV3 – now VM One) to RTÉ for their provision on a national multiplex established, maintained and operated by RTÉ. These provisions cover many of the areas that in other contexts are addressed by the electronic communications regulatory framework.
- 8.426 While this is a particular form of price control, it is not necessarily one that would arise under the electronic communications regulatory framework. Given the particular issue of vertical integration in this sector in Ireland, this form of a price control would not be supported by appropriate cost accounting obligations. Nor would the resulting remedy necessarily address the requirement for transparency and non-discrimination, as there would be no requirement that RTÉ charge itself in the same manner.
- 8.427 Given the persistent risk of price-related competition problems deriving from an SMP position in the market, ComReg considers that the maintenance of a price control and cost accounting obligation is appropriate and proportionate.
- 8.428 For example, RTÉ would have the ability and incentive to price excessively to deter entry/expansion of potential/actual broadcasting customers. RTÉ might also have a limited incentive in keeping wholesale costs to an efficient level, since higher charges would hinder the development of competition and this could benefit the broadcasting activity of RTÉ.
- 8.429 Given the incentive to price excessively in this market, ComReg believes it necessary to impose a price control and cost accounting obligation on RTÉ (for Market B) as this is the only way to ensure that prices are an actual reflection of cost and that they are non-discriminatory.
- 8.430 Regulatory intervention may be relatively light, such as an obligation that prices are reasonable or heavier such that prices are cost oriented to provide full justification for prices where competition is not strong enough to prevent excessive pricing. The method used should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and end user benefit.

- 8.431 ComReg has aimed to ensure that this obligation is effective but also that this obligation is not unnecessarily onerous on RTÉ and so with that in mind, among the potential options for price control implementation ComReg considers cost orientation the most appropriate. When applied on its own, cost orientation would typically allow the regulated entity greater flexibility in relation to the setting of tariffs; as long as the entity can demonstrate that the tariffs are cost-reflective and are on fair, reasonable and non-discriminatory terms.
- 8.432 ComReg is mindful of Regulation 13(3) of the Access Regulations which states that any cost recovery mechanism or pricing methodology that is imposed by ComReg should serve to promote efficiency and sustainable competition and maximise consumer benefits.
- 8.433 ComReg also takes account of Regulation 13(2) of the Access Regulations which notes that, when imposing obligations under Regulation 13(1), ComReg should take into account any relevant investments made by the undertaking and allow a reasonable rate of return on adequate capital employed, taking into account the risks involved<sup>212</sup>. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by other undertakings while also ensuring that the SMP undertaking makes a reasonable return on its efficient investment.
- 8.434 The burden of proof to demonstrate that charges are derived from costs including a reasonable rate of return on investment rests with the SMP operator. Following a direction from ComReg, as per Regulation 13(4) of the Access Regulations, an operator may be required to provide full justification for its prices and may, where appropriate, require prices to be adjusted. For the purposes of setting a cost oriented price in the future, ComReg has the option to choose from a number of cost models to calculate appropriate charges so long as it promotes efficiency, competition and end user benefit. Were ComReg to leave the choice to the SMP operator itself it would likely reduce its effectiveness, its contribution to competition and end user benefit.
- 8.435 Where a cost accounting system is mandated to support price control, a description of the cost accounting system must be made public where at least the main categories under which costs are grouped and the rules used for the allocation of costs are provided.
- 8.436 It should be noted that while the tariffs chargeable by RTÉ are maximum tariffs it can charge reduced tariffs so long as these are applied on a non-discriminatory basis.

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<sup>212</sup> A review of RTÉ's separated accounts indicate that the asset base is nearly fully depreciated.



- 8.437 These tariffs are derived through a tariff model owned and operated by RTÉ. The tariff model allocates costs to broadcasting customers based on a series of assumptions and calculations. The cost data for the tariff models tends to be derived from information solely from RTÉ.
- 8.438 The tariffs for broadcasting customers are published on RTÉ's website. The tariff model underpinning these has not been provided to third party broadcasters for their own independent assessment. This tariff model contains commercially sensitive and confidential data the publication of which could have a negative impact upon RTÉ.
- 8.439 In the interests of transparency and non-discrimination it is necessary for broadcasters to understand the basis for the tariffs they are being charged.
- 8.440 Currently the main features and assumptions in the Market B tariff model are:
- (a) Costs included in the tariff model;
  - (b) Five year averaging period;
  - (c) Inclusion of a proposed Standard Definition (“SD”) channel at a future date; and
  - (d) Cost allocation methodology.

*Costs included in the tariff model*

- 8.441 The main input into the RTÉ tariff model is an input from Market A. It accounts for c. 95% of the Market B cost input. This cost input is comparable to the transfer charge in the Market B separated accounts which in itself is reconcilable to Market A revenues as disclosed in the Market A separated accounts. Other costs included are Market B specific costs such as MUX licence fees and management input.

*Five year averaging*

- 8.442 In order to avoid fluctuations in tariffs RTÉ has adopted a five year averaging model. Costs from Market A and also Market B specific costs are estimated for a period of five years.



### Proposed SD channel

8.443 Currently RTÉ allocates based on the capacity consumed by individual channels on the MUXES. However, within these channels RTÉ has assumed that a new SD channel would request capacity in year two of the five year averaging period (i.e. in 2020)<sup>213</sup>. This has had the effect of attracting costs away from existing broadcasters. However, should a new channel not appear then, as RTÉ is allowed to recover its efficiently incurred costs, these costs will be reabsorbed into the overall cost base. These costs will then be redistributed amongst existing broadcasters. If all other costs remain unchanged then this may necessitate a price increase to existing broadcasters. ComReg will discuss the likelihood of this channel appearing with RTÉ and may amend tariffs if it considers it necessary to do so (subject to the required transparency and other obligations).

### Cost allocation methodology

8.444 The current cost allocation methodology is based on the percentage capacity consumed of the total cost base. Firstly the total cost of operating the multiplexes is divided by the total number of kilobits available to derive a cost per kilobit. Then the number of kilobits consumed by individual broadcasters is multiplied by the cost per kilobit. Therefore, while there is some scope on the multiplexes for additional channels RTÉ recovers the total cost of operating the multiplexes across all existing broadcasters.

8.445 Pursuant to Regulation 13(1) of the Access Regulations;

*“The Regulator ...impose on an operator ...including obligations for cost orientation of prices and obligations concerning cost accounting systems...”*

8.446 ComReg, in accordance with Regulation 13(1) is proposing that RTÉ be subject the following obligations:

- (a) Price control; and,
- (b) Cost Accounting.

8.447 Although specific to national circumstances, a number of NRA's throughout Europe have found the need to impose a price control and cost accounting obligation.

### Price control

8.448 Given the view that RTÉ holds SMP in Market B, ComReg considers that there is a need for a price control obligation to ensure that RTÉ sets appropriate wholesale prices such that effective competition is facilitated.

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<sup>213</sup> RTÉ's first tariff model was also based on a five year averaging period and ran from 2014 to 2019. Its second tariff model commenced in 2019 (year one).

- 8.449 ComReg believes that, absent an appropriate price control obligation, RTÉ would have the ability and incentive to set excessive prices in the wholesale market which would potentially harm competition from undertakings relying on RTÉ's wholesale services. ComReg thus considers it appropriate and justified to impose a price control obligation on RTÉ to guard against such potential excessive pricing to its wholesale customers.
- 8.450 RTÉ's vertically integrated structure across broadcasting activities is important when considering the pricing principles that should be followed in setting tariffs, and in determining such charges.
- 8.451 As a vertically integrated entity, RTÉ might engage in the following activities which *ex ante* regulation seeks to address:
- (a) RTÉ could seek to minimise the number of competing broadcasters that a digital platform (for DTT) may attract. RTÉ has an incentive to minimise the number of broadcasters on DTT to reduce the potential loss of its advertising revenues which might otherwise occur. This could occur if, for example, it could devise a tariff structure which would discourage broadcasters' interested in accessing its multiplexes. RTÉ might also have only limited incentive in keeping its costs to an efficient level, since higher transmission charges would hinder the development of competition in DTT and this could benefit the broadcasting activity of RTÉ. As new broadcasters come on the platform(s), RTÉ's incentives for cost minimisation may be reduced; and,
  - (b) RTÉ could have an incentive to favour its own digital programme services to the detriment of other programme services by applying discriminatory charges.
- 8.452 This highlights the importance of ensuring that tariffs are set on a transparent and non-discriminatory basis.
- 8.453 The pricing mechanism applied to set tariffs will need to ensure that the incentives discussed above do not become a reality, in order to ensure a level playing field for all broadcasters and so as not to disadvantage end users.
- 8.454 The tariffs that RTÉ charges, both internally and externally, should be fair, transparent, reasonable and non-discriminatory.
- 8.455 It is important to ensure that no excessive pricing is applied by RTÉ to discourage entry and that there is a level playing field for broadcasters on RTÉ multiplexes.
- 8.456 Within the context of transparency and non-discrimination, there are various options for the calculation of total allowable costs and for the allocation of common costs, which could result in higher or lower charges for DTT services. While a network operator would, in general, only look at recovering costs and maximise return at the total level, in practice the way in which costs are apportioned could have significant implications for the incentives given to enter the market.

8.457 DTT broadcast transmission charges will need to be non-discriminatory, to ensure that all broadcasters compete on a level playing field, without unfair advantages for RTÉ's own programme services.

## Pricing Methodologies

8.458 As set out at paragraph 8.192 above, ComReg has a number of options available to it in terms of achieving its regulatory objectives which takes into account the current demand and supply situation in the relevant market, technological advancements and the data available to ComReg. These options equally apply to Market B when considering the pricing methodologies.

8.459 Similar to Market A, ComReg has different methods for determining cost which are set out in Annex 2 of the Consultation, these include:

- (a) Retail minus (discussed at paragraphs A2.48 in the Consultation);
- (b) Reasonable costs (discussed at A2.49 in the Consultation); and
- (c) Cost orientation (discussed at paragraphs A2.52 in the Consultation).

8.460 In addition, ComReg has also set out in Annex 2 in the Consultation the options that are available and is of the view that the relevant options to determine an appropriate costing methodology can be summarised as follows:

- (a) Historic costs or current costs (discussed at paragraphs A2.61 to A2.68 in the Consultation),
- (b) Top-down (“**TD**”) model, bottom-up (“**BU**”) model or hybrid model (discussed at paragraphs A2.69 to A2.77 in the Consultation); and
- (c) Long run incremental costs (“**LRIC**”) or fully distributed costs (“**FDC**”) (discussed at paragraphs A2.78 to A2.87 in the Consultation).

8.461 As outlined at paragraph 8.181 onwards above in practice, there are several mechanisms that are generally used to determine regulated prices, which are consistent with the following:

- (a) Maximizing consumers welfare;
- (b) Ensuring RTÉ recovers efficient costs;
- (c) Avoiding any cost over-recovery by RTÉ; and
- (d) Encouraging efficient investment in infrastructure and not deterring incentives to deploy alternative infrastructure.

8.462 ComReg is of the view that a price control based upon cost is the most appropriate approach to assessing compliance with the obligation while taking into account the four categories above at 8.461.

- 8.463 Consumer welfare can be maximised by ensuring that the tariffs charged to broadcasters are reflective of the cost incurred by RTÉ in providing the service. This means that broadcasters' resources are not unnecessarily diverted away from broadcasting to paying for unreasonable wholesale tariffs. This allows broadcasters to provide a wider range of content to end users.
- 8.464 By ensuring that RTÉ only recovers its efficiently incurred costs, broadcasters are not being required to pay for inappropriate investment decisions or excess costs for which there would be no benefit.
- 8.465 The avoidance of potential cost over-recoveries by RTÉ also ensure that tariffs are not excessive and that ultimately there is not a transfer of resources from the consumer to RTÉ.
- 8.466 Investment in capital intensive industries is often rewarded through a return on capital. The return on capital tends to only be applied to efficiently incurred investment. Therefore if inefficient investment is made no return is awarded.
- 8.467 Economic regulators generally use the Weighted Average Cost of Capital ("**WACC**") as the most appropriate measure of the returns that investors require before they will invest in a business. The WACC determines the normal level of profit that must be earned by a business if it is to continue to attract funds in a market where financial resources have many alternative uses. It represents the rate of return a company should earn on its invested capital in order to provide sufficient returns to the investors who are financing the investment. The calculation of an appropriate WACC is not part of this review<sup>214</sup>.
- 8.468 The WACC is regarded as the minimum return a regulator should allow in setting the prices of regulated activities, although sometimes regulators allow returns in excess of the WACC level, to stimulate innovation / investment and to allow for regulatory risk. While the WACC is generally used as the measure of return allowed to companies which are regulated, it might not be appropriate in the case of services which are not network-based. For example, maintenance services are not capital intensive and as such the return calculated by applying only a WACC mark-up would be negligible.
- 8.469 Economic regulators tend not to use returns on operating costs as a means of financing the costs of regulated companies. Returns on operating costs would not incentivise efficiencies in regulated companies because the higher the operating costs the higher the return. One of ComReg's aims and objectives is the encouragement of efficient investment.

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<sup>214</sup> D10/20, ComReg's WACC Decision, was published on 14 October 2020.

- 8.470 ComReg is of the view that it is preferable that this approach should be followed in this market. However, the assets in Market B are almost fully depreciated and ComReg understands that currently there are no plans by RTÉ to make any significant investment in Market B assets. Therefore, it is likely that when the asset base of Market B is fully depreciated RTÉ may not earn a return.
- 8.471 The use of cost is also a practical means of setting tariffs. Most of the information that ComReg considers might be necessary to set tariffs is to be found in the accounting records of RTÉ. ComReg is of the view that the use of this data provides a robust basis for tariffs but would also be subject to further regulatory scrutiny. ComReg is also of the view that the use of RTÉ's own data minimises the regulatory burden on RTÉ.
- 8.472 ComReg is of the view that a TD model is likely to be more compatible with the use of historic costs as the relevant cost base. This is because the material proportion of the capital costs have been incurred in recent years.
- 8.473 The TD model also uses as its starting point information contained within the audited financial statements of RTÉ. While any model developed for tariff setting is likely to go to a level below the audited financial statements (for example efficiency adjustments, likely future changes) its results will still be reconcilable.
- 8.474 As stated above, ComReg is of the view that TD data is the appropriate choice for this cost model.
- 8.475 For the reasons already set out ComReg is of the view that FDC is the preferred cost accounting methodology for the setting of prices combined with a TD cost model (with appropriate efficiency adjustments). It is recommended that this approach is used as the basis of setting tariffs in Market B as it mirrors the price that RTÉ incurred in rolling out its infrastructure.
- 8.476 In setting the timeframe for tariffs ComReg must reflect the necessity for RTÉ to recover its efficiently incurred costs while at the same time providing certainty on the tariffs that purchasers' of wholesale services will be charged. When doing so ComReg bases the regulated tariffs on financial data adjusted for certain economic forecasts. This is to avoid possible fluctuations in the tariffs. These economic forecasts cover both supply and demand factors.
- 8.477 ComReg must determine the likely usage of RTÉ's infrastructure over the timeframe of the review including new users or possible exits from the market by service providers using the infrastructure. If the timeframe is too short regular updating of tariffs would be required creating uncertainty for all.

- 8.478 ComReg must also dimension the expected expenditure on the network over the timeframe of the review. For capital expenditure ComReg must dimension what level of investment would be required over the timeframe of the review; the shorter the timeframe the lower the likelihood of significant capital expenditure. However, if there are consecutive short term reviews there may come a point where significant expenditure is required causing a spike in tariffs. Aligned to this is the need to have appropriate asset lives applied to the capital expenditure. Where asset lives are too short investment would be recovered over too short a period resulting in higher tariffs. Where asset lives are too long RTÉ would be required to wait too long to recover its investment and this may affect further investment in its network.
- 8.479 Operating costs must also be considered to ensure that they reflect the costs of operating the network over the period of the review. This ensures that fluctuations in costs are removed.
- 8.480 As mentioned elsewhere in this document RTÉ currently updates its tariffs annually whereas the BAI tends to grant contracts for a period of 7 to 10 years. When determining timeframes for other regulated industries ComReg often allows for interim review periods. These take account of possible unforeseen fluctuations in underlying data and assumptions used to determine tariffs.
- 8.481 ComReg also notes that a significant input into wholesale tariffs will be the wholesale input from Market A. ComReg is of the view that this wholesale input is also based on FDC combined with a TD cost model. As both elements of the tariff for Market B will be based on the same principles this will ensure that the four categories (as outlined at 8.461) as the terms of reference for assessing the various allocation methodologies are met.

### Evaluation of current tariff model and consideration of alternatives

- 8.482 Currently, RTÉ's DTT tariffs are set on the basis of capacity used. Therefore, the more capacity a channel uses the higher its charges.
- 8.483 The current cost allocation methodology is based on the DTT capacity consumed as a percentage of the relevant total cost base. Firstly, the total cost of operating the multiplexes is divided by the total number of kilobits available to derive a cost per kilobit per second ('**kbps**'). Then, the number of kilobits ('**kb(s)**') consumed by individual broadcasters is multiplied by the cost per kilobit. RTÉ thus recovers the total cost of operating the multiplexes across all existing broadcasters.
- 8.484 In setting charges, RTÉ sets a flat rate per amount of data transmitted (kbps) for all broadcasters. This means that high-definition ('**HD**') broadcasters pay more in total than standard-definition ('**SD**') broadcasters as the former have higher capacity consumption requirements.

