



Commission for  
**Communications Regulation**

## Consultation

### **Consultation on Implementation of Remedies – Wholesale National Markets for Analogue Terrestrial Broadcasting Transmission**

(Relates to Response to Consultation & Notification to European Commission  
Document 04/06)

<b>Document No:</b>	<b>04/80</b>
<b>Date:</b>	<b>22 July 2004</b>

All responses to this consultation should be clearly marked:-  
“Reference: Submission re ComReg 04/80 as indicated above,  
and sent by post, facsimile, e-mail or on-line at [www.comreg.ie](http://www.comreg.ie)  
(current consultations), to arrive on or before, **5.30 pm on the 16  
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Please note ComReg will publish all submissions with the  
Response to Consultation, subject to the standard  
confidentiality procedure.

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## 1 Executive Summary

- 1.1 The new communications regulatory framework requires ComReg to define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.<sup>1</sup> In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.
- 1.2 ComReg set out its initial proposals on the wholesale market for broadcasting transmission services to end users and went to consultation in October 2003<sup>2</sup>. In its Response to Consultation: Market Analysis Wholesale Broadcasting Transmission Services (ComReg Doc. No. 04/06) ComReg stated that the transmission network division of RTÉ, now known as RTÉ Transmission Network Limited (RTÉNL), had significant market power in each of the following national wholesale markets:
- Wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of radio content to end-users
  - Wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end-users
- 1.3 Furthermore, ComReg stated that the remedies most appropriate to apply in this market are:
- Transparency;
  - Non-discrimination;
  - Accounting Separation
- 1.1 As outlined in ComReg Document Number 04/06, ComReg proposed to consult further on the detailed implementation of the remedies to be imposed. This resulting consultation document outlines the nature of the potential competition problems identified in the markets, the principles to be applied when selecting appropriate remedies and the detail of the proposed remedies, including Transparency and Non-Discrimination obligations.
- 1.2 ComReg, as stated in the notification to the European Commission, and accepted by the Commission, had adopted a wait and see approach to the obligation of Accounting Separation. This took into account the public commitments made by RTÉ in its Code of Fair Trading Practice<sup>3</sup> and its agreement to operate under a Public Service Broadcasting Charter<sup>4</sup>, to provide transparency and separated accounts. ComReg has since obtained further information on these accounts from RTÉNL and believes that in their current format they are not sufficient to demonstrate compliance with a Non-Discrimination obligation. ComReg is

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<sup>1</sup> Regulation 26

<sup>2</sup> Market Analysis – Wholesale Broadcasting Transmission Services (ComReg Doc No 03/126)

<sup>3</sup> <http://www.rte.ie/about/organisation/fairtrading.PDF>

<sup>4</sup> <http://www.dcmnr.gov.ie/media/files/broadcasting/Published%20Public%20Service%20Broadcasting%20Charter.doc>

therefore also proposing to impose the obligation of Accounting Separation. The details of the Accounting Separation obligation will be subject to a further consultation at a later stage.

- 1.3 ComReg considers it unnecessary at this point to impose an Access obligation under Regulation 13 of the Access Regulations<sup>5</sup>. RTÉNL currently provides access to all the existing national radio and television broadcasters<sup>6</sup> and the possibility of new entrants is considered unlikely during the review period. Furthermore, there is provision in national legislation which can mandate access to RTÉ's transmission facilities for the independent national radio and television broadcasters.<sup>7</sup>
- 1.4 ComReg also considered imposing an obligation of Price Control and Cost Accounting but believes that an obligation of Accounting Separation is more proportionate at this time.
- 1.5 Respondents are asked for their views in terms of the remedies outlined and the proposed detail of these remedies.
- 1.6 ComReg would welcome comments from all interested parties on the questions posed and will accept written comments on or before the 16 September 2004.
- 1.7 As required by Regulation 20 of the Framework Regulations, any draft measure which ComReg proposes to adopt will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking a final decision.

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<sup>5</sup> European Communities (Electronic Communications Networks and Services)(Access) Regulations, 2003 (S. I. No. 305 of 2003)

<sup>6</sup> "broadcaster" means a person who supplies a compilation of programme material for the purpose of its being transmitted or relayed as a broadcasting service (whether that person transmits or relays that material as such a service or not); (Broadcasting Act, 2001)

<sup>7</sup> Part III, Section 16 of the Radio and Television Act, 1988.

## 2 Introduction

### Objectives under the Communications Regulation Act, 2002

2.1 Section 12 of the Communications Regulation Act 2002 states that the objectives of ComReg in exercising its functions, in relation to the provision of electronic communications networks, electronic communications services and associated facilities are:

- (i) to promote competition,
- (ii) to contribute to the development of the internal market, and,
- (iii) to promote the interests of users within the European Union.

2.2 This document is in line with these objectives which are also set out in the EU directives and transposing Irish regulations.

### The Regulatory Framework

2.3 Four sets of Regulations,<sup>8</sup> which transpose into Irish law four European Community directives on electronic communications and services,<sup>9</sup> entered into force in Ireland on 25 July 2003.

2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.<sup>10</sup> In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.<sup>11</sup>

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<sup>8</sup> Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the *Framework Regulations*"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the *Authorisation Regulations*"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the *Access Regulations*"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the *Universal Service Regulations*").

<sup>9</sup> The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the *Framework Directive*"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the *Specific Directives*"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the *Authorisation Directive*"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the *Access Directive*"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the *Universal Service Directive*"), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the *Privacy and Electronic Communications Directive*"), OJ 2002 L 201/37.

<sup>10</sup> Regulation 26.

<sup>11</sup> Regulation 27

## Process to Date

- 2.5 In October 2003 ComReg issued a consultation paper on market definition and analysis of the “broadcasting transmission services, to deliver broadcast content to end-users”. (ComReg Doc. No. 03/126) in accordance with the Recommendation on relevant product and service markets (“the Relevant Markets Recommendation”<sup>12</sup>) by the European Commission.
- 2.6 The response to consultation and notification were issued in February 2004 (ComReg Doc. No. 04/06) and in April 2004 RTÉNL was designated as having significant market power (SMP) (ComReg Doc. No. 04/47) in each of the following wholesale markets:
- The wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of radio content to end-users, and
  - The wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end-users.
- 2.7 The documents cited above signalled ComReg’s intention to consult on the details of the proposed remedies for these markets. This document now sets out the proposed remedies that ComReg believes are appropriate and ComReg seeks views on the issues outlined in this consultation document.
- 2.8 In carrying out market definition and market analysis, ComReg took the utmost account of the *Recommendation* and the *SMP Guidelines*. These may be revised from time to time by the E.U. Commission, and the market analysis process is to be repeated when this occurs.

