



Commission for
Communications Regulation

Consultation Paper

Three Criteria Test on the Broadcasting Transmission Market

Document No:	10/98
Date:	03 – 12 - 2010

All responses to this consultation should be clearly marked:-
“Reference: Submission re ComReg 10/98” as indicated above,
and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5pm, Thursday, 20
January 2011, to:

Mr. Jason Cleary
Commission for Communications Regulation
Irish Life Centre
Abbey Street
Freepost
Dublin 1
Ireland

Ph: +353-1-8049600 Fax: +353-1-804 9680 Email:
jason.cleary@comreg.ie

Please note ComReg will publish all respondents submissions
with the Response to this Consultation, subject to the provisions
of ComReg’s guidelines on the treatment of confidential
information – ComReg 05/24

This consultation paper is not a binding legal document and also does not contain legal, commercial, financial, technical or other advice. The Commission for Communications Regulation is not bound by it, nor does it necessarily set out the Commission’s final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this document and the due exercise by it of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the Commission for Communications Regulation. Inappropriate reliance ought not therefore to be placed on the contents of this document.

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland

Telephone +353 1 804 9600 Fax +353 1 804 9680 Email info@comreg.ie Web www.comreg.ie

Contents

1	Foreword.....	2
2	Executive Summary	3
3	Introduction.....	7
3.1	REGULATORY FRAMEWORK	7
3.2	THREE CRITERIA TEST FINDINGS IN OTHER EUROPEAN MARKETS.....	9
4	The Legal Context	11
5	Market Definition: Broadcasting Transmission Market.....	21
5.1	DEFINING THE RETAIL TV BROADCASTING MARKET(S)	22
5.1.1	<i>TV Broadcasting Transmission Platforms - Terrestrial TV.....</i>	24
5.1.2	<i>TV Broadcasting Transmission Platforms - Satellite TV.....</i>	26
5.1.3	<i>TV Broadcasting Transmission Platforms - Cable (and MMDS) TV....</i>	27
5.1.4	<i>TV Broadcasting Transmission Platforms - Internet TV.....</i>	28
5.2	DEFINING THE RETAIL RADIO BROADCASTING MARKET(S)	30
5.2.1	<i>Radio Broadcasting Transmission Platforms - Terrestrial Radio</i>	31
5.2.2	<i>Radio Broadcasting Transmission Platforms - Satellite Radio</i>	32
5.2.3	<i>Radio Broadcasting Transmission Platforms - Cable (and MMDS) Radio</i>	32
5.2.4	<i>Radio Broadcasting Transmission Platforms - Internet Radio</i>	32
5.3	MARKET DEFINITION CONCLUSION	33
6	Three Criteria Test.....	35
6.1	NATIONAL TERRESTRIAL BROADCASTING TRANSMISSION MARKET	35
6.1.1	<i>Barriers to Entry.....</i>	36
6.1.2	<i>Tendency Towards Competition</i>	39
6.1.3	<i>Sufficiency of Competition Law Alone</i>	42
7	Draft conclusion	46
8	Submitting Comments	47
	Appendix A – Retail Broadcasting Market.....	48
	RETAIL TV BROADCASTING MARKET	49
	<i>Retail TV Broadcasting Statistics.....</i>	56
	RETAIL RADIO BROADCASTING MARKET	61
	<i>Retail Radio Broadcasting Statistics.....</i>	63
	Appendix B – Process to date.....	64
	Appendix C – Consultation Questions	65

1 Foreword

Broadcasting transmission services were formerly included in the European Commission's *Recommendation on Relevant Product and Service Markets*, as a market which may warrant *ex ante* regulation. ComReg was therefore required to carry out an analysis of that market in Ireland. Following this analysis, ComReg identified RTÉ Transmission Network Limited (RTÉNL) as having Significant Market Power (SMP) on (a) the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks, and on (b) the wholesale market for television broadcasting services on analogue terrestrial networks. ComReg subsequently imposed regulatory remedies as outlined in ComReg Decision Notice (D16/04).