- 8.485 The underlying flat rate charge is c. €308 per kbps. HD channels generally consume around 6kbps per year while SD channels need an average of 2.5kbps. Therefore the current cost of a HD channel is c. €2 million to €2.5 million and that of an SD channel is c. €800,000 to €1 million.
- 8.486 Currently, 37Mbps of the 44 Mbps of available capacity of the two PSB multiplexes is utilised. The 7 Mbps of 'spare' capacity could accommodate up to either three SD channels or one HD channel and one SD channel.
- 8.487 ComReg notes that there is therefore unused capacity on the DTT platform. The question therefore arises as to whether there may be unmet demand from broadcasters whom, under a different pricing structure, might be able to utilise this spare capacity for broadcasting via access to the DTT platform.
- 8.488 In this regard, some broadcasters who may be interested in joining the DTT platform may not do so given that the level at which they are willing to pay is lower than the current flat rate charging structure.
- 8.489 In the event that an existing broadcaster on the DTT platform were to leave<sup>215</sup>, or the as of yet undefined SD channel does not appear, this would also likely lead to increased charges for other remaining broadcasters.
- 8.490 The current approach to pricing allocates common costs on a fixed kbps basis across all broadcasters such that all broadcasters pay the same price per kb used. This is consistent with the principle underpinning the allocation of common costs which allocate to the origin of costs, such that broadcasters that "cause" a greater proportion of costs pay a greater contribution of costs. ComReg has considered possible alternative methodologies (discussed below in paragraphs 8.505 to 8.513) for allocating the costs of operating the multiplexes but is of the view that they do not reflect the principle of cost causality as in the current cost allocation methodology.
- 8.491 ComReg notes that DTT faces a number of challenges in Ireland which contribute to Ireland having a high cost base compared to other jurisdictions. These challenges arise because:
- (a) the costs of the network are relatively high; and
  - (b) the higher costs and limited audience reach mean that there are fewer broadcasters on the platform.

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<sup>215</sup> Having regard to their various BAI licence conditions.



**The costs of the network are relatively high**

8.492 The topography of Ireland, and the fact that a relatively high proportion of the population live in sparsely populated areas means that the platform has to invest in a higher number of masts per given area of coverage. DTT is a more expensive means of transmission than satellite, especially in Ireland.

**The higher costs and limited audience reach mean that there are fewer broadcasters on the platform**

8.493 DTT in Ireland is relatively less popular with broadcasters compared to some countries such as Italy, UK, Spain and France. This in turn means that the fixed costs of the DTT network are spread between a limited number of broadcasters, thereby meaning a higher cost per broadcaster.

8.494 By contrast in Italy, the DTT platform has 130 SD channels and 21 HD channels. DTT penetration is high, aided by the absence of cable TV companies: 66% of Italian households use DTT on the primary TV set. The country counts 20 national multiplexes and 8 national mux operators, with 36 TV broadcasters operating on them<sup>216</sup>.

8.495 The DTT FTA service is popular with broadcasters in the UK, with more than 70 TV channels, radio stations and interactive services<sup>217</sup> being carried on it. It has a coverage of 98.5% and is used by 20m households (including on the primary and secondary television sets), which corresponds to 74% of all households.

8.496 However, in other countries DTT is less successful. In Switzerland (where cable coverage was close to ubiquitous) the take up of DTT was low (used by only 1.9% of households). The service was ended in June 2019. Similarly, Belgian DTT is present only in 45,000 households. For this reason the Belgian public broadcaster VRT (of the Flanders region) decided to terminate its presence on the DTT platform in favour of other more popular platforms<sup>218</sup>.

8.497 ComReg notes that the Irish TV market is small relative to other countries with a total addressable audience of less than 5 million people, meaning that the addressable market for broadcasters is lower than for DTT in other countries.

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<sup>216</sup>[https://www.itu.int/en/ITU-D/Regional-Presence/Europe/Documents/Events/2017/Spectrum%20Management/Elena%20CRTV\\_NEW.pdf](https://www.itu.int/en/ITU-D/Regional-Presence/Europe/Documents/Events/2017/Spectrum%20Management/Elena%20CRTV_NEW.pdf)

<sup>217</sup> [http://www.digitaluk.co.uk/operations/about\\_dtt](http://www.digitaluk.co.uk/operations/about_dtt)

<sup>218</sup> <https://www.broadbandtvnews.com/2018/05/18/belgian-pubcaster-vrt-terminates-dtt-broadcasts/>

8.498 Given the above challenges there appears to be limited scope for new broadcasters to add additional channels to the DTT platform. Although there is some capacity available, it may be that under the current tariff model there is little incentive for this capacity to be purchased. With this in mind, ComReg has considered two alternative approaches to pricing. These include:

- (a) Value based pricing in which broadcasters that derive the most value pay more (according to the value they extract from the service) and broadcasters that derive less value from the platform pay less for multiplex access; and
- (b) Allow for discounted pricing.

8.499 In the case of a value-based pricing model, broadcasters would only pay tariffs based on viewership. This would mean that the lower the viewership the lower the tariff. The advantage of this approach is that it could incentivise any new entrant broadcasters to join the platform. Due to the fact that new entrants would expect to receive relatively low audiences initially they would pay less than the existing flat rate tariff. This could reduce one potential barrier to joining the platform.

8.500 However, a disadvantage of this approach is that it is likely that established channels with the largest audiences will pay more than they currently do, and other channels will pay commensurately less. While some broadcasters may have no alternative but to absorb such increases (due to obligations requiring them to remain on the platform) others may decide to leave the platform. ComReg notes further that in the long run such an approach could also prove to be a hinderance to broadcasters to grow their market share. It could also support inefficient market entry in the sense that broadcasters would still consume a similar amount of capacity on the Multiplex and yet may face limited incentives to improve their service offering and grow market share on the basis that it could lead to higher costs. For those currently on the Irish DTT multiplexes it would mean that there would likely be a transfer of costs from those with a lower viewership to those with a higher viewership, in essence penalising those who have grown their audience share.

8.501 Another alternative is a discount pricing model which could take various forms. RTÉ could offer discounts to potential new entrants. These could be one-off or tiered discounts offered over several years, rising to an equivalent cost per channel of existing broadcasters. For example, a time-bound ring-fenced discount could be applied to allow for the entry of a new channel onto the unused capacity with no change to pricing for existing channels.

8.502 The impact of discounts (for example, targeted discounts) may have less impact on existing broadcasters than value based pricing. The prices would only change where new entrant broadcasters join the platform, and where costs of the platform are shared among more broadcasters. If the maximum of three channels joined the platform prices for existing broadcasters could reduce by up to 10% for the duration of the discount for all broadcasters.

- 8.503 However, given that targeted discounts would be time limited (for example up to three years) the success of the approach at attracting broadcasters to the platform over the longer term impact on competition is uncertain. The use of any discounts would have to be applied on a non-discriminatory and transparent basis. For RTÉ it could either continue to recover all of its costs or alternatively forgo the difference between the discounted tariff and the normal tariff. If RTÉ continues to recover all of its costs, tariffs may decline over the period of the tiered discount for existing broadcasters while at the same time rising for the new entrant. This could be a disincentive for new entrants to commit for the long term. If RTÉ were to forgo the difference between the discounted tariff and the normal tariff it would incur a loss arising from the discount applied for the new entrant.
- 8.504 If tariffs were set based solely on capacity consumed, thereby excluding unused capacity in calculating costs of access to the multiplexes, and not the cost of operating Market B (including any unused capacity) broadcasters may see a slight reduction in tariffs and RTÉ would incur a loss as it would not recover all of its costs. However, as c. 95% of the input costs to Market B are derived from Market A, RTÉ as the operator of Market B has limited discretion over its costs inputs. Furthermore in Market A the costs allocated to various services (Market B, analogue radio and non-regulated third party services) are based on documented cost allocation rules which are subject to annual independent review as part of the audit process.
- 8.505 In Market A, over several years, 2rn has also implemented certain cost efficiencies. For example the reconstruction of four sites as part of Analogue Switch Off ('**ASO**') enabled it to significantly reduce the number of localised sites. Pre ASO there were c. 170 sites and post ASO this was reduced to c. 70 sites. Many of the sites removed were relatively small in stature and in remote locations. This in itself has likely resulted in efficiencies in maintaining the Market A network. 2rn has installed electricity metres at many of its sites, thereby ensuring a more direct means of allocating the cost of electricity. There has also been some rationalisation in headcount within 2rn<sup>219</sup>.
- 8.506 It should also be noted that there is limited capacity on the current multiplexes for the introduction of numerous new channels. ComReg is of the view, therefore, that the current cost allocation methodology, based on the DTT capacity consumed as a percentage of the relevant total cost base, provides for efficient utilisation of the multiplexes.

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<sup>219</sup> Per 2rn's statutory financial statements employees in 2012 - 65 and in 2018 – 57

## Cost accounting

- 8.507 The obligation to maintain appropriate cost accounting systems generally supports the obligations of price control and accounting separation, and can assist ComReg in monitoring the obligation of non-discrimination. ComReg imposes to oblige RTÉ to maintain appropriate cost accounting systems in respect of wholesale products, services or facilities. This imposes an obligation on RTÉ to maintain appropriate cost accounting systems in relation to its PSB DTT multiplexes. This is instead of imposing the obligation of cost accounting on all of RTÉ as those activities are beyond the scope of this Decision.
- 8.508 To support the effective operation of a price control obligation, it is necessary for RTÉ to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. A key part of this process is the stage which identifies those parts of the underlying activities or network components that directly support, or are consumed by, those particular services or products. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product.
- 8.509 The division of services and products, and the corresponding costs, capital employed and revenues between the different services and products should be reflected in costing systems, and coherence and integrity of information should be assured. Where such particular costs form part of the cost of an SMP service, ComReg needs to have visibility as to the basis of and amount of allocation across all services.

## ComReg's Consideration of Respondents' Views regarding the Pricing and Cost Accounting remedy for Market B

### Overview of Respondents' Views

- 8.510 Of the five submissions received three respondents (the BAI, TG4 and VM) agreed with ComReg's preliminary conclusions on the pricing remedies. VM, TG4 and RTÉ offered additional comments on specific elements of the pricing remedies which are considered below. 2rn did not agree or disagree with the remedies.
- 8.511 TG4 commented on the pricing methodology and the tariff models in both Market A and Market B<sup>220</sup>. Regarding Market B, TG4 submit that, the "cost plus a margin" nature of the Tariff Model and the absence of competition rewards inefficiency.

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<sup>220</sup> TG4's views are considered, insofar as they are applicable to Market A, at paragraphs 8.207 to 8.213, 8.215.

- 8.512 VM commented on the tariffs charged by RTÉ in Market B submitting that they are set using a tariff model owned and operated by RTÉ. According to VM, this tariff model has not been published as information contained within it is deemed to be commercially sensitive. While understanding that ComReg reviews the model and any changes to tariffs, it is impossible for access seekers such as VM to determine if the tariffs that are set are fair and reasonable. VM submit that there is insufficient information on the tariff model used for Market B and it is therefore not possible for any operator to determine if the tariffs are reasonable.
- 8.513 VM raised concerns regarding the current cost allocation methodology. In this regard VM noted there is unused capacity and submitted that the cost of this should not be shared by channels currently being carried. VM submit that the unused capacity costs should be borne by 2rn which would incentivise them to sell this capacity to others or price them on a more competitive basis.
- 8.514 RTÉ submit that they have repeatedly demonstrated a desire to strengthen the offering to the end user with additional channels; adding that in the past five years, the platform has been enhanced by the addition of one third party TV channel (UTVI now VM 3), one 3rd party radio channel (Radio Maria), one public service channel (Oireachtas TV), RTÉ One + 1 full time and RTÉ 2 + 1. One of the benefits of adding channels is the reduction in cost to all broadcasters.
- 8.515 RTÉ submit that Market B infrastructure is limited, but the ability to attract new broadcasters or channels is an important feature to the success of this platform.
- 8.516 RTÉ further submit that they have repeatedly requested the ability to offer incentive packages to new entrants into the market while not distorting the cost recovery mechanism. RTÉ submitted that ComReg should review this preliminary position.
- 8.517 RTÉ believes 7 to 10 years contract terms are not normal in the equivalent Market B markets, particularly for new entrants into a market<sup>221</sup>. The current Market B Reference Offer has taken into account the market condition and the Reference offer is for the five-year model term.<sup>222</sup> with an exit clause on the date of renewing a BAI license.

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<sup>221</sup> See the Market B reference offer at <https://about.rte.ie/wp-content/uploads/2020/04/RTE-Saorview-Wholesale-Access-Reference-Offer-Appendix-B-29-Jan-2019.pdf>

<sup>222</sup> See the Market B reference offer at <https://about.rte.ie/wp-content/uploads/2020/04/RTE-Saorview-Wholesale-Access-Reference-Offer-Appendix-B-29-Jan-2019.pdf> 2.1.(iii) The smoothing of the Tariff over a five year period from 1st April 2014 to 31st March 2019 (“the Smoothing Period”) on the basis of the level of new or enhanced Content Transport Streams that the Service Provider reasonably believes will be contracted for during the Smoothing Period, with the Tariff being smoothed over such period on a pro rata basis of such estimates.

- 8.518 RTÉ further submit that in addition to challenges as outlined at paragraph 8.497(a) and (b) of this Decision<sup>223</sup>, ComReg has not taken into account challenge (c); namely the fixed-term of the Reference Offer as a barrier to entry for new channels. Broadcasters may be willing to launch a channel for a pilot period (possibly one to two years) and following the completion of the pilot period the broadcaster may wish to review its position in the market. According to RTÉ, longer term contracts arguably present a barrier to entry. The impact of the term on new channel decision making is a Market B feature identified by RTÉ following its discussions with a large number of potential channel owners not presently on the platform.
- 8.519 RTÉ submit that there is a place for discounted offerings for new channel entries into the market. Following its discussion with a large number of channel owners and representatives, RTÉ submit that it is commonplace in other European TV markets for a new entrant to receive a negotiated short-term discounted pricing structure. RTÉ submits that the discussion, in paragraph 8.433 in the Consultation, does not seem relevant to the Market B discussion on discounted pricing but rather is a point for Market A.
- 8.520 RTÉ further submit (regarding paragraph 8.385 of the Consultation), that in view of the competitive pressures on Saorview as a platform, ComReg should allow RTÉ to develop a discounted optional pricing mechanism for new broadcasters or channels, as the success of additional channels would deliver lower transmission charges for all the broadcasters on the platform and increase the choice for end users.

### ComReg's Consideration of Respondents' Views

- 8.521 ComReg notes VM's comments above regarding publishing the tariff models. VM note that the tariff models are not published due to the sensitivity of the information and VM also notes that ComReg reviews those models. ComReg reminds VM that 2rn and RTÉ operate in regulated markets therefore the products are regulated and 2rn and RTÉ are obliged to adhere to the pricing obligations imposed on them, as set at paragraphs 8.421 to 8.509 of this Decision.
- 8.522 Although the tariff models are not published, the primary accounting documentation and other documentation, which details costs and how costs are allocated are published. It is ComReg's view that access seekers can view information about cost and how such costs are allocated in the those documents.
- 8.523 The regulated accounts are audited annually and any potential issue would be identified as part of the review of those accounts. In doing so it considers that the associated audit opinion be addressed to ComReg and 2rn whereby both will be owed a "duty of care" from the Auditors.

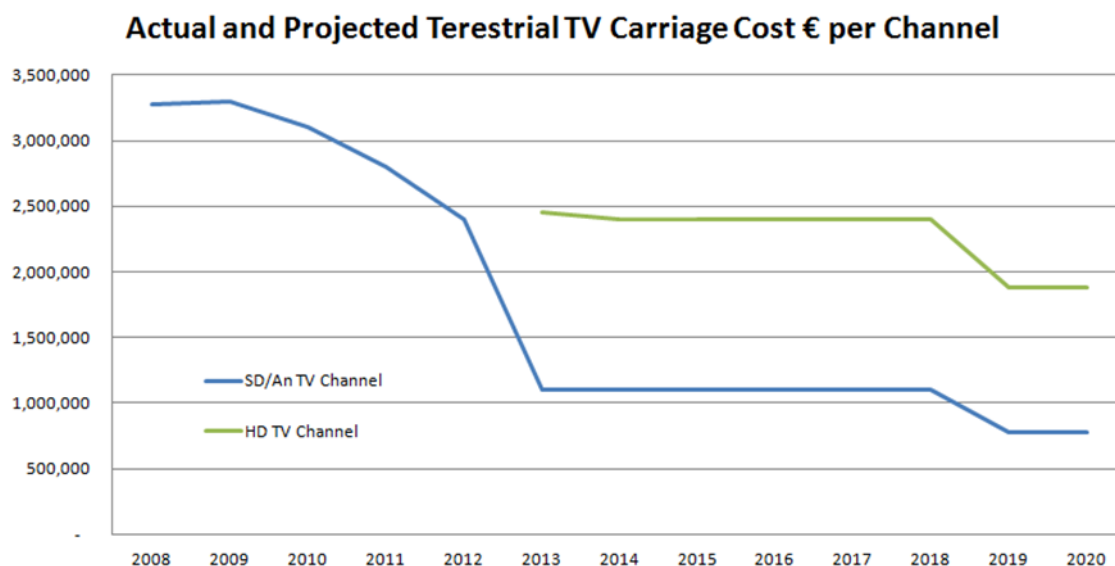
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<sup>223</sup> 8.419 of the Consultation.

8.524 VM also submitted comments about the flat rates charged by RTÉ, submitting that it believes that the flat rates charged by RTÉ are excessive and suggest that if there is unused capacity the cost of this should not be shared by channels currently being carried. VM also submit that “Unused capacity costs should be borne by 2rn which would incentivise them to sell this capacity to others or become more competitively priced.”

8.525 The below graph represents the terrestrial service carriage cost graph from 2008 to 2020. This cost represents a terrestrial channel with 98% coverage pattern. The analogue costs pre 2013 were significantly higher. The DTT service commenced in 2014 offering two standards (SD and HD). The cost have significantly reduced which reflects the changes in cost allocation. It should be noted that the tariffs prior to 2013 reflect analogue tariffs and were not regulated. The tariffs post 2013 reflect DTT tariffs and are regulated.

**Figure 6: Actual and projected terrestrial TV Carriage Costs €per channel**



8.526 ComReg notes RTÉ’s comment above regarding “the ability to offer incentive packages”. ComReg notes that prices are set at a maximum level which does not preclude RTÉ from offering lower prices than the discounted price. ComReg further notes that RTÉ can differentiate its products offerings in adherence with the non-discrimination obligation, therefore ensuring that other access seekers can avail of the same offer.