## Structure of Document

- 2.9 The remainder of this consultation document is structured as follows:
- section 3 contains the background to the proposed market remedies, the nature of the potential competition problems, ComReg’s objectives and the detail of the proposed remedies;
  - section 4 contains the regulatory impact assessment;
  - section 5 contains the procedures for the submission of comments on this consultation document;
  - Annex A contains a summary of the consultation questions;

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<sup>12</sup> EU Commission Recommendation of 11 February, 2003 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

- Annex B contains a draft decision on remedies to be applied to the operator with SMP in the markets for wholesale national analogue terrestrial television and radio transmission services to end users;
- Annex C is an extract from the Access Regulations which lists the available remedies.

### **Consultation Process**

2.10 All responses to this consultation are welcome. Respondents are requested to reference comments to the relevant question numbers from the document.

2.11 The consultation period will run from 22 July 2004 to 16 September 2004 during which time ComReg welcomes written comments on any of the issues raised in this paper.

2.12 As required by Regulation 20 of the Framework Regulations, the draft measures will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking a final decision.

### 3 Proposed Market Remedies

#### The need for ex-ante regulation

- 3.1 According to the Guidelines<sup>13</sup>, the purpose of imposing *ex-ante* obligations on undertakings designated as having SMP is to ensure that undertakings cannot use their market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets. The Framework Directive sets out that it is essential that *ex-ante* regulation should only be imposed where there is lack of competition i.e. “in markets where there are one or more undertakings with significant market power (SMP) and where national and Community competition law remedies are not sufficient”.<sup>14</sup> The Guidelines make it clear that the mere designation of an undertaking as having SMP on a given market, without imposing any appropriate regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 16 (4) of the Framework Directive<sup>15</sup>. Indeed, NRAs must impose at least one regulatory obligation on an undertaking that has been designated with SMP<sup>16</sup>.
- 3.2 For the reasons detailed in the response to consultation (ComReg Doc. No. 04/06), ComReg found RTÉNL to have significant market power in each of the following markets:
- The wholesale market for the provision of national analogue broadcasting transmission services for the provision of radio content to end-users, and
  - The wholesale market for the provision of national analogue broadcasting transmission services for the provision of television content to end-users.
- 3.3 Where markets are effectively competitive, ex-post competition law is generally sufficient to prohibit market abuses by one or more parties. However, where, for historic reasons, a market is not effectively competitive, and/or where there are high and non-transitory barriers to entry, standard ex-post competition law remedies are not sufficient or of a timely enough nature to prevent or remedy market failures. In these circumstances, ex-ante regulation is required to promote and facilitate the development of competition.
- 3.4 *Ex-ante* obligations imposed by NRAs on undertakings with SMP aim to fulfil the specific objectives set out in the relevant regulations. Competition law remedies aim to prohibit agreements or abusive behaviour which restrict or distort competition in the relevant market<sup>17</sup>.
- 3.5 Given the substantial and non-transitory barriers faced by operators wishing to enter the wholesale national analogue terrestrial television and radio transmission

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<sup>13</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 16.

<sup>14</sup> Recital 27 of the Framework Directive.

<sup>15</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 114.

<sup>16</sup> *Ibid*, paragraphs 21 and 114.

<sup>17</sup> *Ibid* paragraph 31.



markets and the lack of potential competition within the timeframe of the review<sup>18</sup>, ComReg is of the view that some form of ex-ante regulation is necessary. As discussed in the consultation and response to consultation, wholesale transmission services are provided by RTE's network division (RTÉNL), downstream to RTE's broadcasters and to other independent broadcasters. RTÉNL, as part of a vertically integrated organisation, is in a position where it could exploit its market power in national analogue terrestrial transmission by discriminating against competing broadcasters in downstream markets, for example, via margin squeeze.

- 3.6 When considering the imposition of ex-ante regulation ComReg has an obligation to encourage efficient investment in infrastructure and promote innovation<sup>19</sup>, and to take into account the risks involved in such investment<sup>20</sup>.

### **Remedies Available in the Access Regulations**

3.7 As set out previously ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with significant market power<sup>21</sup>. ComReg also has the obligation under Regulation 6<sup>22</sup> to act in pursuit of its statutory obligations to ensure adequate access, interconnection and interoperability of services without prejudice to any measures which may be imposed on undertakings designated as SMP operators and subject to obligations listed in Regulation 10 to 14 of the Access Regulations<sup>23</sup>. The obligations are:

- Transparency, (Regulation 10)
- Non-discrimination, (Regulation 11)
- Accounting Separation, (Regulation 12)
- Access to, and use of, specific network facilities, (Regulation 13)
- Price Control and Cost Accounting, (Regulation 14)

An extract from the Access Regulations detailing these remedies is available in Annex C.

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<sup>18</sup> ComReg Document No. 03/126 - Market Analysis: Wholesale Broadcasting Transmission Services.

<sup>19</sup> Framework Directive Article 8(2)

<sup>20</sup> Access Regulation 14(2)

<sup>21</sup> Framework Regulation 27(4) states 'Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate'

<sup>22</sup> Access Regulation 6(1-5)

<sup>23</sup> Access Regulation 9(1) states 'Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 26 of the Framework Regulations, the Regulator shall impose on such an operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate'

## **The Nature of the Potential Competition Problems**

3.8 The list below describes potential competition problems which may occur in these markets. It should be noted that the list is not exhaustive, but provides an indicative list of the types of potential competition problems which ComReg considers could stem from RTÉNL's stable SMP position in national analogue terrestrial transmission and the ability to "vertically leverage" this market power.

### **Non-price Problems**

#### *Withholding of Information*

3.9 This relates to a practise whereby the SMP operator, on the wholesale market provides its own downstream broadcasters with information – such as the characteristics of the network-which it may not provide (either at all, or in a timely and/or accurate manner) to competing operators. Examples could include provision of data and logs on outages of service or data in relation to weaknesses in the transmission network. If a new or existing entrant did not have access to this type of information this could leave it at a competitive disadvantage with an ultimate loss of welfare to end-users. Regulation 10 of the Access Regulations, (Transparency), provides for, among other things, the publication of information on technical specifications, network characteristics and terms and conditions of supply and is of use in addressing this potential problem.

#### *Low Quality*

3.10 An SMP operator in the wholesale market that is part of a vertically integrated organisation may not provide services or information of the same quality or accuracy, or within the same timescales with which it provides its own downstream broadcasters. The incumbent with a stable monopoly position may also not have the same incentives to innovate and improve the quality of service provided to broadcasters. Regulation 10 (Transparency) would assist in assessing whether these potential problems exist, while Regulation 11 of the Access Regulations (Non-Discrimination) would help to ensure that the SMP operator provides services and information, to others under the same conditions and of the same quality as it provides for its own affiliates.

#### *Undue Requirements*

3.11 This may relate to contract terms such as overly onerous requirements for deposits, credit checks and non-disclosure agreements. Contract terms can also be imposed on customers to restrict switching. These may include long contracts, penalties for switching and administrative difficulties. ComReg noted in its market analysis (04/06) that RTÉNL has long term contracts with the national independent radio and television broadcasters and is well established in the market, so it would be difficult for a new entrant to offer a transmission service that would attract broadcasters away from RTÉNL.