In 2007, the European Commission revised its *Recommendation on Relevant Product and Service Markets*. The EU Commission concluded that, on an EU wide basis, broadcasting transmission services are no longer considered to have characteristics that warrant *ex ante* regulation.

In light of this revised position, and the impending move to digital terrestrial television (DTT) broadcasting in Ireland (initial DTT trials commenced in October 2010 and it is envisaged that DTT will be fully launched by Q4 2011), ComReg is applying the three criteria test to the Irish broadcasting transmission market to establish whether *ex ante* regulation remains appropriate.

ComReg now invites responses to this consultation from all interested parties. In making its final decision ComReg will consider the views of all respondents and will take account of any comments from the European Commission.

Responses to this consultation must be received by ComReg before 5pm, Thursday, 20 January 2011.

**John Doherty,
Commissioner**

2 Executive Summary

This consultation paper reviews the Irish broadcasting transmission market to determine whether this market might have characteristics which make it susceptible to *ex ante* regulation.

A market may have characteristics that warrant *ex ante* regulation if it is found to cumulatively satisfy the three criteria test. The three criteria are as follows:

- 1) The presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
- 2) A market structure that does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry; and,
- 3) The insufficiency of *ex post* competition law alone to adequately address the market failure(s) concerned.

On 17 December 2007, the European Commission adopted a revised version of its *Recommendation on Relevant Product and Service Markets*.¹ In its revised *Recommendation*, the Commission concluded that, on an EU wide basis, broadcasting transmission services, used to deliver broadcasting content to retail end-users (TV viewers and radio listeners), no longer have characteristics that warrant *ex ante* regulation.

However, national regulatory authorities (NRAs) still have the power to apply the three criteria test to any electronic communications market in order to assess whether, on the basis of national circumstances, a market removed from the *Recommendation* might nonetheless still be susceptible to *ex ante* regulation in a particular Member State.

ComReg must first define the relevant market(s) to which the three criteria test will be applied. This is done by looking at the demand and supply-side substitutability of the product and service characteristics of both the retail market (to the extent that it impacts market behaviour at the wholesale level) and the wholesale market, as well as the geographic scope of the relevant market(s). If a sufficient degree of substitutability between different products and/or services is possible, then one may conclude that those products and/or services fall within the same market.

Defining the relevant market(s) for application of the three criteria test is determined, inherently, by the two-sided nature of the broadcasting market itself between consumers and providers of content. As noted by the EU Commission,

¹ EU 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (Second Edition).

retail end-users wish to access broadcasting content. Broadcasters produce or procure content and use advertising income to cover their costs. Advertisers want to reach the largest possible number or most appropriate segment of viewers/listeners. Therefore, to satisfy advertisers' demands, and thereby get advertising revenues (which is usually dependent on the number of people a broadcaster can reach), broadcasters will sign transmission agreements with any transmission platform that has access to even a small but significant number of viewers/listeners. Therefore, broadcasters cannot credibly attempt to play off one transmission platform against another. Transmission platform companies know that if the broadcaster did so, they would lose a significant number of viewers and therefore lose out on the advertising revenues that they could otherwise have earned. So, on this basis, that is, from a wholesale perspective, each transmission platform is regarded as a separate (i.e. non-substitutable) market.

ComReg considers that national terrestrial broadcasting transmission services is a distinct market irrespective of the technical means of delivery (i.e. analogue or digital). ComReg is of the view that, in line with findings in its previous review of this market, local/regional terrestrial broadcasting transmission services do not satisfy the three criteria test (due to low barriers to entry) and therefore, they are not considered further in this paper. ComReg also considers that the boundaries between terrestrial TV and terrestrial radio broadcasting are becoming increasingly blurred, particularly as Ireland moves to digital terrestrial transmission.