8.527 ComReg has considered VM's comments as outlined above regarding price control and cost accounting obligations. ComReg disagrees with VM that there is no transparency regarding the separation between RTÉ and 2rn and there is no data available regarding 2rn's cost model. ComReg has imposed price controls, cost accounting and accounting separation obligations on 2rn and RTÉ.<sup>224</sup> Both 2rn and RTÉ operate in regulated markets and are bound to comply with the regulations imposed on them.

8.528 ComReg refers VM to paragraph 8.434 of this Decision, which states:

*"The burden of proof to demonstrate that charges are derived from costs including a reasonable rate of return on investment rests with the SMP operator. Following a direction from ComReg as per Regulation 13(4) of the Access Regulations an operator may be required to provide full justification for its price and may, where appropriate, require prices to be adjusted."*

8.529 ComReg notes RTÉ's comment regarding discounted pricing and as outlined at paragraph 8.364 above, prices are set at a maximum level and RTÉ is not precluded from offering prices lower than the maximum rate. Where discounts are offered this should be done on a transparent and non-discriminatory basis.

### **Overall conclusions on the price control and cost accounting remedies in Market B.**

8.530 Having regard to the analysis set out at paragraphs 8.421 to 8.529 above, ComReg is imposing a Price Control and Cost Accounting obligation on RTÉ; this requirement includes a cost oriented price control based on HCA and FDC methodology. ComReg has set out further detail on the price control and cost accounting obligation in legal form in the DI in Annex: 5.

8.531 Having considered the matter, ComReg holds the view that price control obligations alone would not be insufficient to address the competition problems identified in Section 7, therefore ComReg imposes an additional Accounting Separation remedy.

8.532 The Price Control and Cost Accounting obligations set out above are set out in legal form in the DI in Annex: 5

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<sup>224</sup> See paragraphs 8.421 to 8.509 and 8.534 to 8.567 of this Decision.

## Accounting Separation Remedies in Market B.

### Overview

- 8.533 In accordance with Regulation 11 of the Access Regulations, ComReg can require an operator which is vertically-integrated to make transparent its wholesale prices and its internal transfer prices, to ensure compliance with any non-discrimination obligation imposed or, where necessary, to prevent unfair cross-subsidisation.
- 8.534 An accounting separation obligation can also reinforce cost accounting and transparency obligations as it can help to ensure that costs are neither over- nor under-recovered and help disclose possible competition problems by making visible the wholesale prices and internal transfer prices of an SMP Service Providers' services.
- 8.535 ComReg set out at paragraph 8.34 the existing accounting separation obligations imposed on RTÉ in Market B.

### Accounting Separation remedies

- 8.536 This obligation is put in place to specifically support the obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations.
- 8.537 In section 7 ComReg has identified potential competition problems associated with possible price-related leveraging such as excessive pricing. Separated accounts help disclose such possible competition problems and make visible the wholesale prices and internal transfer prices of a dominant operators' services; thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on RTÉ to maintain separated accounts.
- 8.538 The main objective of accounting separation is to make non-discrimination and cost-orientation transparent by showing cross-subsidisation between products and identifying unfair cross-subsidisation. In requiring separated accounts for the main products and services, this creates more transparency on internal transfer pricing and repartition of common and joint costs.
- 8.539 Therefore, RTÉ will have obligations of transparency and non-discrimination in this market. RTÉ will also be subjected to a price control obligation and, in particular, the obligation of cost orientation. Therefore, the imposition of the obligation of accounting separation upon RTÉ would support these obligations.
- 8.540 As RTÉ should ensure that it conducts its commercial activities, such as those of 2rn, under market conditions, it is important that the costs incurred by the commercial subsidiaries, if they did not exist, should be the minimum overhead costs allocated to the accounts of these subsidiaries.

- 8.541 ComReg notes the conditions and accounting procedures of sections 108 and 109 of the 2009 Broadcasting Act. These provisions are not necessarily designed to address issues of discriminatory pricing or encouraging efficient entry of access to an SMP operator's wholesale service. The aim of this accounting separation obligation is to ensure full transparency of internal pricing in the same manner as under the electronic communications regulatory framework.
- 8.542 ComReg is of the view that the current form of publicly available financial statements for RTÉ does not provide sufficient transparency or financial data of a sufficient level of granularity which would assist ComReg in its regulatory objectives. The financial statements of RTÉ are published at a group level.
- 8.543 It is therefore considered proportionate to impose an obligation on RTÉ to keep separated accounts (for Market B) to help disclose possible competition problems which might otherwise undermine the access, non-discrimination, transparency and price control obligations but only for that aspect of its broadcasting network activities associated with its PSB multiplexes.
- 8.544 ComReg has already separately imposed Accounting Separation obligations on 2rn's transmission activities in Market A. As RTÉ is a vertically integrated entity, ComReg requires visibility on the costs incurred by 2rn in relation to RTÉ's PSB multiplexes and their allocation to RTÉ. ComReg also requires visibility on how these costs are then allocated to digital broadcasters who are using capacity on RTÉ's DTT multiplexes (i.e. allocation of charges to RTÉ services and third party digital broadcasters). This will enable ComReg to ensure that there is no price discrimination by providing transparency on the allocation of costs.
- 8.545 Under the existing Accounting Separation obligation a significant proportion of the costs of Market B are direct transfers from Market A and are evident in both sets of separated accounts. Market B specific costs, such as call centre support and management time, are then added.

### **Main proposals for Accounting Separation**

- 8.546 ComReg imposes that RTÉ submit separated accounts in a format which assists ComReg in discharging its regulatory functions. This will require financial data to be presented in a manner that reflects capacity used by programme services on RTÉ's PSB multiplexes in Market B.
- 8.547 ComReg is of the view that RTÉ should submit to ComReg:
- (c) Regulated Accounts,
  - (a) Additional Financial data; and,
  - (b) Accounting Documentation.

#### **Regulated Accounts**

- 8.548 ComReg requires that the Regulated Accounts would be audited annually by an independent auditor and published on RTÉ's website.

- 8.549 As the revenues earned in Market B are a small subset of the entire revenues (and licence fees) of RTÉ, ComReg does not require a reconciliation statement with the RTÉ group financial statements.
- 8.550 Due to the commercial sensitivity of much of the underlying data it may not be possible to provide further analysis in the Regulated Accounts. However, ComReg considers that, where necessary, it should receive financial data of a more granular nature as part of the AFD (and this is discussed further commencing at paragraph 8.561).
- 8.551 ComReg's position is that the Regulated Accounts should contain the following information:
- (a) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts;
  - (b) Income Statement and Balance Sheet; and
  - (c) Notes to the Regulated Accounts (where required).
- 8.552 ComReg recognises that currently many of the Market B assets are close to or are fully depreciated. Therefore, the ability to assess returns against an asset base may not be entirely feasible. ComReg will discuss the requirement to produce a Balance Sheet with RTÉ on an annual basis.
- 8.553 The Regulated Accounts would be accompanied by:
- (a) A signed statement from the suitably qualified person of RTÉ acknowledging their responsibilities for the preparation of the regulated accounts and confirming their compliance with the requirements of the Decision Instrument in this respect. The appointment of the suitably qualified person should be discussed with ComReg in advance of the signing of the Regulated Accounts;
  - (b) A report and opinion by an Auditor on the regulated accounts and RTÉ's compliance with the requirements of this Decision Instrument, in respect of the preparation of the regulated accounts; and,
  - (c) The Income statement should provide details on the underlying relevant cost categories. RTÉ should discuss these cost categories with ComReg in advance of the publication of the Regulated Accounts.
- 8.554 Where necessary RTÉ can provide additional information as part of the separated accounts if it considers it necessary to do so. For example, it has previously disclosed the trajectory of the returns in the separated accounts. This additional information may not be subject to an independent audit but does allow the user of the separated accounts a greater appreciation of returns over an extended period of time. However, its purpose, content and format should be discussed with ComReg in advance of publication.

- 8.555 These classifications could be amended by ComReg from time to time as required. If ComReg requires further details on any of the cost categories it can request this as part of AFD (see below) as this information is likely to be confidential and commercially sensitive.
- 8.556 The balance sheet should be prepared in a format similar to that used for statutory reporting purposes.
- 8.557 The notes to the Regulated Accounts will differ, in some respects, to the notes produced for the statutory financial statements with the notes to the Regulated Accounts reflecting ComReg's regulatory requirements.
- 8.558 ComReg considers that it is important that the Regulated Accounts be accompanied by a directors' responsibility statement. This will ensure that the directors acknowledge their responsibilities for ensuring that the Regulated Accounts are compliant with the Decision Instrument.
- 8.559 ComReg considers that the Regulated Accounts must be independently audited and that the audit opinion reflects whether or not they are fairly presented in accordance with ("FPIA") the Decision Instrument. If the type of audit opinion is varied this should be agreed in advance with ComReg. A description of the type of audit opinion is contained in section 8.276 to 8.282 above.
- 8.560 ComReg imposes that RTÉ publish its Regulated Accounts on its publicly available website within four months of the end of its financial year, or at a time as agreed by ComReg

**Additional Financial Data**

- 8.561 ComReg is of the view that the Additional Financial Data submitted by RTÉ under its Accounting Separation obligation includes:
- (a) A schedule of charges by individual broadcasters. These charges should be comparable to the RTÉ tariff model and ComReg may require the submission of the tariff model as part of the Additional Financial Data .
- 8.562 Due to the commercial sensitivity of this data ComReg is of the view that this data be submitted to ComReg in confidence within four months of the end of RTÉ's financial year, or at a time as agreed by ComReg.
- 8.563 ComReg imposes that RTÉ submit its Additional Financial Data to ComReg within four months of the end of its financial year, or at a time as agreed by ComReg.
- 8.564 ComReg considers that it is important that the Financial Data be accompanied by a signed statement from a suitably qualified individual within RTÉ acknowledging their responsibilities for the preparation of the Financial Data. This will ensure that the Financial Data is compliant with the Decision Instrument.

**Cost Accounting Documentation**

- 8.565 In order to aid transparency and support the obligations of non-discrimination ComReg requires RTÉ to document how it allocates costs to users of its multiplex(es). ComReg does not intend that this documentation be open-ended and therefore it will discuss with RTÉ its requirements in this regard. However, ComReg considers that at a minimum RTÉ should document how costs are allocated to different users of its multiplexes.
- 8.566 Currently RTÉ's costs are allocated on the basis of capacity consumed by each channel.
- 8.567 ComReg requires that the Cost Accounting Documentation be published on its publicly available website within four months of the end of RTÉ's financial year or at a time as may be agreed by ComReg.

**ComReg's Consideration of Respondents' Views regarding the Accounting Separation remedy for Market B****Overview of Respondents' Views**

- 8.568 Of the five submissions received three respondents (the BAI, TG4 and VM) agreed with ComReg's preliminary conclusions on the accounting separation remedies. 2rn and RTÉ did not agree or disagree with the accounting separation remedies.
- 8.569 Although in agreement with the accounting separation remedy VM also submitted that they "continue to harbour concerns" in relation to the lack of transparency in the financial structure between RTÉ and 2rn and the costs that RTÉ is allowed to include when setting the access price for the 2rn network.

**ComReg's Consideration of Respondents' Views**

- 8.570 ComReg notes VM's views about the accounting separation remedy. VM's concerns regarding transparency are addressed in this Decision in paragraphs 8.241 to 8.290. with reference to the various information which RTÉ and 2rn are required to make available. In particular: ;
- (a) Presentation of accounts (discussed in paragraphs 8.241 to 8.266 above);
  - (b) Transfer charging mechanism (discussed in paragraphs 8.267 to 8.269 above);
  - (c) Allocation of costs (discussed in paragraphs 8.270 to 8.271 above);
  - (d) Audit (discussed in paragraphs 8.272 to 8.282 above); and
  - (e) Documentation (discussed in paragraphs 8.283 to 8.291 above).
- 8.571 Given the analysis set out paragraphs 8.533 to 8.567 above and at 8.241 to 8.291, ComReg remains of the view that the accounting separation obligation is sufficient to address any potential anti-competitive behaviours as outlined in Section 7.

### **Overall conclusions on the Accounting Separation remedies in Market B.**

- 8.572 Having regard to the analysis set out above at paragraphs 8.533 to 8.571, ComReg imposes an accounting separation obligation on RTÉ which includes a requirement to maintain separated accounts and provide accounting records on request to ComReg which may be subject to publication.
- 8.573 The accounting separation obligations set out in paragraphs 8.533 to 8.567 above are set out in legal form in the DI in Annex: 5.



## 9 Regulatory Impact Assessment

### Introduction

- 9.1 A Regulatory Impact Assessment ('**RIA**') is a detailed consideration of the likely effect of new regulations, or changes to existing regulations. A RIA seeks to establish if such proposals are necessary and, in doing so, identifies any possible effects which might result from their implementation.
- 9.2 A RIA identifies alternative regulatory options and ultimately establishes whether regulation is likely to have the desired impact. It is a structured approach to the development of policy, and analyses the impact of the regulation, and other regulatory options, on different stakeholders. Appropriate use of a RIA should ensure that the most effective regulatory option is identified.
- 9.3 ComReg's approach to a RIA follows five steps; the detail of which is set out in Annex: 1:
- (a) **Step 1:** Describe the policy issue and identify the objectives (discussed in Annex: 1 at paragraphs A1.16 to A1.21);
  - (b) **Step 2:** Identify and describe the regulatory options (discussed in Annex: 1 at paragraphs A1.22 to A1.42);
  - (c) **Step 3:** Determine the impacts on stakeholders (discussed in Annex: 1 at paragraphs A1.43 to A1.50);
  - (d) **Step 4:** Determine the impacts on competition; (discussed in Annex: 1 at paragraphs A1.51 to A1.52) and
  - (e) **Step 5:** Assess the impacts on stakeholders and competition and choose the best regulatory option (discussed in Annex: 1 at paragraphs A1.53 to A1.58).
- 9.4 In Step 3 of the RIA which determines the impacts on Stakeholders (also see table 9 below), ComReg notes that the imposition of the remedies will result in the same burden on the 2020 SMP BTS Operator's since the remedies are the same as the existing remedies. ComReg noted in section 7 above that the same competition problems have been identified in respect of the 2020 SMP BTS Operators.
- 9.5 Therefore, ComReg sees no objective reason to change the obligations, as set out in the 2013 Decision. Further, ComReg is of the view that the remedies which it is proposing to impose are necessary and proportionate, and amount to the minimum level of regulation required to promote competition and protect consumers.
- 9.6 Accordingly, ComReg conducts a RIA for this Decision which is detailed in Annex: 1 below.

## ComReg's Consideration of Respondents' Views regarding the RIA

- 9.7 Of the five submissions received four respondents (the BAI, VM, TG4 and 2rn) agreed with ComReg's preliminary conclusions on the RIA. RTÉ neither agreed or disagreed with the RIA.
- 9.8 RTÉ and TG4 submitted the below comments.

### Overview of Respondents' Views

- 9.9 **RTÉ** submit that, it is 4 years since a new 3rd party TV broadcaster has joined the platform. Adding that, RTÉ has conducted extensive discussions with a large number of potential channel representatives, seeking to attract new Broadcasters to join the platform. RTÉ further submit, that;

"It is clear that the addition of new channels to the platform benefits everybody, the broadcaster with future lower tariffs and the end users with more choice. Consistent with this the regulatory model in Market B should seek to facilitate this, and allow the platform to develop further in the future".

- 9.10 **TG4** submit, that they would welcome an undertaking from ComReg to commission a full analysis of 2rn's multiplexing and transmission assets, and a thorough examination of 2rn operations and practices their impact on costs as these relate to the creation of tariffs. TG4 would also like to see an analysis undertaken of any allocation of RTÉ charges attributable to Market A and Market B tariffs.

### ComReg's Consideration of Respondents' Views

- 9.11 ComReg has consider RTÉ and TG4s comments and it is ComReg's view that RTÉ can at any time add new Broadcast Operators to the channel, ComReg reminds RTÉ of the non-discrimination obligations in place, as outlined at paragraphs 8.350 to 8.357 above.
- 9.12 ComReg has also consider comments submitted by TG4. As outlined above at 8.536 to 8.567, 2rn and RTÉ are regulated entities and have obligations imposed on them, that require them to present and publish fully audited accounts, annually.
- 9.13 Based on analysis outlined in the RIA<sup>225</sup>, and since a wide range of competition problems are possible, as outlined in Section 7, of this Decision. It is ComReg's view that the most appropriate option, is option 4, as noted in the RIA, at paragraphs 9.3, of this Decision.

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<sup>225</sup> See Section 9 and Annex: 1 below.

## 10 Next Steps

- 10.1 ComReg has set out its position in the preceding Sections regarding its analysis of the Relevant BTS Markets, and [has published] this Decision on its publicly available website [www.comreg.ie](http://www.comreg.ie).
- 10.2 The BTS Operators which are subject to the regulatory obligations set out in the Decision Instrument appended to this Decision, are hereby notified of this Decision.

## Annex: 1 Regulatory Impact Assessment

- A1.1 In carrying out a RIA, ComReg adheres to its RIA Guidelines and takes account of the Better Regulation programme. ComReg is also cognisant of international best practice, such as guidance from the European Commission and the Organisation for Economic Co-operation and Development ('OECD').
- A1.2 Section 13(1) of the Communications Regulation Act 2002 (as amended) requires ComReg to comply with Ministerial Policy Directions. Section 6 of the Ministerial Policy Direction to ComReg of February 2003 requires that, before imposing regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with international best practice, and otherwise in accordance with measures that may be adopted under the Better Regulation programme.
- A1.3 The ultimate aim of conducting a RIA of proposed regulation in the Relevant BTS Markets is to ensure that the regulatory measures which are implemented are appropriate, proportionate and justified. As decisions can vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact, ComReg may carry out a lighter RIA in that respect.
- A1.4 In the analysis set out below, ComReg repeats each of these steps in respect, of Relevant BTS Markets.
- A1.5 The RIA makes frequent use of terminology describing different categories of Broadcasting Operators. For ease of reference, the table describing these categories is set out below.