#### *Quality Discrimination*

3.12 There are various possibilities to put competitors at a disadvantage by means of quality discrimination. An SMP operator, as part of a vertically integrated organisation, could discriminate against other broadcasters by not providing them with the same data on the quality of its transmission network as it provides to its

own downstream broadcasters or its own downstream broadcasters may be provided with service enhancements that are not offered to other broadcasters, despite their commercial value. An obligation of Non-Discrimination is again useful in addressing this potential problem.

### **Price Problems**

#### *Excessive prices*

3.13 The SMP operator may seek to set an excessive price on the wholesale market. This could be done in a number of ways, such as simply increasing prices to a level that is unjustified by cost or by the inappropriate allocation of costs to the wholesale product or the recovery of inefficiently incurred costs. To assess whether this potential pricing problem exists necessitates a requirement for Regulation 12 of the Access Regulations (Accounting Separation). It is also important that broadcasters have access to a clear, transparent and non-discriminatory charging mechanism.

3.14 Broadcasters in Ireland have coverage obligations contained in either primary legislation and or contractual obligations with the Broadcasting Commission of Ireland (BCI)<sup>24</sup>. The market analysis has shown that no viable competitive alternative to RTÉNL's national analogue terrestrial transmission networks currently exists. Also, as RTÉNL does not purchase services from radio or television broadcasters they have little countervailing power in relation to RTÉNL and in the face of a price increase for transmission services a broadcaster's only option may be to reduce spend on programming. This reduction in spending may have a knock on effect on audience share and revenue generated from advertising and sponsorship. Ultimately this could have an adverse impact on both competing broadcasters and other end-users of these services.

#### *Cross-subsidisation*

3.15 An operator that is pricing below cost is also engaging in cross-subsidisation by charging higher prices in another market, or by anticipating higher prices in the same market. Regulation 11 (Non-Discrimination) enables ComReg to impose obligations that deal with cross-subsidisation where it may harm competition through enabling a margin squeeze or predatory pricing. However, to be effective it requires as an ancillary remedy, Transparency, under Regulation 10. Furthermore, the need to assess whether prices may lie below cost will require the application of Regulation 12 (Accounting Separation).

#### *Price Discrimination*

3.16 It would be possible for an SMP operator in the wholesale market and part of a vertically integrated organisation, to use price discrimination to raise the wholesale cost to its external wholesale customers or to impose costs on them that are not borne by its own downstream broadcasters, thereby putting the external operator at an unfair disadvantage. As stated above, this potential competition problem may stem from SMP in the markets for wholesale national analogue terrestrial

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<sup>24</sup>[http://www.irishstatutebook.ie/1960\\_10.html](http://www.irishstatutebook.ie/1960_10.html) Broadcasting Authority Act, 1960 as amended

[http://www.irishstatutebook.ie/1988\\_20.html](http://www.irishstatutebook.ie/1988_20.html) Radio and Television Act, 1988

[http://www.irishstatutebook.ie/2001\\_4.html](http://www.irishstatutebook.ie/2001_4.html) Broadcasting Act 2001

transmission services. Broadcasters should be able to compare what they are charged for transmission vis a vis the SMP operator's downstream broadcasters or other third parties.

- 3.17 This potential problem requires an obligation of Non-Discrimination supported by obligations of Transparency and Accounting Separation. A margin squeeze (discussed below) could be considered as a form of price discrimination, where the vertically integrated operator is charging a higher price to downstream competitors than implicitly charged to its own retail affiliate, i.e. discrimination between internal and external provision. In this context Regulation 11 (Non-Discrimination) of the Access Regulations is an additional Regulation relevant for vertical leveraging that enables ComReg to impose obligations that deal with the problem of price discrimination.

**Q.1.** Do you agree with ComReg's description of potential competition problems arising in these wholesale markets? Are there any further competition problems that you believe ComReg should consider? Please elaborate your response.

### **ComReg's Objective**

- 3.18 ComReg's objective is to address the potential competition problems in these markets, of which the principal competition problem is that there may be an ability to distort the competitive dynamics at the wholesale level through the conditions of supply of wholesale transmission services.
- 3.19 ComReg is obliged under Article 8(4) of the Access Directive to impose obligations based on the nature of problems identified, proportionate and justified in the light of the objectives laid down in Article 8 of 2002/21/EC (Framework Directive)
- 3.20 By addressing the potential competition problems (outlined in paragraphs 3.8-3.17), ComReg, is of the view that it can impose remedies, in particular Accounting Separation, which, at a minimum, allow relevant parties to compare a detailed breakdown of the costs/charges for transmitting RTÉ's programme services against the amounts charged to other broadcasters for national analogue terrestrial broadcasting transmission services. ComReg is of the view that this will assist in monitoring non-discrimination and will be in the interests of end-users, which is in line with ComReg's policy objectives as stated in Section 12 of Communications Regulation Act, 2002.
- 3.21 In selecting the appropriate remedies, ComReg aims to provide greater predictability and legal certainty over charges for national analogue terrestrial transmission services to deliver radio and television services to end users and to increase transparency, while keeping the regulation required, to the minimum to achieve this.

**Q.2.** Do you agree with ComReg's objective for remedies in these wholesale markets?

### **Principles to be applied when selecting remedies**

- 3.22 When selecting appropriate remedies to address the potential competition problems identified, ComReg has an obligation to consider the objectives of Section 12 of the Communications Regulation Act, 2002 (to promote competition, to contribute to

the development of the internal market, and to promote the interests of users) and of Regulation 6 of the Access Regulations (to promote efficiency, promote sustainable competition and give maximum benefit to end users).

3.23 Furthermore Regulation 9 of the Access Regulations requires that any obligations imposed by ComReg must be based on the nature of the problem identified and be proportionate and justified in light of the objectives laid down in Section 12 of the Communications Regulation Act, 2002<sup>25</sup>.

3.24 While ComReg is obliged to impose the least burdensome and most effective remedy or remedies to address the competition problems in the markets, the interplay of a number of remedies may often be necessary. Therefore, the remedies available to ComReg could be seen as a complementary suite of remedies that support and reinforce each other, to which ComReg must give careful consideration.

**Q.3.** Do you agree with the principles which ComReg believes should be used when selecting remedies? Do you think that there are other principles that ComReg should consider when selecting appropriate remedies?

### **Proposed Remedies**

3.25 In this section ComReg sets out further detail on the remedies that it proposes to impose on RTÉNL, the designated SMP operator, and measures these against the principles set out above. In consideration of the remedies below, ComReg has set out remedies that it considers to be appropriate at this time and in the prevailing market conditions. The remedies proposed are to be applied in each of the following markets:

- The wholesale market for the provision of national analogue terrestrial broadcasting transmission services for the provision of radio content to end-users; and
- The wholesale market for the provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end-users.