ComReg therefore applies the three criteria test to the national (analogue and digital) terrestrial TV and radio broadcasting transmission market. It is ComReg's draft finding that this market does satisfy each of the three criteria, for the reasons set out below and described in detail in Section 6.

Firstly, the national terrestrial broadcasting transmission market is characterised by high and non-transitory entry barriers for reasons which include the high (potentially sunk) cost of entry, lengthy contract durations between broadcasters and the transmission network company, and site location and planning issues.

Secondly, in the context of the second criterion, thereby examining the dynamics behind barriers to entry, RTÉ provides both the most viewed TV channels and the most listened to national radio channels in the State. RTÉ owns and operates the multiplex(es) for the transmission of digital broadcasting services. Its wholly-owned subsidiary, RTÉ Transmission Network Limited (RTÉNL), owns the tower/mast network structures and therefore, provides a key element for transmission services for national terrestrial free to air broadcasting for RTÉ and other terrestrial channels for most viewers/listeners.

On the basis of the interaction between viewers/listeners and broadcasters and advertisers, it would not be in RTÉ's interests to create competition which would result in a loss of market share of viewers/listeners to other broadcasters. Therefore, there is a possibility that a vertically integrated entity, such as RTÉ, might try to exclude potential terrestrial competitors as such broadcasters could

become substantial competitors for content, viewers and advertising revenues. Even if access to the terrestrial broadcast transmission network was granted (or forced through legislation) there is still a possibility that there might be an incentive to charge potential competitors excessive transmission fees in order to weaken their competitive threat to RTÉ in the upstream broadcasting market where RTÉ competes with these companies for key content, talent and ultimately advertising revenue.

Currently, market entry for national radio and TV broadcasters is constrained by the finite amount of spectrum available (in frequency bands allocated to radio broadcasting). While any future digital network would be expected to provide greater capacity for radio and TV broadcasting services, the number of national terrestrial radio and TV broadcasters is likely to be dependent on the capacity available on RTÉ's multiplex(es) or multiplex(es) to be licenced by the BAI, if any, as well as constraints or limitations on additional services arising from BAI policy on the terms and conditions of access to the multiplex(es). If there is limited capacity on the multiplex(es), then the number of national radio and TV broadcasters will also be constrained in the future.

Although RTÉ may have an incentive to expand its TV offerings in the digital world, and win back and/or maintain viewers on its free to air TV service, RTÉ may not want to induce pay TV companies to make offerings that closely match its free to air offering. This is due to the higher likelihood of RTÉ's own channels (RTÉ One and RTÉ Two) being viewed through a free to air platform than through a pay TV platform. This should raise the number of households watching RTÉ's content, which translates into higher advertising revenue for RTÉ.

Thirdly, if competition law remedies for the terrestrial broadcast transmission sector are sufficient then there should be no need for application of a separate regulatory regime. However, for the reasons set out in Section 6.1.3, ComReg considers that competition law alone is insufficient to address failures in the 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. Further, application of competition law does not normally mandate that specific prices or pricing methodologies be used, or involve policing the evolution of prices. It would also be difficult to apply competition law in order to address strategic decisions which may limit the possibility of new terrestrial channels entering the market. It is therefore considered unlikely, in the current context, that application of competition law would enable a sufficient suite of remedies to be applied to address the range of competition problems that might arise. 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 be sub-optimal.

ComReg also considers whether other legislation² could have an impact on this market, so that the imposition of *ex ante* regulation under the 2003 electronic communications framework is unnecessary (for more detail see Section 4). In particular, ComReg considers whether the provisions on pricing in the Broadcasting Act 2009 could duplicate many of the important elements of *ex ante* regulation. However, given the potential incentives of RTÉNL to advantage its parent company, RTÉ, it is ComReg's draft conclusion that the provisions of the Broadcasting Act 2009 do not remove the requirement for independent *ex ante* regulation of the market, under the 2003 electronic communications framework.