**Table 6: Terminology**

Name	Description
The 2020 SMP BTS Operators	This means 2rn and RTÉ
The 2013 Designated BTS Operators	This means 2rn and RTÉ as designated under the 2013 Decision

- A1.6 The purpose of carrying out a RIA is to aid decision-making through identifying regulatory options and analysing the impact of those options in a structured manner. The Department of An Taoiseach's Revised RIA Guidelines state that:
- "RIA should be conducted at an early stage and before a decision to regulate has been taken."*
- A1.7 The European Commission, in its review of impact assessments, notes that:

*“Impact assessments need to be conducted earlier in the policy development process so that alternative courses of action can be thoroughly examined before a proposal is tabled.”*

- A1.8 In determining the impacts of the various regulatory options, current best practice recognises that full cost-benefit analyses should only be carried out where it would be proportionate to do so, or, in exceptional cases, where robust, detailed and independently verifiable data are available. Such a comprehensive review may be undertaken by ComReg when necessary and appropriate.
- A1.9 A RIA should be carried out as early as possible in the assessment of potential regulatory options, where appropriate and feasible. The consideration of regulatory impact facilitates the discussion of options, and a RIA should therefore be integrated into the overall analysis. This is the approach which ComReg follows in this Decision and this RIA should be read in conjunction with the overall Decision.
- A1.10 ComReg conducted a RIA having regard to the regulatory remedies set out in Section 8 of this Decision, along with consideration of other options. The following sections, along with the analysis and discussion set out elsewhere in this Decision represent a RIA. It sets out an assessment of the potential impact of regulatory obligations that ComReg will impose on the 2020 SMP Broadcasting Operators.
- A1.11 There are similarities in the approaches to regulation of Market A and Market B, as well as in the competition problems which ComReg has identified and seeks to remedy. Therefore, for ease of reference, ComReg carries out a joint RIA assessment in respect of both Market A and Market B.

### **Principles in selecting remedies**

- A1.12 In Section 8 ComReg sets out the legislative basis for the imposition of remedies on the 2020 SMP BTS Operators. In choosing appropriate remedies, ComReg is obliged, pursuant to Regulation 8(6) of the Access Regulations, to ensure they are:
- (a) Based on the nature of the problem identified;
  - (a) Proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Act 2002 (as amended), and Regulation 16 of the Framework Regulations; and
  - (b) Only imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.
- A1.13 Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) sets out the objectives of ComReg in exercising its functions in relation to the provision of electronic communications networks, services and associated facilities, namely:

- (a) To promote competition;
- (b) To contribute to the development of the internal market; and
- (c) To promote the interests of users within the European Union.

### **Regulatory Options for Relevant BTS Markets**

- A1.14 As far as possible, ComReg conducts this RIA for both markets together having regard to the analytical similarities which arise in the Relevant BTS Markets. Accordingly, prior to conducting the stepwise RIA described at 9.5 above, ComReg sets out the four options it considers in terms of the bundles of regulatory obligations which could, in principle, be imposed on the 2020 SMP BTS Operators in each of the Relevant BTS Markets. ComReg has already assessed in Section 8 above whether any obligation category on its own would suffice and has found that no single category of obligations would address the issues identified.
- (a) **Option 1:** Impose Transparency and Non-Discrimination obligations;
  - (b) **Option 2:** Impose Transparency, Non-Discrimination and Access obligations;
  - (c) **Option 3:** Impose Transparency, Non-Discrimination, Access, and Price Control (but not Cost Accounting) obligations ; or
  - (d) **Option 4:** Impose Transparency, Non-Discrimination, Access, Price Control & Cost Accounting and Accounting Separation obligations.
- A1.15 Having set out the four potential options for regulation of the Relevant BTS Markets, ComReg sets out below at Table 9 a summary of the impacts on the three sets of stakeholders, the 2020 SMP BTS Operators, Non-SMP BTS Operators (who may be potential new entrants to the Relevant BTS Markets), and Consumers. As ComReg is proposing to make a finding of SMP, a “do nothing” option is not available to ComReg, as discussed below.

Table 7: Assessment of regulatory options

Option 1: Impose Transparency and Non-Discrimination Obligations		
Impact on the 2020 SMP BTS Operators	Impact on other Broadcasting Operators	Impact on Consumers
<p>The 2020 SMP BTS Operators would not experience a material change in the regulatory burden, compared to the 2013 Decision.</p> <p>The 2020 SMP BTS Operators already publish a Reference Offer which include details about access, service standards and other details.</p> <p>The 2013 Designated SMP BTS Operators would, absent other obligations, have flexibility to price above efficient cost and/or obstruct access by existing rivals and/or new entrants in downstream markets. Could facilitate extraction of excessive monopoly rents.</p> <p>2013 Designated SMP BTS Operators incentives to innovate may be reduced by virtue of the lack of effective competitive pressure; be insulated from the need to innovate, and improve efficiency to stay ahead of rivals. This may limit the range of offerings for retail end users than otherwise might occur.</p>	<p>There is a risk that, even though non-discrimination is mandated in principle, there would be scope for exploitative and exclusionary practices such as excessive pricing which may, in practice, amount to discrimination. Effective denial of access and/or delaying tactics could, inter alia, also result in excessive prices and/or raise rivals' costs.</p> <p>This could also contribute to raising entry barriers for newer or smaller market participants.</p> <p>Regulatory certainty is reduced given wholesale pricing and access uncertainty. Disputes over price or access could also raise legal and regulatory costs for customers.</p>	<p>Absent effective access and price control obligations, scope for access to BTS could be undermined through, inter alia, excessive pricing, refusals to supply, delaying tactics, etc. This could contribute to reduced scope of retail service i.e., reduced channels for the viewers and limited access or reduced quality and variety of services for end users.</p> <p>If downstream competition is distorted or investments discouraged through prices that are above efficient cost, consumers would potentially have reduced service choice, quality and innovation.</p>



<b>Option 2: Impose Transparency, Non-Discrimination, and Access Obligations</b>		
<b>Impact on the 2020 SMP BTS Operators</b>	<b>Impact on other Broadcasting Operators</b>	<b>Impact on Consumers</b>
<p>The 2020 SMP BTS Operators would not experience a material change in the regulatory burden, compared to the 2013 Decision.</p> <p>However there would still be flexibility for the 2020 SMP BTS Operators to engage in exploitative and exclusionary behavior in respect of pricing (leading to potential denial of access). Could facilitate extraction of excessive pricing.</p> <p>Risk of disputes and legal challenges involving BTS services due to lack of direct regulatory oversight in respect of the 2020 SMP BTS Operators pricing practices. Disputes could increase the legal and regulatory costs faced by the 2020 SMP BTS Operators.</p> <p>Relative to Option 1, imposition of an access obligation would not generate significant incremental burden to existing regulation.</p>	<p>While risk of impeding access to BTS may be moderated relative to Option 1, effective access may still be undermined by means of exploitative practices such as excessive pricing, which could undermine effective access and raise rivals' costs.</p> <p>Where access is provided to downstream competitors on exploitative terms, this could disadvantage existing rivals and distort existing competition in downstream markets by raising their costs.</p> <p>Ineffective access to BTS (through exploitative or exclusionary pricing) could raise barriers to entry and expansion for new entrants or smaller participants in downstream markets due to inability to guarantee service.</p> <p>Prices set above efficient cost raise barriers to entry and expansion for smaller or newer entrants in downstream retail markets.</p>	<p>Availability of access to BTS would exist. However, there is a high risk that, even though access mandated in principle, there would be scope for such access to be effectively undermined through excessive pricing.</p> <p>If downstream competition is distorted or investments discouraged through prices which are above efficient cost, consumers would potentially have reduced service choice, quality and innovation.</p> <p>Higher wholesale prices potentially limit the scope for innovation in the quality and quantity of retail offerings, thereby potentially depriving consumers of new and innovative services.</p>

Option 3: Impose Transparency, Non-Discrimination, Access, and Price Control /Cost Accounting Obligations		
Impact on the 2020 SMP BTS Operators	Impact on other Broadcasting Operators	Impact on Consumers
<p>The 2020 SMP BTS Operators would not experience a material change in the regulatory burden, compared to the 2013 Decision.</p> <p>The 2020 SMP BTS Operators are currently subject to price control obligations, the incremental burden of such obligations on the 2020 SMP BTS Operators is not likely to be significant. However, in case of cost accounting obligations, given the identified risks in the Relevant BTS Markets and the nature of the services, it is considered necessary to continue apply a cost accounting obligation.</p> <p>The accounting obligations help protect against discriminatory and leveraging behavior and is necessary to address competition problems identified in Section 7.</p> <p>Risk of disputes and legal challenges involving pricing may be eased relative to Options 1 and 2 due to price control obligation.</p> <p>Increasing symmetry of approach to imposition of obligations to all SMP BTS Operators promotes regulatory certainty for all.</p>	<p>Regulating the Relevant BTS Markets at efficient cost would reinforce the effectiveness of the access, transparency and non-discrimination obligations, thus reducing risk of competitive distortions in downstream retail markets and potentially lowering barriers to entry/expansion for smaller or new entrant Service Providers.</p> <p>The impact of lower wholesale costs would likely be more significant for smaller and new entrant Service Providers,</p> <p>Greater certainty that prices would be set at efficient cost potentially moderates risk of disputes relative to Options 1 and 2.</p> <p>However additional cost accounting obligations may still be required due to competition issues set out in Section 7.</p> <p>Separated accounts would make visible the wholesale prices and internal transfer prices of the 2020 Broadcasting Operators, thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered proportionate to impose an obligation on the 2020 Broadcasting Operators to keep separated accounts to</p>	<p>Availability of effective access would facilitate access to BTS.</p> <p>Reduced risk of competitive distortions and more level playing field in downstream markets and greater wholesale pricing certainty helps facilitate retail price and service innovations.</p> <p>Potential for discriminatory behavior due to lack of accounting separation may impact on downstream competition and investment with consequent negative implications in terms of price and service choice over time. However, this may be mitigated by means of the price control obligation of cost orientation.</p>

Option 3: Impose Transparency, Non-Discrimination, Access, and Price Control /Cost Accounting Obligations		
	<p>help disclose possible competition problems which might otherwise undermine the access, non-discrimination, transparency and price control obligations.</p>	

Option 4: Impose Transparency, Non-Discrimination, Access, Price Control & Cost Accounting, and Accounting Separation Obligations		
Impact on the 2020 SMP BTS Operators	Impact on other Broadcasting Operators	Impact on Consumers
<p>Regulatory burden on the 2020 SMP BTS Operators would be unchanged, compared to the 2013 BTS Decision.</p> <p>The accounting obligations helps protect against discriminatory and leveraging behavior. It is necessary to address competition problems identified in Section 7.</p>	<p>General competition / revenue / cost impacts associated with the price control as set out for Option 3 above.</p> <p>As set out for Option 3 above, greater consistency with EU guidance and other regulatory decisions would promote legal certainty and a more predictable environment for potential investors.</p> <p>Greater certainty that pricing would be set at efficient cost, complemented by greater visibility of internal transfers to support non-discrimination obligation, moderates risk of disputes relative to Options 1 and 2. and 3.</p> <p>Accounting separation adds further certainty beyond that generated in Option 3.</p> <p>In addition to the impacts identified for Option 3 above, wholesale customers (and thus downstream rivals) would have greater certainty and transparency regarding the costs and any potential leveraging practices.</p>	<p>Availability of effective access would facilitate access to BTS.</p> <p>Reduced risk of competitive distortions and more level playing field in downstream markets helps facilitate innovation and improvements in the quality, variety, and number of services (e.g. TV Channels).</p> <p>Reduced risk of above-cost pricing being passed through to end users in form of higher prices relative to other Options.</p> <p>Dynamic competition from Service Providers (facilitated by effective price control and appropriate preventative measures for discriminatory behavior in BTS Services) should help facilitate ongoing delivery of price and service innovations and choice to end users over time.</p>

## Relevant BTS Market Regulatory Impact Assessment

### **Step 1: Describe the policy issue and identify the objectives in respect of the Relevant BTS Markets.**

- A1.16 The European Commission acknowledges the need for the imposition of ex ante regulatory obligations to mitigate the potentially abusive exercise of market power by SMP BTS Operators and to ensure the development of effective competition within and across communications markets.
- A1.17 As noted in Section 8, of this Decision, in order to address identified competition problems, ComReg is required to impose on the 2020 SMP BTS Operators such of those obligations set out below, as it deems appropriate:
- (a) Transparency;
  - (b) Non-Discrimination;
  - (c) Access;
  - (d) Price Control and Cost Accounting; and
  - (e) Accounting Separation.
- A1.18 As also noted in paragraph 2.28, ComReg is required to impose at least one of the above obligations on the 2020 SMP BTS Operators .
- A1.19 Having regard to the competition problems identified in Section 7, ComReg's objectives are to mitigate the effects of market power in the Relevant BTS Markets and the impacts on related markets. In so doing, ComReg aims to prevent the emergence of restrictions or distortions in competition among Broadcasting Operators, to the ultimate benefit of consumers. ComReg also seeks to provide regulatory certainty to all BTS Operators through the development of an effective and efficient forward-looking regulatory regime that serves to promote competition between BTS Operators. These objectives also serve to further the development of the internal market.
- A1.20 In pursuing these objectives, ComReg aims to influence the behaviour of the 2020 SMP BTS Operators to mitigate the potential harmful effects that can arise from the exercise of SMP in the Relevant BTS Markets. In this regard, ComReg considers that the regulatory measures in Section 8 should address, in a proportionate way, the relevant competition problems and the consequential impacts on competition and consumers.
- A1.21 In Section 8, of this Decision, ComReg considered the impact of the specific nature of the regulatory obligations considered necessary in the Relevant BTS Markets, and formed the view that the range of remedies specified is both appropriate and justified in light of the analysis set out in Section 7. The various regulatory options for the Relevant BTS Markets are, in the context of the RIA, further considered below.

**Step 2: Identify & describe potential regulatory options in Market A**

- A1.22 ComReg recognises that regulatory measures should be kept to the minimum necessary to address identified market failures in an effective, efficient and proportionate manner. A range of regulatory options are available to ComReg to address competition concerns in the Relevant BTS Markets.
- A1.23 In this regard, regulation should be incremental, such that only those obligations are imposed which are necessary and proportionate to address the identified competition problems, as set out in Regulations 9 to 13 of the Access Regulations. For example, the lightest measure that can be imposed is the obligation of transparency. Should this be insufficient to address competition problems on its own, ComReg may apply a non-discrimination obligation. If this is still not sufficient, ComReg may next consider the imposition of an access obligation, or price controls, with accounting separation obligations potentially required where price control obligations are imposed.
- A1.24 ComReg first considers whether it is appropriate to forbear from imposing regulatory obligations. ComReg then assesses what regulatory options are available and appropriate in respect of the Relevant BTS Markets.

**Forbearance on Relevant BTS Markets**

- A1.25 ComReg has considered whether the option of regulatory forbearance is appropriate in the Relevant BTS Markets. As set out in Section 6, of this Decision, ComReg is of the view that none of the Relevant BTS Markets are effectively competitive, nor are they likely to become effectively competitive within the timeframe covered by this market review. Therefore, in accordance with Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations, ComReg is required to impose at least some level of regulation on the 2020 SMP BTS Operators.
- A1.26 In Section 7, of this Decision, ComReg set out its view that, absent regulation, such BTS Operators have the ability and incentives to engage in a range of exploitative and exclusionary behaviours. ComReg is of the view that, absent the imposition of remedies within the Relevant BTS Markets, these markets would not function effectively, ultimately to the detriment of downstream competition and consumers.
- A1.27 In the context of negotiations between BTS Operators, access could, for instance, be effectively refused or materially delayed. Along with a significant delay to market entry this could result in the new entrant incurring the additional costs of their Service Providers.
- A1.28 Furthermore, the 2020 SMP BTS Operators could be in a position to distort competition in adjacent or downstream markets by obstructing (through price or non-price means) effective access to BTS.

- A1.29 Consequently, ComReg is of the view that the option of regulatory forbearance in the Relevant BTS Markets is not appropriate or justified. ComReg would fail to fulfil its statutory obligations if it did not impose regulatory obligations on the SMP BTS Operators..

## **Regulatory Options on Obligations in the Relevant BTS Markets**

### **Transparency Obligations**

- A1.30 ComReg's position, set out in Section 8, of this Decision, is that, due to the ability and incentives of the 2020 SMP BTS Operators to engage in the identified anti-competitive behaviours, transparency obligations are necessary to facilitate the development of effective downstream competition. ComReg has specified transparency remedies including requirements to publish a Reference Offer setting out contractual terms and conditions, and the technical basis upon which BTS Operators can obtain access to BTS and associated facilities, along with requirements to publish a Reference Offer and provide advance notification of changes to them.
- A1.31 ComReg considers that each of the 2020 SMP BTS Operators should be required to comply with these transparency obligations in order to minimise information asymmetries and, therefore, facilitate timely and efficient access to BTS and associated facilities. It is envisaged that these obligations will promote effective competition in downstream markets.
- A1.32 As set out in Sections 8, of this Decision, ComReg does not consider that transparency obligations, in isolation, will sufficiently address the competition problems in the Relevant BTS Markets. For example, transparency obligations do not directly address concerns regarding denial of access, discrimination (on price or non-price grounds) or excessive pricing.

### **Non-Discrimination Obligations**

- A1.33 Non-discrimination obligations are designed to promote pro-competitive behaviours in the Relevant BTS Market, by requiring equivalent treatment of BTS Operators (with the transparency obligation providing a means of observing that discrimination is not occurring). In view of potential issues of discriminatory treatment (on price or non-price terms), transparency obligations alone would not address such issues. Furthermore, a non-discrimination obligation itself (or coupled with transparency) does not specifically address what type of product or service should be offered, or how it should be priced.
- A1.34 Thus, the operation of the non-discrimination and transparency obligations alone are not considered by ComReg to be sufficiently adequate in providing a means of ensuring ex ante that the 2020 SMP BTS Operators have access to BTS and associated facilities, or providing access in a fair, reasonable and timely manner.