3.26 However, ComReg reserves the right to refine these remedies if required by market needs or as a result of the output of the remedies that are eventually imposed.

3.27 ComReg considers that the remedies it proposes are the minimum required to remedy the potential competition problem identified (i.e. the ability to distort competitive dynamics at the wholesale level through the conditions of supply of the wholesale transmission services). ComReg considers that the barriers to entry in the market are such, that there is little prospect of competition in the near future. Some of the respondents to the market analysis consultation also made reference to the perceived lack of an independent review of RTÉNL's pricing and other practises.

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<sup>25</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services. See paragraphs 21 and 116. See also Regulation 9 (5) of the Access Regulations.

- 3.28 Historically, RTÉ did not have separate accounting systems for its radio and television divisions and its transmission division (RTÉNL). It is therefore difficult to understand the operating costs of managing the network and to match costs with the price charged for transmission to third parties. Lack of transparency makes it difficult to assess whether transmission services are currently provided on a fair, reasonable and non-discriminatory basis.
- 3.29 ComReg considers that some form of intervention is necessary to ensure that broadcasters are not being discriminated against in the national markets for wholesale analogue terrestrial transmission services for the provision of television and radio content to end-users. ComReg has also considered the existing regulatory requirements imposed by other State bodies on RTÉNL and has taken them into account in shaping the proposed remedies.

### **Proposed Transparency Remedy**

- 3.30 ComReg may under Regulation 10 (1) of the Access Regulations, require the SMP operator to ensure transparency in relation to access to their network, through requirements to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices. ComReg proposes an obligation of Transparency on RTÉNL in each of the following markets:
- The wholesale market for the provision of national analogue terrestrial broadcasting transmission services for the provision of radio content to end-users; and
  - The wholesale market for the provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end-users.
- 3.31 ComReg believes that an obligation of Transparency has many benefits. Firstly a Transparency obligation can assist ComReg and the industry in ascertaining and monitoring whether SMP operators are complying with a Non-Discrimination obligation, under Regulation 11, as the information needed to measure this would not otherwise be available. This can deter potential anti-competitive behaviour from SMP operators as it enables ComReg and the industry to actively monitor SMP behaviour. Furthermore, ComReg believes that an obligation of Transparency can serve to speed-up negotiation, avoid disputes and give confidence to market players that a service is not being provided on a discriminatory basis, as the information needed for the purpose of negotiations and disputes will be available to broadcasters and assist them in making informed decisions.
- 3.32 ComReg considers an obligation of Transparency directly targets the nature of the potential competition problems, as outlined in paragraphs 3.9 – 3.17, such as the withholding of information and quality of service issues and should therefore be imposed on RTÉNL. ComReg considers the remedy to be proportionate in that it is confined to the specific area of RTÉNL's managed transmission services, where there has been a finding of SMP. In addition, with regard to the costs that may be incurred via the imposition of an obligation of Transparency, ComReg believes these are few, in particular given RTÉ's commitments under its Code of Fair

Trading Practice.<sup>26</sup> ComReg also considers that the benefits of such a remedy outweigh any potential costs.

3.33 The following sets of obligations on the SMP operator are deemed necessary under the detail of a Transparency obligation.

- The filing with ComReg of all agreements and associated documents, for the provision of transmission services, including a description of all terms and conditions and prices. These are to be filed within 28 days of becoming effective and within 28 days of the imposition of this obligation. Updates to these agreements should also be filed within 28 days of becoming effective.
- To publish a complete schedule of tariffs on its website within 28 days of the imposition of this obligation. In addition, ComReg may request and publish such information from time to time. ComReg understands that RTÉ has committed in 2004 under its Code of Fair Trading Practice to maintain a schedule of tariffs for analogue and digital broadcast transmission services which will be reviewed annually by the board of RTÉ Transmission Network Ltd. (RTÉNL), before September of each year. The schedule of tariffs should also provide the pricing point at the commencement of any new contract.
- Advance notification of all price changes. The SMP operator shall send to ComReg a written and electronic notice of any amendment to the charges or the introduction of new charges, at which it provides wholesale national analogue terrestrial transmission services, not less than 28 days before any such amendment or introduction of new charges takes place. In addition the SMP operator must notify all relevant parties of such changes at the same time as ComReg is notified.
- To provide a Service Level Agreement with relevant parties. This would make transparent, details of the terms and conditions of supply, technical specifications and network characteristics. As part of its Code of Fair Trading Practice, ComReg understands that RTÉ has committed to providing a level of excellence in services by offering service level agreements (SLA), which will ensure a guaranteed level of service availability. Such details would include, but should not be limited to, where relevant:

Service Level Agreement:

- The scope of the agreement and details of the duration and negotiation of the agreement;

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<sup>26</sup>Under the Code of Fair Trading Practise, RTÉ has committed, in relation to the Transmission Network, to operate its services in a transparent, accountable and non-discriminatory way. It will provide service level agreements and provide financial reports which clearly show the basis of allocation of costs to the various services it supports. From 2004 it will maintain a schedule of tariffs, calculate tariffs based on industry standard practise and the schedule of tariffs will provide the pricing point at the commencement of any new contract.

(<http://www.rte.ie/about/organisation/fairtrading.PDF>),

- The objective of the agreement;
- Broadcasters' Business Support;
- Fault Incidents;
- Fault Management;
- Fault Response;
- Escalation Process;
- Network Monitoring Centre;
- Service Requests;
- Business Continuity Management;
- Routine Meetings;
- Reports;
- A dispute resolution procedure to be used between parties;
- Provisions regarding confidentiality of non-public parts of the agreements;
- A description of the Network Access to be provided, including technical information;
- The locations of the points of Network Access;
- The technical standards for Network Access (including any usage restrictions and other security issues);
- The conditions for access to ancillary and supplementary services;
- Details of traffic and network management;
- Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
- Details of quality metrics;
- Details of measures to ensure compliance with requirements for network integrity; and
- Rules of allocation between the parties when supply is limited.

3.34 ComReg believes that it is appropriate and proportionate that the proposed remedies apply to the SMP operator. The transparency requirements outlined above are not overly burdensome and can assist in remedying the competition problem identified. ComReg believes that the above Transparency obligations will:



- Provide visibility to the terms and conditions through which organisations can purchase services, enabling negotiations to be undertaken more speedily and reducing potential complaints;
- Enable organisations to react to price changes in a timely manner;
- Assist in monitoring a Non-Discrimination obligation.