For these reasons, it is ComReg's draft conclusion that the three criteria test remains satisfied in the market for national terrestrial (television and radio) broadcasting transmission services, regardless of whether they are delivered in analogue or digital format.

² For example, the Universal Services Directive, the Framework Directive and the Access Directive.

3 Introduction

3.1 Regulatory Framework

Broadcasting transmission services, used to deliver content to retail end-users (TV viewers and radio listeners), was formerly identified in the European Commission's *Recommendation on Relevant Product and Service Markets* (first published on 11 February 2003)³ as a market with characteristics which may warrant *ex ante* regulation (Market 18). The *Recommendation* defines markets as having characteristics that may warrant *ex ante* regulation if they are found to cumulatively satisfy the three criteria test. The three criteria are:

1. The presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
2. A market structure that does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry; and,
3. The insufficiency of competition law alone to adequately address the market failure(s) concerned.

ComReg reviewed the broadcasting transmission market in Ireland between 2003 and 2004 taking utmost account of the Commission's *Recommendation*. On foot of its review, ComReg defined four separate markets in the State:

1. The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks;
2. The wholesale market for television broadcasting transmission services on analogue terrestrial networks;
3. The wholesale market for radio broadcasting transmission services on local/regional analogue terrestrial networks; and,
4. The wholesale market for broadcasting transmission services on cable and satellite networks.

ComReg designated RTÉ Transmission Network Limited (RTÉNL) as having SMP in markets 1 and 2 above. By Decision Notice dated 22 December 2004

³ 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 of the Council on a common regulatory framework for electronic communications networks and services.

(Doc. D04/122), ComReg imposed a number of SMP obligations on RTÉNL related to transparency, non-discrimination, and accounting separation.⁴

The Commission must regularly review its *Recommendation* and on 17 December 2007 the Commission adopted a revised *Recommendation*.⁵ The Commission removed Market 18 from its list of recommended markets, mainly on the basis that, although barriers to entry may still exist, market dynamics are such that the second criterion of the three criteria test is no longer satisfied. The Commission expressed its view that the move from analogue to digital transmission should result in fewer capacity constraints and more platforms with which to compete, while remaining problems of market power could be addressed by *ex post* application of competition law or by any other regulatory measures that may be in place.

Under Article 16(1) of the Framework Directive⁶, each NRA is required to carry out an analysis of each of the relevant markets as soon as possible after the adoption of the Commission's *Recommendation*, or any updating thereof. The *Recommendation* states:

“Allowing a regulatory measure or remedy to run its course, without risk of it being reversed mid-term, is an important element of regulatory commitment which reinforces the predictability of regulatory intervention. The underlying principle therefore is that remedies that have been imposed should stay in place until a new market analysis is due and is undertaken.”⁷

In light of the Commission's revision of its *Recommendation* and the upcoming transition from analogue to digital terrestrial broadcasting transmission in Ireland, beginning later in 2010, ComReg is now applying the three criteria test to the national (analogue and digital) terrestrial TV and radio broadcasting transmission market.⁸ This is the first stage in a possible two-stage review process which will eventually establish whether the market is effectively competitive or whether it should remain subject to *ex ante* regulation.

Section 3 of this document explains the purpose for this analysis and presents a sample of three criteria test findings by other NRAs in the broadcasting transmission market. **Section 4** identifies relevant legal powers available to

⁴ ComReg, Decision Notice D16/04, Wholesale Broadcasting Transmission Services Markets SMP Obligations, Document Number 04/122.

⁵ EU 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (Second Edition).

⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

⁷ EU 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (Second Edition).

⁸ The relevant market definition(s), (as appropriate to national circumstances) for the application of the three criteria test is undertaken in Section 5 of this consultation paper.