### **Access Obligations**

- A1.35 Having reviewed the competition problems identified in Section 7, ComReg set out its position in Section 8 that access obligations are necessary to prevent the actual denial of, or effective refusal to provide, access to BTS and associated facilities. Transparency and non-discrimination obligations are necessary supporting obligations, but ComReg considers that such obligations alone are incapable of effectively addressing access issues.
- A1.36 ComReg's view is that obligations to provide BTS and access to associated facilities (including physical interconnect infrastructure necessary for effecting such access, e.g. Interconnection Services and SLAs) are both proportionate and justified. An access obligation on the 2020 SMP BTS Operator will promote regulatory predictability and ensure that BTS Operators are treated in a consistent fashion.
- A1.37 ComReg is of the view that the specified access obligations are fundamental requirements in the Relevant BTS Markets and, taking account of the provisions of Regulation 12(1) of the Access Regulations, the absence of such obligations would hinder the development of effectively competitive retail markets by restricting or distorting competition among BTS Operators, to the detriment of consumers.
- A1.38 These access obligations are therefore considered necessary and appropriate in achieving the objectives of Section 12 of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations, namely the promotion of competition, contributing to the development of the internal market and protecting the interests of end users.

### **Price Control and Cost Accounting Obligations**

- A1.39 Having identified competition problems with respect to the Relevant BTS Markets in Section 7, ComReg set out its position in Section 8 that wholesale charges for access to BTS and associated facilities should be subject to price control obligations.
- A1.40 ComReg requires that each 2020 SMP BTS Operators be subject to a price control obligation of cost orientation with respect to access to BTS and Associated Facilities. ComReg's analysis in Sections 7 and 8 indicates that each of the 2020 SMP BTS Operator has the ability and incentive to engage in excessive pricing, absent regulation. ComReg thus sees no objective reason to distinguish its approach to price control amongst such BTS Operators, particularly given that the same competition problem – potential exploitative conduct by means of excessive pricing - has been identified in each case. Imposing a cost orientation obligation on the 2020 BTS Operators will provide regulatory certainty to each party. In doing so, it will also minimise the scope for disputes and potentially inefficient case-by-case regulation through dispute resolution or other activities.



A1.41 If specific price control obligations are to be meaningful, it may be necessary to have a clear and comprehensive understanding of the costs associated with the provision of BTS for the 2020 SMP BTS Operators.

### **Accounting Separation Obligations**

A1.42 Having reviewed the competition problems in Section 7, it is ComReg's view that an accounting separation obligation is still required.

### **Step 3: Determine the Impacts on Market A Stakeholders**

A1.43 Given the proposal to designate the 2020 SMP BTS Operators, namely 2rn and RTÉ with SMP, it is ComReg's view, as outlined at paragraphs A1.25 above, that the option of regulatory forbearance is not appropriate or justified, and should be discounted when considering the impact on stakeholders.

A1.44 Having regard to the SMP designations in Section 6, ComReg is required to impose at least some level of regulation. In its review of competition problems identified in Section 7 and remedies in Section 8 respectively, ComReg has, on an incremental basis, set out its position that a range of remedies is necessary, proportionate and justified, while at the same time discounting other remedies, where appropriate.

A1.45 D11/13 imposed a range of regulatory obligations on the 2013 Designated BTS Operators, and ComReg reimposes a broadly similar suite of regulatory obligations on the 2020 SMP BTS Operators. Accordingly, it faces a largely unchanged level of compliance burden arising from the obligations which ComReg imposes on the 2020 SMP BTS Operators .

A1.46 The 2013 Designated BTS Operators are already subject to a range of SMP regulatory obligations, some of which remain largely unchanged, and some of which ComReg proposes to alter. For example, in respect of the transparency obligation, the 2013 Designated BTS Operators are currently subject to a general obligation to publish a Reference Offer including prices and associated terms and conditions for BTS access, therefore ComReg considers that to continue to publish a Reference Offer, does not place undue incremental burden on the 2020 SMP BTS Operators.

A1.47 In respect of the transparency obligations, ComReg considers that the implementation of an obligation on the 2020 SMP BTS Operators to make prices publicly available would not place a disproportionate burden on them.

A1.48 The 2013 Designated BTS Operators currently have an obligation of non-discrimination with respect to the provision of wholesale access products, features and additional associated facilities.

A1.49 In view of the issues identified in Section 7, ComReg considers it objectively justified to adopt the same approach with respect to non-discrimination obligations for the 2020 SMP BTS Operators .

A1.50 Having regard to the analysis of the Relevant BTS Markets, it is ComReg's view that, in each case, the remedies are necessary and proportionate, and are restricted to the minimum regulatory burden necessary to ensure that BTS Operators which have the ability and incentive to use their SMP for exclusionary or exploitative purposes are dissuaded or prevented from doing so. ComReg has now grouped remedies into four options set out at Table 9 above for the purpose of considering the incremental impact of each option on Stakeholders.

**Step 4: Determine the Impacts on Competition in the Provision of Market A Services**

A1.51 ComReg's view is that, absent regulation, the 2020 SMP BTS Operators have the ability and incentive to engage in exploitative and exclusionary behaviours likely to impact on competition and consumers. In Section 7, ComReg provided examples of potential competition problems and their impacts on competition and consumers. ComReg has also highlighted its objectives in regulating the Relevant BTS Markets in paragraph 2.3 above, including preventing the restriction or distortion of competition in affected downstream markets and helping to ensure that consumers can achieve maximum benefits in terms of price, choice and quality of service.

A1.52 The imposition of appropriate ex ante remedies to address such competition problems is set out in Section 8, with each of the remedies designed to promote the development of effective competition to the benefit of consumers. Remedies are to be applied consistently across all of the 2020 SMP BTS Operators in order to address the identified impacts of competition problems, and will ultimately benefit BTS Operators by allowing them to compete fairly at the retail level.

**Step 5: Assess Likely Impacts and Choose Best Option in respect of Market A**

A1.53 In its approach to remedies in this Decision, ComReg has taken full account of its obligations under Regulation 8(6) of the Access Regulations, as well as its relevant objectives as set out under Section 12 of the Communications Regulation Act 2002 (as amended).

A1.54 ComReg's position is that, absent regulation, the 2020 SMP BTS Operators have the ability and incentive to engage in exploitative and exclusionary behaviours which would impact on competition and consumers. In Section 7, ComReg provided examples of potential competition problems and their impact on competition and, ultimately, consumers.

A1.55 Based on its assessment above and throughout this Decision, and having considered the impacts on stakeholders and competition, including the impact on the development of competition within the internal market, it is ComReg's view that Option 4 represents the most justified, reasonable and proportionate of the approaches to regulation of the Relevant BTS Markets.

- A1.56 The imposition of appropriate ex ante remedies to address competition problems was discussed and justified in Section 8, and each of the specific remedies is designed to promote the development of effective competition and protect end users. Accordingly, ComReg is of the view that the risk of competition problems and associated impacts resulting from SMP positions in the Relevant BTS Markets should be minimised. This will ultimately be to the benefit of BTS Operators and end users of retail broadcast services.
- A1.57 The regulatory obligations do not unduly discriminate against the 2020 SMP BTS Operators in that, the obligations are to address specific competition problems, and are proportionate, in that they are the least burdensome means of achieving this objective.
- A1.58 ComReg considers that it has met its transparency obligations by setting out the remedies which it imposes on the 2020 SMP BTS Operators.

## Annex: 2 List of Consultation Questions

**Q. 1. Do you agree with ComReg's preliminary conclusions on the retail television and retail radio market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.**

**Q. 2. Do you agree with ComReg's preliminary conclusions on the Relevant BTS Markets assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.**

**Q. 3. Do you agree with ComReg's preliminary finding that each of the criterion of the 3CT is satisfied in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.**

**Q. 4. Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.**

**Q. 5. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in Market A and Market B? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views**

**Q. 6. Do you agree with ComReg's proposals regarding the application of transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.**

**Q. 7. Do you agree with ComReg's preliminary proposals regarding on the Regulatory Impact Assessment, in respect of the Relevant BTS markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.**

## Annex: 3 Glossary of Frequently Used Terms

Acronym	Full Title
<b>BAI</b>	The Broadcasting Authority of Ireland
<b>BEREC</b>	Body of European Regulators for Electronic Communications
<b>Broadcast Operator</b>	Broadcast Operator means a multiplex contractor, a national sound broadcasting contractor and RTE
<b>BTS</b>	Wholesale broadcasting transmission and distribution services
<b>CBP</b>	Countervailing Buyer Power
<b>CCA</b>	Current cost accounting
<b>ComReg</b>	Commission for Communications Regulation
<b>CPP</b>	Calling Party Pays
<b>DTH satellite</b>	Direct to the home satellite
<b>DTT</b>	Digital terrestrial television
<b>EC</b>	European Commission
<b>EPG</b>	Electronic Programme Guide
<b>EEA</b>	European Economic Area
<b>EU</b>	European Union
<b>FDC</b>	Fully distributed cost pricing
<b>FTA</b>	Free to air
<b>HCA</b>	Historical cost accounting
<b>HD</b>	High Definition refers to high resolution TV programme services.
<b>HM</b>	Hypothetical monopolist
<b>IP</b>	Internet Protocol
<b>IPTV</b>	Internet Protocol Television, used for the delivery of television programme content via an internet connection (usually via broadband phone line) for reception by a suitable to a television receiver
<b>LNB</b>	Low noise block downconverter
<b>LRIC</b>	Long Run Incremental Cost
<b>Mhz</b>	Megahertz (1,000,000 Hertz).

<b>Multiplex Operator</b>	This means RTÉ, as a multiplex licensee under section 132 of the 2009 Act and, separately, a holder of a multiplex contract entered into under section 131 of the 2009 Act
<b>Nielsen TAM Establishment Survey</b>	Pay by subscription TV service over cable, satellite and IP platforms
<b>Pay TV</b>	Pay by subscription TV service over cable, satellite and IP platforms
<b>Programme services</b>	TV and or radio content material distributed to end-users (i.e. a TV and or radio channel).
<b>PSB</b>	Public service broadcasting
<b>RIA</b>	Regulatory Impact Assessment
<b>RO</b>	Reference Offer
<b>RTÉ</b>	Raidió Teilifís Éireann. As described in section 2 of the 2009 Act, RTÉ means the authority originally established under section 3 of the Broadcasting Authority Act 1960. It is a national public service broadcaster in Ireland. The principal objects and associated powers of RTÉ are described in section 114 of the Broadcasting Act 2009. RTÉ is a vertically integrated entity and self supplies terrestrial network services via its wholly owned subsidiary RTÉNL. RTÉ launched its DTT platform marketed as “Saorview” in May 2011. The spectrum used by RTÉ is licensed to it by ComReg.
<b>SD</b>	Standard Definition refers to standard resolution TV programme services
<b>SLA</b>	Service Level Agreement
<b>SMP</b>	Significant Market Power
<b>SMS</b>	Short Message Service
<b>SSNIP</b>	Small but Significant Non-transitory Increase in Price
<b>TD</b>	Top down approach to costing
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TG4</b>	Teilifís na Gaeilge. As described in section 2 of the 2009 Broadcasting Act, Teilifís na Gaeilge means the body, originally established by section 44 of the Broadcasting Act of 2001. The objects of TG4 are discussed in section 118 of the 2009 Broadcasting Act.
<b>3CT</b>	Three Criteria Test
<b>2rn</b>	RTÉ’s wholly owned subsidiary, and RTÉ’s Transmission Network, trading as 2rn

<b>WACC</b>	Weighted Average Cost of Capital
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# Annex: 4 Market A Decision Instrument

## 1 STATUTORY POWERS GIVING RISE TO THIS DECISION

1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”):

- (i) Pursuant to and having regard to sections 10 and 12 of the Communications Regulation Act;
- (ii) Pursuant to and having regard to Regulation 6(1) of the Access Regulations and Regulation 16 of the Framework Regulations;
- (iii) Having had regard to, where appropriate, the Broadcasting Act;
- (iv) Having, pursuant to section 13 of the Communications Regulation Act, where applicable, complied with Ministerial Policy Directions;
- (v) Having taken the utmost account of the European Commission’s Recommendation on Relevant Product and Service Markets and the European Commission’s SMP Guidelines;
- (vi) Having had regard to the market analysis and reasons set out in ComReg Document 20/31;
- (vii) Having, in accordance with Regulation 12(3) of the Framework Regulations, published the text of the proposed measure in ComReg Document 20/31 and given reasons for it, including information as to which of ComReg’s statutory powers gives rise to the measure;
- (viii) Having, in accordance with Regulation 12(4) of the Framework Regulations, considered the submissions received in response to ComReg Document 20/31;
- (ix) Having consulted with the Competition and Consumer Protection Commission pursuant to Regulation 27 of the Framework Regulations;
- (x) Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 13 of the Framework Regulations and having taken the utmost account, pursuant to Regulation 13(6) of the Framework Regulations, of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State;
- (xi) Pursuant to Regulations 25, 26 and 27 of the Framework Regulations;
- (xii) Pursuant to Regulation 8 of the Access Regulations;
- (xiii) Pursuant to Regulations 9, 10, 11, 12, and 13 of the Access Regulations;

(xiv) Having regard to the analysis and reasons set out in ComReg Decision DXX/XX [Final Decision].

1.2 This Decision Instrument shall, as and where required, be construed consistently with and in light of the Response to Consultation and Final Decision, ComReg Decision DXX/XX.

1.3 To the extent that there is any conflict between a decision instrument dated prior to the Effective Date and this Decision Instrument, this Decision Instrument shall prevail.

## **PART I - GENERAL PROVISIONS**

### **2 DEFINITIONS AND INTERPRETATION**

2.1 In this Decision Instrument:

“**2rn**” means RTÉ Transmission Network Designated Activity Company;

“**Access**” shall have the same meaning as under Regulation 2 of the Access Regulations;

“**Access Regulations**” means the European Communities (Electronic Communications and Network Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), as may be amended from time to time or replaced with equivalent effect;

“**Associated Facilities**” shall have the same meaning as under Regulation 2 of the Framework Regulations, and for the avoidance of doubt shall include handover with a Multiplex Contractor, where “handover” means adequate connectivity to a Multiplex;

“**Associated Services**” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“**BAI**” means the Broadcasting Authority of Ireland, as established in accordance with Part 2 of the Broadcasting Act;

“**BEREC**” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018;

“**Broadcast Distribution Service(s)**” means the delivery of programme material (television and/or radio) from where it is compiled to a network of broadcast transmission sites;

“**Broadcast Operator**” means, for the purposes of this Decision Instrument, a Multiplex Contractor, a national Sound Broadcasting Contractor and RTÉ;

“**Broadcasting Act**” means the Broadcasting Act 2009 (No. 18 of 2009), as amended;

“**Broadcasting Service**” shall have the same meaning as under section 2 of the Broadcasting Act;

“**Broadcast Transmission Service(s)**” means the delivery of programme material (television and/or radio) via a terrestrial network for consumption by the public;

“**Combiner**” means radio frequency equipment that is used to combine radio frequencies from a number of different broadcast transmission sources into one output;

“**Communications Regulation Act**” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

“**ComReg**” means the Commission for Communications Regulation, as established under section 6 of the Communications Regulation Act;

“**ComReg Decision D11/13**” means ComReg’s Response to Consultation and Final Decision of July 2013, ComReg Document 13/71;

“**ComReg Decision D10/20**” means ComReg Document 20/96 “Review of Weighted Average Cost of Capital: Mobile Telecommunications, Fixed Line Telecommunications, Broadcasting Transmission”, Response to Consultation and Final Decision, ComReg Decision D10/20”, dated 14 October 2020;

“**ComReg Decision DXX/XX**” means ComReg Document No. XX/XX Response to Consultation and Final Decision dated XX/XX/XXXX [Final Decision Document];

“**ComReg Document 20/31**” means ComReg Document No. 20/31 entitled “Market Review: Broadcasting Transmission Services in Ireland, Consultation and Draft Decision, dated 11 May 2020;

“**Co-location**” means a form of Associated Facilities sharing which facilitates, for example, space for transmitter equipment required to provide a Broadcasting Service;

“**Competition and Consumer Protection Commission**” means the body established under section 9 of the Competition and Consumer Protection Act 2014;

“**Effective Date**” means the date set out in Section 17.1 of this Decision Instrument;

“**Feeder(s)**” means equipment used to connect the output of an apparatus for wireless telegraphy or combiner to an antenna;

“**Framework Regulations**” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time or replaced with equivalent effect;

“**Ministerial Policy Directions**” for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, then Minister for Communications, Marine and Natural Resources dated 21 February 2003 and 26 March 2004;

**“Multiplex”** means an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public;

**“Multiplex Contractor”** shall have the same meaning as under section 2 of the Broadcasting Act and for the avoidance of doubt shall include a Sound Broadcasting Multiplex Contractor; **“Recommendation on Relevant Product and Service Markets”** means the European Commission Recommendation of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, which reviewed and replaced the European Commission Recommendation of 9 October 2014 in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services;

**“Reference Offer”** or **“RO”** means the offer of contract by 2rn to a Broadcast Operator in respect of Broadcast Distribution Services and Broadcast Transmission Services and Associated Facilities;

**“Relevant Market”** means the market defined in Section 4.1 of this Decision Instrument;

**“RTÉ”** means Raidió Teilifís Éireann, the body corporate established under the Broadcasting Authority Act 1960 and continued in being by section 113 of the Broadcasting Act;

**“Service Level Agreements”** or **“SLAs”** means legally binding contracts between 2rn and a Broadcast Operator in relation to the service levels to be provided by 2rn;

**“SMP”** means Significant Market Power;

**“(the) SMP Guidelines”** means the European Commission guidelines of 7 May 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01);

**“Sound Broadcasting Contractor”** means persons have entered into a sound broadcasting contract with the BAI under section 63 of the Broadcasting Act, where the area specified in the sound broadcasting contract is national or quasi-national;

**“Sound Broadcasting Multiplex Contractor”** means a person having entered into a contract with the BAI in accordance with section 131 of the Broadcasting Act for the purposes of establishing, maintaining and operating a multiplex in which programme material is predominately sound.