*Note that the issue of transparency associated with Accounting Separation will be contained in the detail of the Accounting Separation consultation.*

3.35 ComReg believes that an obligation of Transparency may help to deter anti-competitive behaviour as the internal transactions of the SMP operator and the conditions relating to standards, quality and delivery of service are made as transparent as possible. Transparency would be made more effective by the addition of the obligation of Non-Discrimination as it allows national regulatory authorities to use the information obtained under a Transparency obligation to check that an SMP operator is not behaving in a discriminatory fashion.

**Q.4.** Do you agree that an obligation of Transparency should be imposed on RTÉNL? Please provide a detailed answer.

**Q.5.** Do you agree that RTÉNL should be required to publish a schedule of tariffs? If so, what do you think this schedule should contain? Please provide a detailed answer.

**Q.6.** If RTÉNL is to provide advance notification of new charges or amendments to existing charges do you agree that 28 days is a sufficient time period? Please give reasons for your answer.

**Q.7** Do you believe that ComReg should require RTÉNL to make public any further information other than that outlined above? Please provide support for your answer.

### **Proposed Non-Discrimination Remedy**

3.36 Regulation 11 of the Access Regulations lays down the requirements with regard to the obligation of Non-Discrimination and ComReg proposes an obligation of Non-Discrimination on RTÉNL in each of the following markets:

- The wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of radio content to end-users; and
- The wholesale market for the provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end-users.

3.37 ComReg has considered whether a requirement of Transparency only would suffice. While such an obligation would provide operators with information and clear processes to which they may not otherwise have access, it would not overcome the basic potential competition problems, as outlined in paragraphs 3.9 to 3.17, relating to RTÉNL's position as an SMP provider in these markets. RTÉNL charges RTE for national analogue terrestrial transmission services. ComReg

considers that a Non-Discrimination obligation can serve (for all broadcasters) to ensure that RTÉNL does not distort competition by virtue of it being part of a vertically integrated organisation which supplies services to undertakings with which RTÉ itself competes on downstream markets.<sup>27</sup>

- 3.38 ComReg considers that an SMP operator could also discriminate on non-price parameters, such as quality of service or on terms and conditions of supply and that Non-Discrimination is the only remedy that can directly target these potential competition problems. Therefore ComReg considers that an obligation of Non-Discrimination is necessary to ensure that RTÉNL does not discriminate in favour of RTÉ's downstream broadcasters.
- 3.39 A remedy of Non-Discrimination would require that RTÉNL applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent circumstances. Such an obligation should ensure that RTÉNL provides services and information to others under the same conditions and of the same quality as the SMP operator provides for its own services or those of its parent company or partners and associates. In providing the service there should be no unreasonable delays, no undue bundling and no undue contractual terms for broadcasters who wish to avail of the service.
- 3.40 ComReg considers that an obligation of Non-Discrimination is proportionate as it does not preclude differential pricing being offered to broadcasters depending on the services required and the circumstances of individual broadcasters. That it is transparent in its intention that broadcasters under equivalent circumstances are not to be discriminated against. ComReg considers that the costs that may be incurred via the imposition of an obligation of Non-Discrimination are few in particular given RTÉ's commitments under its Code of Fair Trading Practice, referred to in paragraph 3.32 and that the benefits of such a remedy outweigh any such costs.
- 3.41 Information and services must be provided to broadcasters within timescales, on a basis, and of a quality which are, as a minimum, at least as good as those provided to RTÉNL's own services or those of its parent company or partners and associates. In particular, the details of the terms and conditions of supply, technical characteristics and network specifications referred to in paragraph 3.33, should be provided in a non-discriminatory manner. The Service Level Agreements provided under the obligation of Transparency, are necessary to monitor RTÉNL's obligation of Non-Discrimination, and would ensure that equivalent service is being provided in equivalent circumstances.
- 3.42 ComReg also believes that RTÉ's downstream arm should not have privileged access to RTÉNL wholesale. For example, other broadcasters should be afforded the equivalent access to RTÉNL wholesale as RTÉ's broadcasters.
- 3.43 In considering Non-Discrimination, ComReg believes it is difficult to specify a list of prohibited behaviour as such a list, could fetter ComReg's discretion in the event of any future breaches of the obligation. ComReg proposes to address any allegation of discrimination through dispute resolution procedures where appropriate.

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<sup>27</sup> Recital 17 of Access Directive

3.44 The obligation of Non-Discrimination requires that the SMP operator demonstrates that the provision of services to other broadcasters is under the same conditions (i.e. price) as the SMP operator provides for its own services or those of its parent company or partners. This obligation applies to prices as well as operational matters. ComReg considers that the obligation of Accounting Separation is required to support the obligation of Non-Discrimination. ComReg proposes to consult further on the detailed implementation of Accounting Separation and non discrimination issues under the new framework

**Q.8.** Do you agree that an obligation of Non-Discrimination should be imposed on RTÉNL? Please elaborate your answer making reference to ComReg's interpretation of such an obligation as set out above.

### **Proposed Accounting Separation Remedy**

3.45 Regulation 12 sets out the requirements with regard to the obligation of Accounting Separation and ComReg proposes an obligation of Accounting Separation on RTÉNL in each of the following markets:

- The wholesale market for the provision of national analogue terrestrial broadcasting transmission services for the provision of content to end-users and;
- The wholesale market for the provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end-users.

3.46 It has been outlined above how the obligation of Non-Discrimination is important as a remedy for a number of identified potential competition problems. The obligation of Accounting Separation will support ComReg in its monitoring of RTÉNL's behaviour with regard to Non-Discrimination, by clearly reporting its wholesale prices and internal transfer prices for relevant services, as well as making transparent the non-discriminatory allocation of costs between products and services.

3.47 In the earlier consultation, ComReg adopted a wait and see approach to Accounting Separation, taking into account the public commitments made by RTÉ in reference to the Public Service Broadcasting Charter and Code of Fair Trading Practice, to provide transparency and separated accounts. ComReg has since obtained further information on these accounts from RTÉNL and believes that in their current format the accounts are not sufficient to support compliance with a Non-Discrimination obligation. ComReg therefore proposes to impose the obligation of Accounting Separation on RTÉNL.

3.48 Separated accounts will help disclose possible market failures and provide evidence, in relevant markets of the presence or absence of discrimination. It will make visible the wholesale prices and internal transfer prices of a dominant operator's products and services.

3.49 An obligation of Non-Discrimination can require, *inter alia*, the imposition of financial reporting regimes in order to monitor RTÉNL's compliance with such an obligation. ComReg believes it appropriate to impose an obligation of Accounting

Separation upon RTÉNL, in each of these markets, given RTÉNL's designation of SMP and the identification of Non-Discrimination as a means to remedy the potential competition problems discussed earlier.