ComReg and other State agencies in the broadcasting market. *Section 5* defines the relevant market(s). The three criteria test is applied in *Section 6*. *Section 7* gives ComReg's draft conclusion on the three criteria test. *Section 8* provides information on how to submit a response to this consultation. *Appendix A* provides a summary description of the retail broadcasting market in Ireland, and *Appendix B* summarises the process ComReg has undertaken to date as part of this review. Finally, *Appendix C* lists all of the consultation questions in this document.

3.2 Three Criteria Test Findings in Other European Markets

The European Commission withdrew the broadcasting transmission market (Market 18) from its *Recommendation on Relevant Product and Service Markets*, on the grounds that the emergence of new digital transmission technologies, and increased use of digital transmission platforms, would reduce capacity constraints and thus improve competition.

It is of note that, more than most other electronic communications markets within the Commission's original *Recommendation*, the specific nature of the broadcasting transmission market in a particular Member State seems to be decisive in determining whether the three criteria test remains satisfied or not.

Because the broadcasting transmission market was identified as a market which may warrant *ex ante* regulation under the Commission's original *Recommendation* (published in February 2003), it was not necessary for NRAs to undertake the three criteria test before conducting a full market analysis of the broadcasting transmission market. However, as of the December 2007 publication of the revised *Recommendation* which removed Market 18, undertaking the three criteria test is a requirement prior to determining whether to carry out a full market analysis. The table below in Figure 1 provides a summary (as of September 2010) of market notifications by NRAs in other EU Member State (based primarily on the EU Commission's document on market reviews under the EU Regulatory Framework (3rd report)).⁹

Due to varying characteristics of the broadcasting transmission markets across different Member States, a number of NRAs concluded that the three criteria test remains fulfilled in the market in their jurisdictions. In many of these Member States (such as Finland, France and Spain) the European Commission agreed that the possibility of *ex ante* regulation remained appropriate.

While most NRAs have designated SMP, or found the three criteria test to be met in part(s) of their broadcast transmission market, some NRAs have not done so (Cyprus, Czech Rep., Denmark, Greece, Latvia, Malta and Slovakia).

⁹ A list of findings in all EU27 markets can be found (pages 123 – 128) in the EU Commission's document on market reviews under the EU Regulatory Framework (3rd report). Com (2010) 271 final.

http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/eu_consultation_procedures/working_doc_comm_art7_en.pdf

Three Criteria Test on the Broadcasting Transmission Market

Furthermore, a number of NRAs (Belgium, Bulgaria and Luxembourg) have not issued a notification on this market to the EU Commission.

Figure 1: Examples of Three Criteria Test Findings by other NRAs¹⁰

Country	Year	Designation of SMP / Three Criteria Test	Serious Doubts / Withdrawal of Notification
Austria	2009	Satisfied	No
Belgium			Yes
Bulgaria			
Cyprus	2006	Not satisfied	No
Czech Republic	2009	Not satisfied	No
Denmark	2007	Not satisfied	No
Estonia	2007	Satisfied	No
Finland	2008	Satisfied	No
France	2009	Satisfied	No
Germany	2010	Satisfied	No
Greece	2007	Not satisfied	No
Hungary	2007	Satisfied	No
Italy	2007	Satisfied	No
Latvia	2007	Not satisfied	No
Lithuania	2009	Satisfied	No
Luxembourg			
Malta	2008	Not satisfied	No
Netherlands	2009	Satisfied	No
Poland	2010	Satisfied	No
Portugal	2007	Satisfied	No
Romania	2009	Satisfied	No
Slovakia	2010	Not satisfied	No
Slovenia	2007	Satisfied	No
Spain	2010	Satisfied	No
Sweden	2010	Satisfied	No
UK	2004	Satisfied	No

¹⁰ Further detail on these notifications is available on the European Commission's Circa website at http://circa.europa.eu/Public/irc/info/ecctf/library?!=/overview_commission&vm=detailed&sb=Date_d

4 The Legal Context

Throughout this consultation, ComReg takes full account of its statutory functions and objectives under the Communications Regulation Act 2002, as amended,¹¹ together with its duties under the 2003 regulatory framework.