### **3 SCOPE AND APPLICATION**

- 3.1 This Decision Instrument applies to 2rn in respect of activities falling within the scope of the Relevant Market, as defined in section 4 of this Decision Instrument.
- 3.2 This Decision Instrument is binding upon 2rn and its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns and including, for the avoidance of doubt, RTÉ, and all shall comply with it in all respects.

### **4 RELEVANT MARKET**

- 4.1 For the purposes of this Decision Instrument, the relevant market is hereby defined as the market for wholesale access to national terrestrial Broadcast Transmission Services and Broadcast Distribution Services in Ireland, as set out in detail in Section 4 of ComReg Decision **DXX/XX**.
- 4.2 ComReg hereby finds that the three criteria test set out in the Recommendation on Relevant Product and Service Markets is met, and accordingly that the Relevant Market is a market that is susceptible to ex ante regulation.

### **5 DESIGNATION OF UNDERTAKING WITH SMP**

- 5.1 ComReg hereby determines that the Relevant Market is not effectively competitive and hereby designates 2rn as having SMP on the Relevant Market.

## **PART II – SMP OBLIGATIONS**

### **6 SMP OBLIGATIONS**

- 6.1 Further to, and in accordance with, the requirements set out in Regulation 8 of the Access Regulations, in accordance with Regulations 9, 10, 11, 12 and 13 of the Access Regulations, ComReg hereby imposes obligations of access, non-discrimination, transparency, accounting separation, cost accounting and price control on 2rn, as detailed further in sections 7 to 12 below.

### **7 OBLIGATIONS TO PROVIDE ACCESS**

- 7.1 2rn shall meet all reasonable requests from Broadcast Operators for the provision of Access, including Associated Facilities.
- 7.2 Without prejudice to the generality of section 7.1, 2rn shall provide and grant Broadcast Operators access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) including Associated Facilities, which includes but is not limited to:
- (i) The provision of co-location for the transmitter equipment;

- (ii) The provision of power and the backup power supply for the transmitter and associated equipment;
- (iii) The provision of telemetry services;
- (iv) The provision of access to the antenna Combiner and Feeder to enable the connection of the transmitter equipment to the combiner;
- (v) The provision of access to the microwave distribution system, and
- (vi) The provision of support services.

7.3 Without prejudice to the generality of section 7.1, 2rn shall meet all reasonable requests from Broadcast Operators for Access on an unbundled/unmanaged basis whereby access to any element of a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) may be sought by Broadcast Operators on a disaggregated basis.

7.4 Without prejudice to the generality of sections 7.1 to 7.3:

- (i) 2rn shall negotiate in good faith with Broadcast Operators requesting Access;
- (ii) 2rn may not withdraw, without the prior approval of ComReg, Access to services and facilities already granted;
- (iii) 2rn shall grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services.

## **8 CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS**

8.1 2rn shall, in relation to the obligations set out under section 7 above, grant Access in a fair, reasonable and timely manner.

8.2 Without prejudice to the generality of section 8.1, 2rn shall:

- (i) Conclude, maintain and keep updated, as appropriate, legally binding SLAs with Broadcast Operators that shall include, but shall not be limited to, the maintenance of the SLA requirements as set out in Annex 2 to this Decision Instrument;
- (ii) Negotiate in good faith with Broadcast Operators in relation to the conclusion of legally binding and fit for purpose SLAs;
- (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Service credits shall be a matter of negotiation between 2rn and Broadcast Operators and recovery of service credits shall be, in the first instance, a matter for the Broadcast Operators and 2rn;
- (iv) Ensure SLAs detail how service credits, when they occur, are calculated, to include the provision of an example calculation;

- (v) Ensure that service credits, when they occur, shall be made in a timely and efficient manner.

8.3 Where a request by a Broadcast Operator for the provision of Access, or a request by a Broadcast Operator for the provision of information is refused or granted only in part, 2rn shall provide the objective criteria and reasons for such refusal, or partial grant, to the Broadcast Operator which made the request, in a fair, reasonable and timely manner.

## **9 OBLIGATION OF NON-DISCRIMINATION**

9.1 2rn shall ensure that there is no discrimination in its treatment of Broadcast Operators.

9.2 Without prejudice to the generality of section 9.1, 2rn shall:

- (i) Apply equivalent conditions in equivalent circumstances to Broadcast Operators providing equivalent services;
- (ii) Ensure that all services (including Associated Facilities) and information are provided to Broadcast Operators under the same conditions and of the same quality as the services and information that 2rn provides to itself or to its subsidiaries or partners, including RTÉ;
- (iii) Ensure that all services and information shall be provided to Broadcast Operators at the same time as the service(s) and/or information are made available by 2rn to itself or its subsidiaries or partners, including RTÉ.

9.3 For the avoidance of any doubt, the obligations set out at this section 9 apply irrespective of whether or not a specific request for services or information has been made.

## **10 OBLIGATION OF TRANSPARENCY**

10.1 2rn shall ensure transparency in its provision of Access in accordance with section 7.

10.2 Without prejudice to the generality of the obligation in section 10.1, 2rn shall make publicly available and keep updated on a publicly available website, a Reference Offer. The Reference Offer shall be sufficiently detailed to ensure that Broadcast Operators availing of services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested.

10.3 2rn's Reference Offer shall include at least the following:

- (i) A description of the relevant offerings broken down into components according to market needs;
- (ii) A description of the technical specifications and network characteristics of the Access being offered;



- (iii) A description of the associated terms and conditions for supply and use, including prices;
  - (iv) A detailed description of the tariff model and how it operates to derive prices.
- 10.4 2rn shall, unless otherwise determined by ComReg, make publicly available and publish on its publicly available website at least two months in advance of coming into effect, any proposed changes to the Reference Offer and proposed changes to wholesale prices (including prices for new services and facilities). 2rn shall notify ComReg, in writing, with the information to be published, at least one month in advance of such publication, i.e. three months prior to any changes coming into effect. The periods referred to in this section may be varied with the agreement of ComReg or at ComReg's discretion.
- 10.5 Without prejudice to Section 10.4, 2rn shall, within two months of the Effective Date, provide to ComReg written confirmation that a Reference Offer for the purpose of section 10.2 is available on a publicly available website, with detail of same and of any changes made to the Reference Offer previously available.
- 10.6 2rn shall make such changes to the Reference Offer as ComReg directs from time to time.
- 10.7 2rn shall make available on a publicly available website information such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 7, as may be reasonably required by or for Broadcast Operators, and in the manner as specified by ComReg from time to time.
- 10.8 2rn shall publish all SLAs and any amendments thereto on a publicly available website.

## **11 OBLIGATION OF ACCOUNTING SEPARATION**

- 11.1 2rn shall maintain separated accounts as detailed in Annex 1 attached to this Decision Instrument.

## **12 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING**

- 12.1 2rn shall maintain appropriate cost accounting systems in respect of Access, including Associated Facilities, referred to in section 7, as may be agreed with ComReg from time to time.
- 12.2 2rn shall be subject to a price control obligation in the form of an obligation of cost orientation, as regards the prices charged by it to any Broadcast Operator (including for the avoidance of doubt, RTÉ) for Access, including Associated Facilities, referred to in section 7.

- 12.3 In particular, 2rn shall ensure that its charges in respect of Access, including Associated Facilities referred to in section 7, are no more than the Fully Distributed Costs using the Historical Cost Accounting methodology, adjusted, where appropriate, for non-relevant costs as described in Annex 1, allowing for a reasonable rate of return as determined by ComReg Decision D10/20 of 14 October 2020 (ComReg Document 20/96) as may be amended or otherwise replaced from time to time.

## **PART IV – FURTHER GENERAL PROVISIONS AND EFFECTIVE DATE**

### **13 STATUTORY POWERS NOT AFFECTED**

- 13.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument) from time to time as the occasion requires.

### **14 MAINTENANCE OF OBLIGATIONS**

- 14.1 If any Section(s), clause(s) or provision(s) or portion(s) thereof contained in this Decision Instrument is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s) or portion(s) thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s) or portion(s) thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

### **15 WITHDRAWAL**

- 15.1 The Decision Instrument contained in Appendix D of ComReg Document No. 13/71, ComReg Decision D11/13 is hereby withdrawn at the Effective Date.

### **16 PUBLICATION AND NOTIFICATION**

- 16.1 This Decision Instrument shall be published on ComReg's website, [www.comreg.ie](http://www.comreg.ie) and notified to 2rn.

### **17 EFFECTIVE DATE**

- 17.1 The effective date of this Decision Instrument shall be the date of its notification to 2rn and it shall remain in force until further notice by ComReg.

**GARRETT BLANEY**

**CHAIRPERSON**

**THE COMMISSION FOR COMMUNICATIONS REGULATION**

**THE XX DAY OF XXXXX 2021**



## **ANNEX 1 – DETAIL OF THE ACCOUNTING SEPARATION OBLIGATIONS - MARKET A**

### **1 DEFINITIONS AND INTERPRETATION**

1.1 In this Annex 1, unless otherwise indicated:

**“Accounting Documentation”** refers to the description of policies and methodologies used to produce the financial information contained within the Regulated Accounts and the Additional Financial Data including those documents containing the information set out in Section 5 of this Annex;

**“Accounting Policies”** means the specific policies and procedures used by a company to prepare its Regulated Accounts.

**“Additional Financial Data”** means the data that shall be provided by 2rn, as determined by ComReg, on an annual basis.

**“Agreed Upon Procedures”** means procedures agreed between relevant parties pursuant to a letter of engagement.

**“Attribution Methods”** refers to the methods employed to allocate and apportion revenues, costs and capital employed to Market A or Service levels.

**“Auditor(s)”** means a firm(s) which is/are authorised to conduct the audit of financial statements of companies registered in Ireland.

**“Cost Component”** means the accumulation of various costs (direct, indirect, and common) through the various cost allocation stages within the cost accounting system from initial input layer through to final Services.

**“Effective Date”** means the date set out in Section 17.1 of this Decision Instrument.

**“EPM”** means equi-proportional mark-up;

**“External”** means the supply of Services to parties outside of 2rn.

**“Fixed Asset”** means tangible and intangible items that are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes and which are expected to be used during more than one period.

**“Functional Cost Categories”** means the various expense categories as set out in paragraph 4.4 of this Annex.

**“Income Statement”** means a statement showing all items of income and expense recognised in a period.

**“Inter”** means the supply of Services between 2rn and its subsidiaries.

**“Intra”** means the supply of Services within 2rn.

**“Market A”** means the market for wholesale access to national terrestrial broadcast transmission services as set out in section 4 of this Decision Instrument.

**“Mean Capital Employed”** is the mean of the assets and liabilities of 2rn, adjusted to amend for certain assets and liabilities which are excluded for regulatory purposes.

**“Nearest Equivalent Charge”** means a price and/or prices set out in 2rn’s Reference Offer (as defined in the Decision Instrument) price list which most closely represent(s) the technical capabilities of a Service as if it were an External transaction.

**“Regulatory Accounting Principles”** establish the key doctrines to be applied in the preparation of regulatory accounting information. They should include, but not be limited to, the principles of cost causality, objectivity, transparency and consistency of treatment.

**“Regulated Accounts”** means those accounts as described in section 3.3 to 3.9 of this Annex.

**“Separated Accounts”** refers to the financial information referred to in section 3.1 to 3.2 of this Annex.

**“Service(s)”** for the purposes of this Annex shall mean Broadcast Transmission Services and Broadcast Distribution Services as provided to Broadcast Operators, other regulated services (as may arise from time to time) and non-regulated services.

**“Statutory Accounts”** means the accounts of 2rn, and its successors, which 2rn is required to prepare pursuant to the Companies Act 2014 (No. 38 of 2014).

- 1.2 Where a capitalised term used in this Annex is not defined, the definition in the Market A Decision Instrument shall prevail.

## **2 FUNDAMENTAL REQUIREMENTS OF SMP OBLIGATIONS**

- 2.1 2rn’s financial records and accounting systems shall be sufficiently detailed and supported by sufficient data to ensure that:
- (i) 2rn is in a position to comply with the transparency, non-discrimination, accounting separation, price control, and cost accounting obligations imposed on it by the Decision Instrument; and,
  - (ii) 2rn is in a position to prepare Separated Accounts which shall be maintained for Market A and, where specified, for Services.

## **3 REPORTING AND TRANSPARENCY**

### **Separated Accounts**

- 3.1 Without prejudice to the generality of section 2 of this Annex, 2rn shall prepare Separated Accounts annually.
- 3.2 2rn’s Separated Accounts shall contain:
- (i) Regulated Accounts (as set out in detail in section 3.3 to 3.9 of this Annex);

- (ii) Additional Financial Data (as set out in detail in section 3.10 to 3.15 of this Annex);
- (iii) Accounting Documentation (as set out in detail in section 5 of this Annex).

### **Regulated Accounts**

- 3.3 2rn's Regulated Accounts will consist of Historical Cost Accounts ("HCA").
- 3.4 2rn's Regulated Accounts shall contain:
- (i) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts which shall include, but not be limited to, the following terms:
    - a. Cost causality;
    - b. Objectivity;
    - c. Transparency;
    - d. Consistency of treatment.
  - (ii) An Income Statement and statement of Mean Capital Employed;
  - (iii) Notes to the Regulated Accounts as required;
- 3.5 2rn's Regulated Accounts shall be accompanied by:
- (i) A signed statement from the directors of 2rn acknowledging their responsibilities for the preparation of the Regulated Accounts and confirming their compliance with the requirements of this Annex in this regard.
  - (ii) A report and opinion by an Auditor on the Regulated Accounts and 2rn's compliance with the requirements of this Annex in respect of the preparation of the Regulated Accounts, including the requirements set out in paragraph 6.1.(ii) of this Annex.
- 3.6 The Regulated Accounts shall be prepared in accordance with the Regulatory Accounting Principles and Accounting Policies. These Regulated Accounts shall show data for 2rn's last complete financial period as well as the previous financial period and where these figures are not comparable, as a result of (for example) a material change in Accounting Policy, cost attribution methodology or material error, the figure for the preceding financial period must be adjusted, unless ComReg agrees in writing that it would be unreasonable to have to make such an adjustment.
- 3.7 The Regulated Accounts shall include a reconciliation to the Statutory Accounts and contain (where relevant) a description of adjustments made between the Statutory Accounts and the Regulated Accounts.

- 3.8 In accordance with the transparency obligation in section 10 of the Decision Instrument, 2rn shall publish its Regulated Accounts on its publicly available website no later than four months after the end of the financial period (or otherwise as required by ComReg).
- 3.9 2rn shall include the report and opinion of the Auditor with the published Regulated Accounts.

### **Additional Financial Data**

- 3.10 2rn shall prepare such Additional Financial Data as required by ComReg (from time to time) and in a format as requested by ComReg, which may include the following:
- (i) HCA Income Statements for each Service. 2rn shall provide comparative prior period data, where available, unless ComReg agrees in writing that to have to do so would be unreasonable.
  - (ii) Schedule of charges for Services. 2rn shall provide comparative prior period data where possible, unless ComReg agrees in writing that it would be unreasonable to have to do so. The Services required to be included in the schedule of charges shall be determined annually by ComReg prior to the end of the financial period and notified to 2rn.
- 3.11 Income Statements requested by ComReg pursuant to paragraph 3.10 of this Annex shall distinguish between External and Inter/Intra revenues and costs.
- 3.12 2rn's Additional Financial Data shall follow the same Regulatory Accounting Principles as applied in the preparation of the Regulated Accounts.
- 3.13 2rn shall submit its Additional Financial Data to ComReg and, when required by it, the related opinion(s) of the Auditor or the report(s) from a qualified independent body, no later than four months after the end of the financial period (or otherwise as required by ComReg).
- 3.14 2rn may submit a copy of the Fixed Asset register as reconciled to the property, plant and equipment note and the intangible assets note (or their equivalents) per the Statutory Accounts no later than four months after the end of the financial period (or otherwise as required by ComReg).
- 3.15 The format and level of detail shown in the Additional Financial Data shall be determined by ComReg on an annual basis prior to the end of the financial period.

## **4 ACCOUNTING PRINCIPLES**

### **General**



- 4.1 The collection of data and the basis on which it is to be allocated and apportioned between regulated and unregulated markets and Services are detailed under the following headings:
- (i) Cost allocation and apportionment principles (as set out in section 4.2 of this Annex);
  - (ii) Cost allocation and apportionment rules (as set out in section 4.3 to 4.6 of this Annex);
  - (iii) Inter/Intra transactions (as set out in section 4.7 of this Annex); and
  - (iv) Survey techniques (as set out in section 4.8 of this Annex).

### **Cost allocation and apportionment principles**

- 4.2 2rn shall allocate costs to each Service on a fully allocated cost basis, in the following manner:
- (i) Where possible, costs which can be directly assigned to a particular Service shall be so assigned.
  - (ii) Common costs, which are costs that cannot be directly assigned to a particular Service, shall be allocated as follows:
    - a. Whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
    - b. When direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible, the indirect linkage shall be based on comparable cost structures; and
    - c. When neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of an EPM, computed by using the ratio of all relevant expenses directly or indirectly assigned or allocated, to each Service.

### **Cost allocation and apportionment rules**

- 4.3 2rn shall ensure that costs are apportioned among the various Cost Components on the basis of factors/drivers which reflect the different impact of each item on the Functional Cost Categories. Where survey techniques are applied for the apportionment of costs the principles outlined in section 4.8 of this Annex shall be followed.
- 4.4 At a minimum and where relevant, 2rn shall ensure that the hierarchy of costs to be applied shall enable the cost of the following Functional Cost Categories to be calculated:
- (i) Employee and personnel related costs;

- (ii) Network electricity;
- (iii) Maintenance costs;
- (iv) Other operating costs;
- (v) Depreciation and amortisation;
- (vi) Central shared services costs;
- (vii) Rent and rates.