- 3.50 ComReg is proposing that RTÉNL as an SMP operator should have an obligation not to unduly discriminate. RTÉNL, as part of a vertically integrated undertaking may have an incentive to provide wholesale services on terms and conditions that discriminate in favour of RTÉ's downstream activities in such a way that may have a material effect on competition. The obligation of Accounting Separation will support ComReg in its monitoring of RTÉNL's behaviour with regard to non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services.
- 3.51 ComReg must ensure that the obligation proposed is based on the tenets set out in the Access Regulations. In this regard, the Accounting Separation obligation is designed to help in the provision of evidence from RTÉNL which may demonstrate the presence or absence of price discrimination. ComReg believes the imposition of Accounting Separation on RTÉNL to be justifiable and based upon the nature of the problem identified. Additionally, as RTÉNL has already developed a financial model to demonstrate the cost of services, ComReg considers the costs that may be incurred via the imposition of an obligation of Accounting Separation should be minimal. If ComReg were not to impose this obligation, it would not have any means of monitoring Non Discrimination.
- 3.52 ComReg considers it unnecessary at this point to impose an Access obligation under Regulation 13 of the Access Regulations<sup>28</sup>. RTÉNL currently provides access to all of the national radio and television broadcasters and the possibility of new entrants is considered unlikely during the review period. Furthermore, there is provision in national legislation which can mandate access to RTÉ's transmission facilities for the independent national radio and television broadcasters.<sup>29</sup>
- 3.53 ComReg has also considered the options of imposing an obligation of Price Control and Cost Accounting on RTÉNL but considers that an obligation of Accounting Separation is more proportionate at this time. According to RTÉ's Annual Report, total revenue and TV licence fee income amounted to €179 million in 2003, while revenue from the regulated business accounted for €15 million of this figure.<sup>30</sup> ComReg is conscious of its obligation to impose regulation which is proportionate and is not convinced that an obligation of Price Control and Cost Accounting is proportionate at this time.
- 3.54 There is a degree of uncertainty surrounding the future of the national analogue terrestrial transmission networks, with the advent of DTT (Digital Terrestrial Television) and DAB (Digital Audio Broadcasting) and RTÉNL currently has only two third-party customers (in addition to RTÉ broadcasters and affiliates) in the wholesale markets under consideration. Furthermore, there is no scope for additional, independent analogue terrestrial television broadcasters under existing legislation. As RTÉ is part funded by the licence fee it has corresponding

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<sup>28</sup>European Communities (Electronic Communications Networks and Services)(Access) Regulations, 2003 (S. I. No. 305 of 2003)

<sup>29</sup> Part III, Section 16 of the Radio and Television Act, 1988.

<sup>30</sup> Radio Telefís Éireann: Annual Report & Consolidated Financial Statement Statements 2003.

obligations to ensure that public funding is expended in a fair and transparent manner and has produced a Code of Fair Trading Practise, referenced in paragraph 3.32. RTÉ is also subject to obligations under national, primary legislation and is subject to the Public Service Broadcasting Charter.

3.55 ComReg, therefore, considers that at this time any further obligations could be regarded as disproportionate. The benefits of imposing further obligations are not clearly evident at this stage, given that contracts are already in place between RTÉ and the national independent radio and TV broadcasters. Notwithstanding the above, ComReg considers that it may be necessary to reconsider this position, should the output of Accounting Separation show excess profits within the relevant parts of RTÉNL operations designated as having SMP.

3.56 ComReg proposes to consult further on the detailed implementation of Accounting Separation under the new framework.

<p><b>Q.9.</b> Do you agree that an obligation of Accounting Separation should be imposed on RTÉNL?</p>
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## 4 Regulatory Impact Assessment

4.1 The Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources under Section 13 in accordance with S13 of the Communications Regulation Act, 2002) published in February 2003, directs:

*“The Commission before deciding to impose regulatory obligations on undertakings in the market for electronic Communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government’s Better Regulation programme.”*

4.2 ComReg is obliged by the *Framework Regulations* to impose an obligation on undertakings with significant market power<sup>31</sup>. ComReg is further obliged to impose at least one of the obligations listed in Articles 9 to Article 13 inclusive of the Access Directive<sup>32</sup>. The obligations under the Access Directive are as follows:

- Transparency
- Non-Discrimination
- Accounting Separation
- Access to, and use of, specific network facilities
- Price Control and Cost Accounting

4.3 ComReg has a responsibility under Article 8(4) of the Access Directive to impose obligations based on the nature of problems identified, proportionate and justified in the light of the objectives laid down in Article 8 of 2002/21/EC (Framework Directive).

4.4 ComReg considers that the obligations of Transparency, Non-Discrimination and Accounting Separation are the minimum necessary to address the potential competition problems in the relevant markets as detailed in section 3. Furthermore ComReg considers these obligations to be proportionate and justified.

4.5 ComReg considers it unnecessary at this point to impose an Access obligation under Regulation 13 of the Access Regulations<sup>33</sup>. RTÉNL currently provides access to all of the national radio and television broadcasters and the possibility of new entrants is considered unlikely during the review period. Furthermore, there is

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<sup>31</sup> Article 16.4 states ‘Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations...’

<sup>32</sup> Article 8(2) of Access Directive

<sup>33</sup>European Communities (Electronic Communications Networks and Services)(Access) Regulations, 2003 (S. I. No. 305 of 2003)

provision in national legislation which can mandate access to RTÉ's transmission facilities for the independent national radio and television broadcasters.<sup>34</sup>

*“Co-operation with Radio Telefís Éireann in use of broadcasting installation”.*

**16.—(1)** *The Minister may, at the request of the [Broadcasting] Commission [of Ireland] and after consultation with Radio Telefís Éireann, require the latter to co-operate with sound broadcasting contractors 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 to be established under this Act.*

*(2) A sound broadcasting contractor shall make to Radio Telefís Éireann such periodical or other payments in respect of any facilities provided in pursuance of subsection (1) as the Minister, after consultation with Radio Telefís Éireann and the Commission, directs.”*

While, Part IV, Section 18 of the Act provides for the same to apply to the television programme service contractor:

**18.—(1)** *The provisions of Part III of this Act, other than sections 7, 8 and 15, relating to the powers, duties, functions, obligations and responsibilities of the Minister, the Commission and sound broadcasting contractors respectively, shall apply with respect to the television programme service contract entered into by the Commission and the television programme service provided under this Part, and any reference in Part III of this Act to a sound broadcasting contractor shall for the purposes of this Part be construed as a reference to the television programme service contractor.*

- 4.6 ComReg has considered the option of imposing an obligation of Price Control and Cost Accounting on RTÉNL but as stated in paragraph 3.53, considers that an obligation of Accounting Separation is more proportionate at this time. However it may be necessary to reconsider this position, should the output of Accounting Separation show excess profits within the relevant parts of RTÉNL operations, designated as having SMP
- 4.7 In addition, ComReg considers the market analysis process is a comprehensive review of the sector under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction quoted in 4.1 above.
- 4.8 ComReg, taking into account the policy directions made under Section 13 of the Communications Regulation Act, 2002 and the Directives and Regulations of the New Regulatory Framework, believes that the remedies listed in section 3 are appropriate, proportionate and justified. In terms of the promotion of competition, the development of the internal market and the promotion of the interests of users within the Community, ComReg considers that the proposed remedies will have the following neutral to positive effect.