4.5 There shall be consistency in definitions of Functional Cost Categories between the Regulated Accounts and the Additional Financial Data.

4.6 ComReg reserves the right to amend this list as required from time to time.

### **Inter/Intra transactions**

4.7 2rn shall comply with the following transfer charging principles:

- (i) Transfer charges (revenues and costs) shall be attributed to Cost Components, for regulated and unregulated Services, in accordance with the activities, which cause the revenues to be earned, or costs to be incurred.
- (ii) The attribution described in (i) above shall be objective and not intended to benefit any Service (regulated or unregulated).
- (iii) There shall be consistency of treatment of transfer charges from period to period.
- (iv) The transfer charging methods used shall be transparent. There shall be a clear rationale for the transfer charges used and each charge shall be justifiable (and supporting calculations shall be made available to ComReg pursuant to section 5 of this Annex).
- (v) The charge for Inter/Intra usage shall be equivalent to the charge that is levied if the Service(s) were an External transaction rather than an Inter/Intra transaction. Where no equivalent charge exists, the Nearest Equivalent Charge shall be charged and fully justified to ComReg by 2rn, pursuant to section 5 of this Annex. Where no Nearest Equivalent Charge exists for the Inter/Intra transaction, a cost-based charge shall be transferred and fully justified to ComReg by 2rn, pursuant to section 5 of this Annex.

### **Survey techniques**

4.8 2rn shall ensure that survey data is based on appropriate methods. This shall result in a fair and objective allocation of revenue (including transfer charges), costs (including transfer charges), assets and liabilities. In this regard, any survey techniques used shall take account of the following:

- (i) The survey data is unbiased and objective;
- (ii) The survey data is representative of the entire population;
- (iii) The survey data is not obscured by seasonal or other factors; and
- (iv) The survey data is updated annually.

## **5 ACCOUNTING DOCUMENTATION**

5.1 2rn's Accounting Documentation shall be sufficiently transparent and shall explain, but not be limited to, the regulatory principles used and the methodologies applied, for the purpose of preparing:

- (i) The Regulated Accounts;
- (ii) The Additional Financial Data.

5.2 The Accounting Documentation shall consist of, as a minimum:

- (i) An explanation of the basis of preparation of the Regulated Accounts, including an explanation of the key Accounting Policies adopted by 2rn. This shall include, but not be limited to, details of 2rn's income recognition policy, depreciation policy, capitalisation policy, and its approach to dealing with issues such as cost allocation, prior period adjustments and changes in Accounting Policies.
- (ii) A description of 2rn's business, explaining the main activities and functions performed.
- (iii) The definitions in relation to Functional Cost Categories.
- (iv) An overview of the regulatory accounting systems, in terms of the underlying principles and the conceptual flow of costs and revenues from source financial systems.
- (v) An overview of the basis of calculation of any Inter/Intra transactions.
- (vi) An overview of the key cost allocation methodologies employed.
- (vii) The details of material period on period changes to the form and content of the Regulated Accounts and changes to cost allocation methodologies having a material impact.
- (viii) Additional documentation or information as may be required by ComReg from time to time.

- 5.3 2rn shall submit to ComReg, for approval, an annual edition of the Accounting Documentation, detailing any amendments to the prior period versions.
- 5.4 Where it considers that one off or exceptional adjustments are required for the preparation of the Regulated Accounts, 2rn shall submit its proposals in this regard in advance to ComReg for consideration and approval. This shall detail any amendments to the relevant section of the Accounting Documentation, together with supporting files and/or workings where necessary. 2rn shall inform ComReg of these proposed adjustments in sufficient time to allow for them to be reviewed. These one-off or exceptional adjustments shall include (for example):
- (i) Changes to study methodologies resulting in prior period adjustments;
  - (ii) Changes to study methodologies resulting in significant changes to cost allocations; and
  - (iii) Changes in Accounting Policies, methodologies and estimation techniques.
- 5.5 2rn shall submit its Accounting Documentation to ComReg within four months of the end of the financial period (or otherwise as required by ComReg).
- 5.6 2rn shall:
- (i) Review and update the Accounting Documentation annually.
  - (ii) Publish the Accounting Documentation on its publicly available website.

## **6 REVIEW AND CONFIRMATION OF COMPLIANCE**

- 6.1 2rn shall:
- (i) Submit a statement signed by the directors of 2rn acknowledging their responsibilities for the preparation of the Separated Accounts and confirming 2rn's compliance with the requirements of this Annex. This signed statement shall be submitted to ComReg four months after the end of the financial period (or otherwise as required by ComReg).
  - (ii) Engage an Auditor to perform an audit of the Regulated Accounts, including considering compliance of the Regulated Accounts with this Annex, in accordance with International Standards on Auditing (UK and Ireland) and the principles and guidance set out by bodies' representative of the Irish accountancy professions from time to time. Such an audit opinion should be on:
    - a. "Fairly presents in accordance with..." basis, or
    - b. "Properly prepared in accordance with..." basisin respect of the Regulated Accounts as a whole, as shall be notified in writing to 2rn from time to time by ComReg.

- (iii) Provide a report in respect of Additional Financial Data from a qualified independent body, when required by ComReg from time to time, prepared according to Agreed Upon Procedures which have been agreed between ComReg, 2rn and the qualified independent body.
- (iv) Consult with ComReg before the appointment / reappointment of the Auditor and provide assurances that its preferred Auditor has the necessary expertise.
- (v) Procure a qualified independent body, to provide an appropriate opinion or report on the compliance of 2rn's Regulated Accounts, or part thereof, with this Annex, as required by ComReg from time to time. ComReg's requirements in this regard will be notified to 2rn in advance of its financial period end or in exceptional circumstances after the start of its next financial period where such an opinion or report is required.

6.2 2rn shall ensure:

- (i) That the Accounting Documentation is subject to review by a qualified independent body annually; and
- (ii) That the processes and procedures used by 2rn be subject to a review by a qualified independent body on an annual basis.

6.3 In this section, references to a qualified independent body may include an Auditor.

**ANNEX 2 – PARAMETERS FOR INCLUSION IN THE SLA - MARKET A**

- 1.1 The SLA parameters shall include, but shall not be limited to the following:
- (i) The scope of the SLA and details of the duration and negotiation of the SLA;
  - (ii) The objective of the SLA;
  - (iii) Broadcaster operators' business support;
  - (iv) Fault incidents;
  - (v) Fault management;
  - (vi) Fault response;
  - (vii) Escalation process;
  - (viii) Network monitoring centre;
  - (ix) Service requests;
  - (x) Business continuity management;
  - (xi) Routine meetings;
  - (xii) Reports;
  - (xiii) A dispute resolution procedure to be used between parties;
  - (xiv) Provisions regarding confidentiality of non-public parts of the SLA;
  - (xv) A description of the network access to be provided, including technical information;
  - (xvi) The locations of the points of network access;
  - (xvii) The technical standards for network access (including any usage restrictions and other security issues);
  - (xviii) The conditions for access to ancillary and supplementary services;
  - (xix) Details of traffic and network management;
  - (xx) Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
  - (xxi) Details of quality metrics;
  - (xxii) Details of measures to ensure compliance with requirements for network integrity; and,
  - (xxiii) Rules of allocation between the parties when supply is limited.

# Annex: 5      Market B Decision Instrument

## 1      STATUTORY POWERS GIVING RISE TO THIS DECISION

- 1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”):
- (i) Pursuant to and having regard to sections 10 and 12 of the Communications Regulation Act;
  - (ii) Pursuant to and having had regard to Regulation 6(1) of the Access Regulations and Regulation 16 of the Framework Regulations;
  - (iii) Having had regard to, where appropriate, the Broadcasting Act;
  - (iv) Having, pursuant to Section 13 of the Communications Regulation Act, where applicable, complied with Ministerial Policy Directions;
  - (v) Having taken the utmost account of the European Commission’s Recommendation on Relevant Product and Service Markets and the European Commission’s SMP Guidelines;
  - (vi) Having had regard to the market analysis and reasons set out in ComReg Document 20/31;
  - (vii) Having, in accordance with Regulation 12(3) of the Framework Regulations, published the text of the proposed measure in ComReg Document 20/31 and given reasons for it, including information as to which of ComReg’s statutory powers gives rise to the measure;
  - (viii) Having, in accordance with Regulation 12(4) of the Framework Regulations, considered the submissions received in response to ComReg Document 20/31;
  - (ix) Having consulted with the Competition and Consumer Protection Commission further to Regulation 27 of the Framework Regulations;
  - (x) Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 13 of the Framework Regulations and having taken the utmost account, pursuant to Regulation 13(6) of the Framework Regulations, of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State;
  - (xi) Pursuant to Regulations 25, 26 and 27 of the Framework Regulations;



- (xii) Pursuant to Regulations 8 of the Access Regulations;
  - (xiii) Pursuant to Regulation 9, 10, 11, 12, and 13 of the Access Regulations;
  - (xiv) Having regard to the analysis and reasoning set out in ComReg Decision **DXX/XX** [Final Decision]
- 1.2 This Decision Instrument shall, as and where required, be construed consistently with and in light of the Response to Consultation and Final Decision, ComReg Decision **DXX/XX**.
- 1.3 To the extent that there is any conflict between a decision instrument dated prior to the Effective Date and this Decision Instrument, this Decision Instrument shall prevail.

## **PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)**

### **2 DEFINITIONS AND INTERPRETATION**

#### 2.1 In this Decision Instrument:

“**Access**” shall have the same meaning as under Regulation 2 of the Access Regulations;

“**Access Regulations**” means the European Communities (Electronic Communications and Network Services) (Access) Regulations, 2011 (S.I. No. 334 of 2011), as may be amended from time to time or replaced with equivalent effect;

“**Associated Facilities**” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“**Associated Services**” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“**BEREC**” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018;

“**Broadcaster**” shall have the same meaning as under section 2 of the Broadcasting Act and for the purposes of this Decision Instrument, the Broadcaster shall have the necessary statutory basis or Ministerial consent pursuant to section 130 of the Broadcasting Act, having regard to section 3.3 of this Decision Instrument;

“**Broadcasting Act**” means the Broadcasting Act 2009 (No. 18 of 2009), as amended;

“**Broadcasting Service**” shall have the same meaning as under section 2 of the Broadcasting Act;

**“Communications Regulation Act”** means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

**“ComReg”** means the Commission for Communications Regulation, as established under section 6 of the Communications Regulation Act;

**“ComReg Decision D11/13”** means ComReg’s Response to Consultation and Final Decision of July 2013, ComReg Document 13/71;

**“ComReg Decision D10/20”** means ComReg Document 20/96, “Review of Weighted Average Cost of Capital: Mobile Telecommunications, Fixed Line Telecommunications, Broadcasting Transmission”, Response to Consultation and Final Decision, ComReg Decision D10/20”, dated 14 October 2020;

**“ComReg Decision DXX/XX”** means ComReg Document No. XX/XX, Response to Consultation and Final Decision, dated XX/XX/XXX [Final Decision Document]

**“ComReg Document 20/31”** means ComReg Document No. 20/31, entitled “Market Review: Broadcasting Transmission Services in Ireland, Consultation and Draft Decision, dated 11 May 2020;

**“Competition and Consumer Protection Commission”** means the body established under section 9 of the Competition and Consumer Protection Act 2014;

**“DTT”** means Digital Terrestrial Television;

**“Effective Date”** means the date set out in Section 17.1 of this Decision Instrument;

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time or replaced with equivalent effect;

**“Ministerial Policy Directions”** for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, the Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004;

**“Multiplex”** means an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public, and the term “Multiplexing Services” shall have the same meaning;

**“Programme material”** shall have the same meaning as under section 2 of the Broadcasting Act;

**“Recommendation on Relevant Product and Service Markets”** means the European Commission Recommendation of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing

the European Electronic Communications Code, which reviewed and replaced the European Commission Recommendation of 9 October 2014 in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services;

“**Reference Offer**” or “**RO**” means the offer of contract by RTÉ to another Broadcaster in respect of Multiplexing Services (and Associated Services and Associated Facilities) in accordance with the requirements of this Decision Instrument;

“**RTÉ**” means Raidió Teilifís Éireann, the body corporate established under the Broadcasting Authority Act 1960 and continued in being by section 113 of the Broadcasting Act;

“**Service Level Agreements**” or “**SLAs**” means legally binding contracts between RTÉ and Broadcasters in relation to the service levels to be provided by RTÉ;

“**SMP**” means Significant Market Power;

“**(the) SMP Guidelines**” means the European Commission guidelines of 7 May 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01).

### **3 SCOPE AND APPLICATION**

- 3.1 This Decision Instrument applies to RTÉ in respect of activities falling within the scope of the Relevant Market, as defined in section 4 of this Decision Instrument.
- 3.2 This Decision Instrument is binding upon RTÉ, its subsidiaries, and its successors, affiliates and assigns and all shall comply with it in all respects.
- 3.3 For the avoidance of doubt, the obligations set out in section 6 to 12 of this Decision Instrument apply to RTÉ with respect to its broadcast of programme material pursuant to section 130(1)(e) of the Broadcasting Act only if RTÉ has exercised its discretion to broadcast such programme material.

### **4 RELEVANT MARKET**

- 4.1 For the purposes of this Decision Instrument, the relevant market is hereby defined as the market for wholesale access to DTT Multiplexing Services in Ireland, including wholesale access to any Multiplex operated and maintained by RTÉ for the purposes of DTT, as set out in detail in Section 4 of ComReg Decision **DXX/XX**.
- 4.2 ComReg hereby finds that the three criteria test set out in the Recommendation on Relevant Product and Service Markets is met, and accordingly that the Relevant Market is a market that is susceptible to ex ante regulation.

## **5 DESIGNATION OF UNDERTAKING WITH SMP**

- 5.1 ComReg hereby determines that the Relevant Market is not effectively competitive and hereby designates RTÉ as having SMP on the Relevant Market.

## **PART II – SMP OBLIGATIONS**

### **6 SMP OBLIGATIONS**

- 6.1 Further to, and in accordance with, the requirements set out in Regulation 8 of the Access Regulations, in accordance with Regulations 9, 10, 11, 12 and 13 of the Access Regulations, ComReg hereby imposes obligations of access, non-discrimination, transparency, accounting separation, cost accounting and price control on RTÉ, as detailed further in sections 7 to 12 below.

### **7 OBLIGATIONS TO PROVIDE ACCESS**

- 7.1 RTÉ shall meet all reasonable requests from Broadcasters in the context of section 130 of the Broadcasting Act for the provision of Access to a Multiplex, including Associated Facilities and Associated Services, subject to section 3.3 of this Decision Instrument.
- 7.2 Without prejudice to the generality of section 7.1:
- (i) RTÉ shall negotiate in good faith with Broadcasters requesting Access;
  - (ii) RTÉ may not withdraw, without the prior approval of ComReg, Access to services and facilities already granted;
  - (iii) RTÉ shall grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services;

### **8 CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS**

- 8.1 Subject to section 3.3 of this Decision Instrument, RTÉ shall, in relation to the obligations set out under section 7 above, grant Access in a fair, reasonable and timely manner.
- 8.2 Without prejudice to the generality of section 8.1, RTÉ shall:
- (i) Conclude, maintain and keep updated, as appropriate, legally binding SLAs with Broadcasters that shall include, but shall not be limited to, the maintenance of the SLA requirements as set out in Annex 2 to this Decision Instrument;
  - (ii) Negotiate in good faith with Broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs;

- (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Service credits shall be a matter of negotiation between RTÉ and Broadcasters and recovery of service credits shall be, in the first instance, a matter for the Broadcasters and RTÉ;
- (iv) Ensure SLAs detail how service credits, when they occur, are calculated, to include the provision of an example calculation;
- (v) Ensure service credits, when they occur, shall be made in a timely and efficient manner.

8.3 Where a request by a Broadcaster for the provision of Access, or a request by a Broadcaster for the provision of information is refused or granted only in part, RTÉ shall provide the objective criteria and reasons for such refusal, or partial grant, to the Broadcaster which made the request, in a fair, reasonable and timely manner.

## **9 OBLIGATION OF NON-DISCRIMINATION**

9.1 Subject to section 3.3 of this Decision Instrument, RTÉ shall ensure that there is no discrimination in its treatment of Broadcasters.

9.2 Without prejudice to the generality of section 9.1, RTÉ shall:

- (i) Apply equivalent conditions in equivalent circumstances to other Broadcasters providing equivalent services;
- (ii) Ensure that all services (including Associated Services and Associated Facilities) and information are provided to other Broadcasters under the same conditions and of the same quality as the services and information that RTÉ provides to itself or to its subsidiaries or partners;
- (iii) Ensure that all such services and information shall be provided to other Broadcasters at the same time as the service(s) and/or information are made available by RTÉ to itself or its subsidiaries or partners.

9.3 For the avoidance of any doubt, the obligations set out at this section 9 apply irrespective of whether or not a specific request for services or information has been made.

## **10 OBLIGATION OF TRANSPARENCY**

10.1 RTÉ shall ensure transparency in its provision of Access in accordance with section 7.

10.2 Without prejudice to the generality of the obligation in section 10.1, RTÉ shall make publicly available and keep updated on a publicly available website, a Reference Offer. The Reference Offer shall be sufficiently detailed to ensure that Broadcasters availing of services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested.

- 10.3 RTÉ's Reference Offer shall include at least the following:
- (i) A description of the relevant offerings broken down into components according to market needs;
  - (ii) A description of the technical specifications and network characteristics of the Access being offered;
  - (iii) A description of the associated terms and conditions for supply and use, including prices;
  - (iv) A detailed description of the tariff model and how it operates to derive prices.
- 10.4 RTÉ shall, unless otherwise determined by ComReg, make publicly available and publish on its publicly available website at least two months in advance of coming into force, any proposed changes to the Reference Offer and any proposed changes to wholesale prices (including prices for new services and facilities). RTÉ shall notify ComReg, in writing, with the information to be published at least one month in advance of any such publication, i.e. three months prior to any changes coming into effect. The periods referred to in this section may be varied with the agreement of ComReg or at ComReg's discretion.
- 10.5 Without prejudice to Section 10.4, RTÉ shall, within two months of the Effective Date, provide to ComReg written confirmation that a Reference Offer for the purpose of Section 10.2 is available on a publicly available website, with details of same and of any changes made to the Reference Offer previously available.
- 10.6 RTÉ shall make such changes to the Reference Offer as ComReg directs from time to time.
- 10.7 RTÉ shall make available on a publicly available website, information such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 7, as may be reasonably required by or for Broadcasters, and in the manner as specified by ComReg from time to time.
- 10.8 RTÉ shall publish all SLAs (and any amendments thereto) on a publicly available website.

## **11 OBLIGATION OF ACCOUNTING SEPARATION**

- 11.1 RTÉ shall maintain separated accounts as detailed in Annex 1 attached to this Decision Instrument.

## **12 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING**

- 12.1 RTÉ shall maintain appropriate cost accounting systems in respect of Access, including Associated Services and Associated Facilities, referred to in section 7, as may be agreed with ComReg from time to time.

- 12.2 Having regard to section 3.3 of this Decision Instrument, RTÉ shall be subject to a price control obligation in the form of an obligation of cost orientation, as regards the prices charged by it to any Broadcaster for Access, including Associated Services and Associated Facilities, referred to in section 7.
- 12.3 In particular, RTÉ shall ensure that its charges in respect of Access, including Associated Services and Associated Facilities, referred to in Section 7 are no more than the Fully Distributed Costs using the Historical Cost Accounting methodology, adjusted, where appropriate for non-relevant costs, as described in Annex 1, allowing for a reasonable rate of return as determined by ComReg Decision D10/20 of 14 October 2020 (ComReg Document 20/96) as may be amended or otherwise replaced from time to time.

## **PART IV – FURTHER GENERAL PROVISIONS AND EFFECTIVE DATE**

### **13 STATUTORY POWERS NOT AFFECTED**

- 13.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument) from time to time as the occasion requires.

### **14 MAINTENANCE OF OBLIGATIONS**

- 14.1 If any Section(s), clause(s) or provision(s) or portion(s) thereof contained in this Decision Instrument is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s) or portion(s) thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s) or portion(s) thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

### **15 WITHDRAWAL OF SMP OBLIGATIONS**

- 15.1 The Decision Instrument contained in Appendix E of ComReg Document No. 13/71, ComReg Decision D11/13 is hereby withdrawn at the Effective Date.

### **16 PUBLICATION AND NOTIFICATION**

- 16.1 This Decision Instrument shall be published on ComReg's website, [www.comreg.ie](http://www.comreg.ie) and notified to RTÉ.

### **17 EFFECTIVE DATE**

- 17.1 The effective date of this Decision Instrument shall be the date of its notification to RTÉ and it shall remain in force until further notice by ComReg.



**GARRETT BLANEY**

**CHAIRPERSON**

**THE COMMISSION FOR COMMUNICATIONS REGULATION**

**THE **XX** DAY OF **XXXXX** 2021**

## **ANNEX 1 – DETAIL OF THE ACCOUNTING SEPARATION OBLIGATIONS - MARKET B**

### **1 DEFINITIONS AND INTERPRETATION**

1.1 In this Annex 1, unless otherwise indicated:

**“Accounting Documentation”** refers to the description of policies and methodologies used to produce the financial information contained within the Regulated Accounts and the Additional Financial Data including those documents containing the information set out at section 5 of this Annex;

**“Accounting Policies”** means the specific policies and procedures used by a company to prepare its Regulated Accounts;

**“Additional Financial Data”** means the data that shall be provided by RTÉ, as determined by ComReg, on an annual basis;

**“Agreed Upon Procedures”** means procedures agreed between relevant parties pursuant to a letter of engagement;

**“Attribution Methods”** refers to the methods employed to allocate and apportion revenues, costs and capital employed to Market B or Service levels;

**“Auditor(s)”** means a firm(s) which is/are authorised to conduct the audit of financial statements of companies registered in Ireland;

**“Cost Component”** means the accumulation of various costs (direct, indirect, and common) through the various cost allocation stages within the cost accounting system from initial input layer through to final Services;

**“Effective Date”** means the date set out in Section 17.1 of this Decision Instrument;

**“EPM”** means equi-proportional mark-up;

**“External”** means the supply of Services to parties outside of RTÉ;

**“Fixed Asset”** means tangible and intangible items that are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes and which are expected to be used during more than one period;

**“Functional Cost Categories”** means the various expense categories as determined from time to time by ComReg;

**“Income Statement”** means a statement showing all items of income and expense recognised in a period;

**“Inter”** means the supply of Services between RTÉ and its subsidiaries;

**“Intra”** means the supply of Services within RTÉ;

**“Market B”** means the market for wholesale access to DTT multiplexing services as set out in section 4 of this Decision Instrument;

**“Mean Capital Employed”** is the mean of the assets and liabilities of RTÉ, adjusted to amend for certain assets and liabilities which are excluded for regulatory purposes;

**“Nearest Equivalent Charge”** means a price(s) set out in RTÉ’s Reference Offer (as defined in the Decision Instrument) price list which most closely represent(s) the technical capabilities of a Service as if it were an External transaction;

**“Regulatory Accounting Principles”** establish the key doctrines to be applied in the preparation of regulatory accounting information. They should include, but not be limited to, the principles of cost causality, objectivity, transparency and consistency of treatment;

**“Regulated Accounts”** means those accounts as described in section 3.2 to 3.8 of this Annex;

**“Separated Accounts”** refers to the financial information referred to in section 3.1 to 3.2 of this Annex;

**“Service(s)”** for the purposes of this Annex shall mean Multiplexing Services;

**“Statutory Accounts”** means the accounts of RTÉ, and its successors, which RTÉ is required to prepare pursuant to the Companies Act 2014 (No. 38 of 2014).

1.2 Where a capitalised term used in this Annex is not defined, the definition in the Market B Decision Instrument shall prevail.

## **2 FUNDAMENTAL REQUIREMENTS AND FURTHER SPECIFICATION OF SMP OBLIGATIONS**

2.1 RTÉ’s financial records and accounting systems shall be sufficiently detailed and supported by sufficient data to ensure that:

- (i) RTÉ is in a position to comply with the transparency, non-discrimination, accounting separation, price control, and cost accounting obligations imposed on it by the Decision Instrument; and,
- (ii) RTÉ is in a position to prepare Separated Accounts which shall be maintained for Market B and, where specified, for Services.

## **3 REPORTING AND TRANSPARENCY**

### **Separated Accounts**

3.1 Without prejudice to the generality of section 2 of this Annex, RTÉ shall prepare Separated Accounts annually.

3.2 RTÉ’s Separated Accounts shall contain:

- (i) Regulated Accounts (as set out in section 3.3 to 3.8 of this Annex);
- (ii) Additional Financial Data (as set out in section 3.9 to 3.13 of this Annex);

- (iii) Accounting Documentation (as set out in section 5 of this Annex).

### **Regulated Accounts**

- 3.3 RTÉ's Regulated Accounts will consist of Historical Cost Accounts ("HCA").
- 3.4 RTÉ's Regulated Accounts shall contain:
- (i) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts which shall include, but not be limited to, the following terms:
    - a. Cost causality;
    - b. Objectivity;
    - c. Transparency;
    - d. Consistency of treatment.
  - (ii) An Income Statement and a Statement of Mean Capital Employed (where considered necessary by ComReg);
  - (iii) Notes to the Regulated Accounts as required.
- 3.5 RTÉ's Regulated Accounts shall be accompanied by:
- (i) A signed statement from a suitably qualified person as approved by the board of RTÉ and ComReg acknowledging the board's responsibilities for the preparation of the Regulated Accounts and confirming its compliance with the requirements of this Annex in this respect.
  - (ii) A report and opinion by an Auditor on the Regulated Accounts and RTÉ's compliance with the requirements of this Annex in respect of the preparation of the Regulated Accounts, including the requirements set out in paragraph 6.1.(ii) of this Annex.
- 3.6 The Regulated Accounts shall be prepared in accordance with the Regulatory Accounting Principles and Accounting Policies. These Regulated Accounts shall show data for RTÉ's last complete financial period as well as the previous financial period and where these figures are not comparable, as a result of (for example) a material change in Accounting Policy, cost attribution methodology or material error, the figure for the preceding financial period must be adjusted, unless ComReg agrees in writing that it would be unreasonable to have to make such an adjustment.
- 3.7 In accordance with the transparency obligation in section 10 of the Decision Instrument, RTÉ shall publish its Regulated Accounts on its publicly available website no later than four months after the end of the financial period (or otherwise as required by ComReg).

3.8 RTÉ shall include the report and opinion of the Auditor with the published Regulated Accounts.

### **Additional Financial Data**

3.9 RTÉ shall prepare such Additional Financial Data as required by ComReg (from time to time) and in a format as requested by ComReg, which may include the following:

- (i) Schedule of charges by individual Broadcasters. This shall also be reconciled to the income per the Income Statement in paragraph 3.4.(ii) of this Annex.
- (ii) Copy of the Fixed Asset register of assets relevant to Services in respect of Market B;
- (iii) Breakdown of Market B specific costs.

3.10 Income Statements requested by ComReg pursuant to paragraph 3.9 of this Annex shall distinguish between External and Inter/Intra revenues and costs.

3.11 RTÉ's Additional Financial Data shall follow the same Regulatory Accounting Principles as applied in the preparation of the Regulated Accounts.

3.12 RTÉ shall submit Additional Financial Data to ComReg and, when required by it, the related opinion(s) of the Auditor or the report(s) from a qualified independent body, no later than four months after the end of the financial period (or otherwise as required by ComReg).

3.13 The format and level of detail shown in RTÉ's Additional Financial Data shall be determined by ComReg on an annual basis prior to the end of the financial period.

## **4 ACCOUNTING PRINCIPLES**

### **General**

4.1 The collection of data and the basis on which it is to be allocated and apportioned between Broadcasters is detailed under the following headings:

- (i) Cost allocation and apportionment principles (as set out in section 4.2 of this Annex);
- (ii) Cost allocation and apportionment rules (as set out in section 4.3 of this Annex);
- (iii) Inter/Intra transactions (as set out in section 4.4 of this Annex); and
- (iv) Survey techniques (as set out in section 4.5 of this Annex).

**Cost allocation and apportionment principles**

- 4.2 RTE shall allocate costs to each Service on a fully allocated cost basis, in the following manner:
- (i) Where possible, costs which can be directly assigned to a particular Service shall be so assigned.
  - (ii) Common costs, which are costs that cannot be directly assigned to a particular Service, shall be allocated as follows:
    - a. Whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
    - b. When direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible, the indirect linkage shall be based on comparable cost structures; and
    - c. When neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of an EPM, computed by using the ratio of all relevant expenses directly or indirectly assigned or allocated, to each Service.

**Cost allocation and apportionment rules**

- 4.3 RTE shall ensure that costs are apportioned among the various Cost Components on the basis of factors/drivers which reflect the different impact of each item on the Functional Cost Categories. Where survey techniques are applied for the apportionment of costs, the principles outlined in section 4.5 of this Annex shall be followed.

**Inter/Intra transactions**

- 4.4 RTE shall comply with the following transfer charging principles:
- (i) Transfer charges (revenues and costs) shall be attributed to Broadcasters, in accordance with the activities, which cause the revenues to be earned, or costs to be incurred.
  - (ii) The attribution described in (i) above shall be objective and not intended to benefit any particular Broadcaster.
  - (iii) There shall be consistency of treatment of transfer charges from period to period.
  - (iv) The transfer charging methods used shall be transparent. There shall be a clear rationale for the transfer charges used and each charge shall be justifiable (and supporting calculations shall be made available to ComReg including the details of the basis of calculation of any Inter/Intra transactions); and

- (v) The charge for Inter/Intra usage shall be equivalent to the charge that is levied if the Service(s) (regulated and unregulated) were an External sale rather than an Inter/Intra transaction. Where no equivalent charge exists, the Nearest Equivalent Charge shall be charged and fully justified to ComReg by RTÉ. Where no Nearest Equivalent Charge exists, a cost-based transfer charge shall be used and fully justified to ComReg by RTÉ, including the details of the basis of calculation of an Inter/Intra transactions.

### **Survey techniques**

- 4.5 RTÉ shall ensure that survey data is based on appropriate methods. This shall result in a fair and objective allocation of revenue (including transfer charges), costs (including transfer charges), assets and liabilities. In this regard, any survey techniques used shall take account of the following:
  - (i) The survey data is unbiased and objective;
  - (ii) The survey data is representative of the entire population;
  - (iii) The survey data is not obscured by seasonal or other factors; and
  - (iv) The survey data is updated annually.

## **5 ACCOUNTING DOCUMENTATION**

- 5.1 RTÉ's Accounting Documentation shall be sufficiently transparent and shall explain, inter alia, the regulatory principles used and the methodologies applied, for the purpose of preparing:
  - (i) The Regulated Accounts;
  - (ii) The Additional Financial Data.
- 5.2 The Accounting Documentation shall contain:
  - (i) Information on the sources of financial data;
  - (ii) Details on the cost drivers used to allocate costs;
  - (iii) Details on the Services offered and the associated capacity required on the Multiplex.
- 5.3 RTÉ shall review and update the Accounting Documentation annually.
- 5.4 RTÉ shall publish the Accounting Documentation annually on the publicly available website of RTÉ following ComReg's approval.
- 5.5 RTÉ shall submit its Accounting Documentation to ComReg within four months of the end of the financial period (or otherwise as required by ComReg).



## 6 REVIEW AND CONFIRMATION OF COMPLIANCE

### 6.1 RTÉ shall:

- (i) Submit a statement signed by a suitably qualified person as approved by the Board of RTÉ and ComReg acknowledging their responsibilities for the preparation of the Separated Accounts and confirming their compliance with the requirements of this Annex in this respect. This signed statement shall be submitted to ComReg four months after the end of the financial period (or otherwise as required by ComReg).
- (ii) Engage an independent Auditor qualified for appointment as an Auditor under the Companies Act to perform an audit of the Regulated Accounts, including considering compliance of the Regulated Accounts with this Annex, in accordance with International Standards on Auditing (UK and Ireland) and the principles and guidance set out by bodies' representative of the Irish accountancy professions from time to time. Such an audit opinion should be on:
  - a. "Fairly presents in accordance with ..." basis or
  - b. "Properly prepared in accordance with...." basis

in respect of the Regulated Accounts as a whole, as shall be notified in writing to RTÉ from time to time by ComReg.

- (iii) Provide a report in respect of RTÉ's Additional Financial Data from a qualified independent body, when required by ComReg from time to time, prepared according to Agreed Upon Procedures which have been agreed between ComReg, RTÉ and the qualified independent body.
- (iv) Consult with ComReg before the appointment/reappointment of the Auditor and provide assurances that its preferred Auditor has the necessary expertise.
- (v) Procure a qualified independent body, to provide an appropriate opinion or report on the compliance of RTÉ's Regulated Accounts, or part thereof, with this Annex, as required by ComReg from time to time. ComReg's requirements in this regard will be notified to RTÉ in advance of its financial period end or in exceptional circumstances [after the start of its next financial period] where such an opinion or report is required.

### 6.2 RTÉ shall ensure:

- (i) That the Accounting Documentation is subject to review by a qualified independent body annually; and
- (ii) That the processes and procedures used by RTÉ be subject to a review by a qualified independent body on an annual basis.

6.3 In this section, references to a qualified independent body may include an Auditor.

**ANNEX 2 – PARAMETERS FOR INCLUSION IN THE SLA OBLIGATION - MARKET B**

- 1.1 The SLA parameters shall include, but shall not be limited to the following:
- (i) The scope of the SLA and details of the duration and negotiation of the SLA;
  - (ii) The objective of the SLA;
  - (iii) Broadcasters' business support;
  - (iv) Fault incidents;
  - (v) Fault management;
  - (vi) Fault response;
  - (vii) Escalation process;
  - (viii) Network monitoring centre;
  - (ix) Service requests;
  - (x) Business continuity management;
  - (xi) Routine meetings;
  - (xii) Reports;
  - (xiii) A dispute resolution procedure to be used between parties;
  - (xiv) Provisions regarding confidentiality of non-public parts of the SLA;
  - (xv) A description of the network access to be provided, including technical information;
  - (xvi) The locations of the points of network access;
  - (xvii) The technical standards for network access (including any usage restrictions and other security issues);
  - (xviii) The conditions for access to ancillary and supplementary services;
  - (xix) Details of traffic and network management;
  - (xx) Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
  - (xxi) Details of quality metrics;
  - (xxii) Details of measures to ensure compliance with requirements for network integrity; and,
  - (xxiii) Rules of allocation between the parties when supply is limited.

## Annex: 6 Consultation with the Competition and Consumer Protection Commission



Garrett Blaney  
Chairperson  
Commission for Communications Regulation  
1 Dockland Central  
Guild Street  
Dublin 1, D01 E4X0

18 December 2020

**Re: Market Review Broadcasting Transmission Services in Ireland**

Dear Garrett,

Pursuant to Regulation 27(1) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), the Commission for Communications Regulation (“ComReg”) has consulted the Competition and Consumer Protection Commission (the “Commission”) with respect to ComReg’s proposed draft measures arising from its updated analysis of the Broadcasting Transmission Services (“BTS”) in Ireland.

On the basis of the facts and analysis presented by ComReg, the Commission is satisfied that there are no compelling grounds to disagree with ComReg’s conclusion that the existing definition of the BTS markets should be maintained. The Commission also agrees that, on the basis of the facts and analysis presented by ComReg, RTÉ Transmission Network DAC (trading as 2rn) and RTÉ each should be designated as having significant market power (“SMP”) and that it continues to be appropriate to maintain SMP designations on these undertakings identified by ComReg in its previous BTS Market review.

Yours sincerely



**Ibrahim Bah**  
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## **Annex: 7      European Commission Response to ComReg's Draft Measures**

A7.1      To be included