#### *The Promotion of Competition*

- 4.9 RTÉNL is the only supplier and hence has 100% market share in the market for wholesale national analogue terrestrial television transmission and the market for national analogue terrestrial radio transmission. Due to the characteristics of the

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<sup>34</sup> Part III, Section 16 of the Radio and Television Act, 1988.

national analogue terrestrial radio and television transmission networks, with sunk costs and network effects, it is highly unlikely that it would be economically replicated. There is also little prospect of competition developing within the timeframe of the review. One of the objectives of the regulation of markets with such a structure is to constrain the exercise of market power and to ensure that there is no distortion or restriction of competition. By proposing the above obligations ComReg is attempting to replicate the effects of competition in the provision of services to users of RTÉNL's networks.

- 4.10 ComReg considers that the obligations of Transparency, Non-Discrimination and Accounting Separation are proportionate and justified in light of RTÉNL's SMP in the markets concerned.

*The Promotion of the Interests of Users within the Community*

- 4.11 As outlined in section 3, one of the potential competition problems identified was the ability to price discriminate in the markets for wholesale national analogue terrestrial television transmission and national analogue terrestrial radio transmission. Independent broadcasters can be regarded as users in the context of these wholesale markets and therefore the implementation of these remedies will allow the internal transfer prices to be rendered visible, while removing the ability to distort the competitive dynamics at wholesale level through the conditions of supply of wholesale transmission services. In addition, price discrimination can adversely affect the quality of programming that can be made available to end-users. The imposition of these remedies, will promote the interests of end-users as they allow the minimum protection against any excessive pricing or discrimination in price/ non-price terms and conditions. Furthermore, the proposed remedies promote the provision of clear information, in particular requiring transparency of tariffs and conditions for the use of the transmission services.

- 4.12 ComReg considers that the remedies are both proportionate and justified, in particular as the aim is for broadcasters to be treated fairly while not precluding the possibility of differential pricing being offered to broadcasters depending on the services required.

*The Development of the Internal Market*

- 4.13 The development of the internal market requires the regulator to ensure that there is no discrimination in the treatment of undertakings providing electronic communications networks and services. The proposed obligations do not discriminate in terms of treatment and are targeted at the managed transmission services, in which RTÉNL has been found to have SMP. All national analogue terrestrial broadcasters should therefore be subject to equal treatment in equivalent circumstances.

- 4.14 ComReg considers that the proposed remedies of Transparency, Non-Discrimination and Accounting Separation are therefore both proportionate and justified.

<b>Q.10.</b> Do you agree with ComReg's regulatory impact assessment?
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## 5 Submitting Comments

All comments are welcome; however it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

The consultation period will run from 22 July 2004 until 5.30pm, 16 September 2004, during which time ComReg welcomes written comments on any of the issues raised in this paper.

ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.

Having analysed and considered the comments received, ComReg will review the proposed remedies and publish a report on the consultation which will *inter alia* summarise the responses to the consultation.

In order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its office, subject to confidentiality.

## **6 Annex A: Consultation Questions for Proposed Market Remedies**

- Q.1.** Do you agree with ComReg's description of potential competition problems arising in these wholesale markets? Are there any further competition problems that you believe ComReg should consider? Please elaborate your response.
- Q.2.** Do you agree with ComReg's objective for remedies in these wholesale markets?
- Q.3.** Do you agree with the principles that ComReg believe should be used when selecting remedies? Do you think there are other principles that ComReg should consider when selecting appropriate remedies?
- Q.4.** Do you agree that an obligation of Transparency should be imposed on RTÉNL? Please provide a detailed answer.
- Q.5.** Do you agree that RTÉNL should be required to publish a schedule of tariffs, and if so, what do you think this should contain? Please provide a detailed answer.
- Q.6.** If RTÉNL is to provide advance notification of new charges or any amendments to existing charges do you agree that 28 days is a sufficient time period? Please provide reasons for your answer.
- Q.7.** Do you believe that ComReg should require RTÉNL to make public any further information than that outlined above? Please provide support for your answer.
- Q.8.** Do you agree that an obligation of Non-Discrimination should be imposed on RTÉNL? Please elaborate your response making reference to ComReg's interpretation of such an obligation as set out above.
- Q.9.** Do you agree that an obligation of Accounting Separation should be imposed on RTÉNL? Please provide a detailed answer.
- Q.10.** Do you agree with ComReg's regulatory impact assessment?
- Q.11.** Do you agree with the wording of the draft Decision? Please elaborate your response.

## 7 Annex B: Draft Direction

### 1 Statutory Powers Giving Rise to the Decision

- 1.1 In making this Decision, the Commission for Communications Regulation ('ComReg') has taken account, of amongst other things, its functions under Regulation 6 (1) of the Access Regulations,<sup>35</sup> has (where appropriate) complied with the Policy Directions made by the Minister<sup>36</sup> and has also taken the utmost account of the EU Commission's Recommendation<sup>37</sup> and the Guidelines<sup>38</sup>. This Decision is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the markets referred to in section 2 of this Decision,<sup>39</sup> as part of the consultation process arising from the ComReg document entitled Market Analysis Wholesale Broadcasting Transmission Services ComReg Doc. No. 03/126 (Response to Consultation Document 04/06 and Decision 04/47) dated 22 October 2003. The said document forms part of this Decision.
- 1.2 This Decision is made pursuant to the provisions of Regulations 25, 26 and 27 of the Framework Regulations<sup>40</sup>, Regulations 9, 10, 11 and 12, of the Access Regulations and having regard to sections 10 and 12 of the Communications Regulations Act, 2002.

### 2 Market Definition

- 2.1 The wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of radio content to end users; and
- 2.2 The wholesale market for provision of national analogue terrestrial broadcasting transmission services for the provision of television content to end users.
- 2.3 The relevant geographical market for the product markets is defined as Ireland.

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<sup>35</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Regulations').

<sup>36</sup> Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

<sup>37</sup> EU Commission Recommendation of 11 February, 2003 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>38</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

<sup>39</sup> As referred to in the EU Commission's Recommendation.

<sup>40</sup> S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

### **3 Designation of Undertaking with Significant Market Power**

- 3.1 RTÉ Networks Limited (RTÉNL) is designated as having SMP in each of the wholesale markets for radio and television broadcasting transmission services on national analogue terrestrial networks and is referred to herein as RTÉNL. (ComReg Doc. No. 04/47)

### **4 SMP Obligations Generally**

- 4.1 In accordance with Regulation 9 of the Access Regulations, RTÉNL shall have imposed on it, the obligations of Transparency, Non-Discrimination and Accounting Separation obligations as provided for by Regulations 10, 11 and 12 of the Access Regulations respectively. These obligations are detailed in the sections below.

### **5 Obligation of Transparency**

- 5.1 The SMP Operator RTÉNL shall file with ComReg all agreements and associated documents, for the provision of transmission services, including, a description of all terms and conditions and prices.
- 5.2 Each agreement for the provision of transmission services is to be filed within 28 days of the imposition of this Decision becoming effective. Each new agreement and updates to these agreements must also be filed within 28 days of this Decision becoming effective.
- 5.3 RTÉNL will publish on their website a complete schedule of tariffs, within 28 days of the imposition of these remedies becoming effective.
- 5.4 RTÉNL shall send to ComReg a written notice (which may be in electronic format) of any new charges or any amendment to the existing charges at which it provides national analogue terrestrial transmission services, not less than 28 days before the introduction of any such new charge or any such amendment to existing charges takes place.
- 5.5 RTÉNL shall notify all parties with which RTÉNL has a contractual arrangement for the relevant services of the matters referred to in section 5.3 and 5.4 at the same time as ComReg is notified.
- 5.4 The SMP operator RTÉNL shall make available to all parties with which RTÉNL has a contractual arrangement for the relevant services and to ComReg, details of the technical specifications, network characteristics and terms and conditions of supply, under a service level agreement (SLA), as follows:
- a. The scope of the agreement and details of the duration and negotiation of the agreement;
  - b. The objective of the agreement;
  - c. Broadcasters' Business Support;
  - d. Fault Incidents;

- e. Fault management;
- f. Fault Response;
- g. Escalation Process;
- h. Network Monitoring Centre;
- i. Service Requests;
- j. Business Continuity Management;
- k. Routine Meetings;
- l. Reports;
- m. A dispute resolution procedure to be used between parties;
- n. Provisions regarding confidentiality of non-public parts of the agreements;
- o. A description of the Network Access to be provided, including technical information;
- p. The locations of the points of Network Access;
- q. The technical standards for Network Access (including any usage restrictions and other security issues);
- r. The conditions for access to ancillary and supplementary services;
- s. Details of traffic and network management;
- t. Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
- u. Details of quality metrics;
- v. Details of measures to ensure compliance with requirements for network integrity; and
- w. Rules of allocation between the parties when supply is limited.

## **6 Obligation of Non-discrimination**

- 6.1 The SMP operator RTÉNL shall have an obligation of Non-Discrimination as provided for by Regulation 11 of the Access Regulations.
- 6.2 Without prejudice to the generality of section 6.1 and Regulation 11 of the Access Regulations, RTÉNL shall ensure that it offers a SLA to broadcasters and all of the detail contained in section 5 on a non-discriminatory basis.

## **7 Obligation of Accounting Separation**

- 7.1 RTÉNL shall have an obligation in relation to Accounting Separation as provided for by Regulation 12 of the Access Regulations. The details of this obligation shall be contained in a decision or decisions to be made by ComReg, following further consultation in relation to the detailed requirements for, and the practical implementation of accounting separation.

## **8 Provision of Information**

- 8.1 ComReg may, under Regulation 17 of the Framework Regulations require any undertaking to provide (within such time as ComReg shall specify in the document containing the requirement) any information, including financial information, that ComReg considers necessary for the purpose of ensuring compliance with this Decision.

## **9 Directions**

- 9.1 ComReg may, for the purpose of further specifying requirements to be complied with relating to obligations imposed by this Decision, issue directions to any undertaking to do or refrain from doing anything which ComReg specifies in the direction and the undertaking shall comply with any such directions.

## **10 Period for which the Obligations shall remain in force**

- 10.1 The obligations under this Decision shall remain in force until further notice unless removed by ComReg following the completion of any further market review has been completed.

## **11 Effective Date**

- 11.1 This Decision shall be effective from the [•] day of [•]

John Doherty  
Chairman  
The Commission for Communications Regulation  
The [•] day of [•]

<p><b>Q. 11.</b> Do you agree with the wording of the draft Decision? Please elaborate your response</p>
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## **8 Annex C: Obligations under the Access Regulations**

### Obligation of Transparency

8.1 Regulation 10 sets out the requirements with regard to the obligation of Transparency and covers the following;

- a. Publication of information such as accounting information, technical specifications, network characteristics, terms and conditions of supply and use and prices in relation to interconnection and/or access;
- b. Publication of a sufficiently unbundled reference offer;
- c. The Regulator's power to specify the precise information to be made available in the reference offer with regards to the level of detail and the manner of publication;
- d. The Regulator's power to make changes to the reference offer and to direct the operator designated as having significant market power to publish the reference offer with such changes.

### Obligation of Non-discrimination

8.2 Regulation 11 lays down the requirements with regard to the obligation of Non-discrimination and covers the following;

- a. Regulator's power to impose non-discrimination in relation to interconnection and/or access;
- b. Such non-discrimination shall ensure that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and shall ensure that the operator 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.

### Obligation of Accounting Separation

8.3 Regulation 12 sets out the requirements with regard to the obligation of Accounting Separation and covers the following;

- a. Regulator's power to impose accounting separation on an operator in relation to specified activities related to interconnection and/or access;
- b. Regulator's power to make a vertically integrated company to make transparent its wholesale prices and its internal transfer prices to ensure compliance with any obligation imposed under Regulation 11 and to prevent unfair cross-subsidy.

### Obligation of access to, and use of, specific network facilities

8.4 Regulation 13 lays down the requirements with regard to the obligation of access to and the use of specific network facilities and covers the following;

- a. Regulator's power to impose on an operator obligations to meet reasonable request for access;
- b. Regulator's power to attach conditions of fairness, reasonableness and timeliness to the obligation to meet reasonable request for access;
- c. Regulator's obligation to review the imposition of meeting reasonable requests for access against a number of factors to ensure proportionality.

Price control and cost accounting obligations

8.5 Regulation 14 sets out the requirements with regard to the obligation of Price control and cost accounting and covers the following;

- a. Regulator's power to impose cost orientation of prices and obligations concerning cost accounting systems for the provision of interconnection and/or access where a market analysis indicates that a lack of effective competition means that an operator might sustain prices at an excessively high level or apply a price squeeze;
- b. Regulator's obligation that the operator is able to earn a reasonable rate of return on adequate capital employed following the imposition of cost oriented prices;
- c. Regulator's obligation to ensure that the cost recovery mechanism serves to promote efficiency and sustainable competition and maximise consumer benefits;
- d. Regulator's power to direct an operator to provide full justification for its prices and to require prices to be adjusted;
- e. Clarification that the burden of proof is place upon the operator show that charges are derived from costs including a reasonable rate of return;
- f. Regulator's obligation to ensure that where implementation of a cost accounting system is imposed under this Regulation, a description of the system is made publicly available, verified as appropriate and a statement regarding compliance published annually.