Regulation 26 of the Framework Regulations 2003¹² requires ComReg to define any relevant markets, in accordance with the market definition procedure set out in the Framework Regulations, and to take utmost account of the European Commission's *Recommendation on Relevant Product and Service Markets*¹³ and its SMP Guidelines.¹⁴ Where ComReg determines as a result of its market analysis 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 significant market power (SMP). ComReg will impose on such undertaking(s) such specific obligations as ComReg considers appropriate, including any of the wholesale access obligations set out in Regulations 10 to 14 of the Access Regulations 2003.¹⁵

ComReg has taken the utmost account of the European Commission's *Recommendation* and its accompanying Explanatory Note on relevant product and service markets within the electronic communications sector,¹⁶ as well as the SMP Guidelines. ComReg has further taken account of the European Commission's *Notice on the definition of relevant market for the purposes of Community competition law*.¹⁷

Broadcasting transmission services were designated as Market 18 in the original version of the European Commission's *Recommendation on Relevant Product and Service Markets*, published in February 2003. ComReg reviewed that

¹¹ Communications Regulation Act 2002, No. 20 of 2002, as amended by Communications Regulation (Amendment) Act 2007, No. 22 of 2007 and Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010, No. 2 of 2010 (the Communications Regulation Act 2002).

¹² The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), (the Framework Regulations).

¹³ EU 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (Second Edition).

¹⁴ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

¹⁵ European Communities (Electronic Communications) Access Regulations 2003 (S.I. No. 305 of 2003) (the Access Regulations). The SMP Guidelines also state at paragraph 17 that "NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP".

¹⁶ Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC(2007) 1483, dated 13/11/2007 (the Explanatory Note).

¹⁷ European Commission, Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5 (Commission Notice on Market Definition).

market between 2003 and 2004. On foot of its review, ComReg defined four separate markets in the State:

1. The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks;
2. The wholesale market for television broadcasting transmission services on analogue terrestrial networks;
3. The wholesale market for television broadcasting transmission services on local/regional analogue terrestrial networks; and,
4. The wholesale market for broadcasting transmission services on cable and satellite networks.

ComReg designated RTÉ Transmission Network Limited (RTÉNL) as having SMP in markets 1 and 2 above. By Decision Notice dated 22 December 2004 (Doc. D04/122), ComReg imposed a number of SMP obligations on RTÉNL related to transparency, non-discrimination, and accounting separation.

In 2007, the Commission removed Market 18 from its list of recommended markets, mainly on the basis that, while barriers to entry may still exist, on an EU-wide basis market dynamics are such that the second criterion of the three criteria test is no longer satisfied. The Commission expressed its view that the move from analogue to digital transmission should result in fewer capacity constraints and more platforms with which to compete in the market, and that remaining problems of market power could be addressed by competition law or by any other regulatory measures that may be in place.

With the removal of Market 18 from the list of relevant markets, and the imminent switch-off of national analogue terrestrial television broadcasting, ComReg believes that it should now re-apply the three criteria test to the broadcasting transmission market. This is the first stage in a possible two-stage review process which will eventually establish whether the market is effectively competitive or whether it should remain subject to *ex ante* regulation. ComReg will follow the Commission's guidance in this regard:

“The removal of a market from the initial Recommendation means that the Commission is of the opinion that in most circumstances this market no longer satisfies the three criteria. However, for these markets NRAs should have the power to apply the three criteria test in order to assess whether on the basis of national circumstances a market would still be susceptible to ex ante regulation. In those cases, NRAs should append to their (new) analysis detailed reasoning outlining why, in their particular circumstances, the three criteria are satisfied.”

Ex ante regulation under the electronic communications framework may not be necessary if other forms of regulation are available. Therefore, in applying the three criteria test, ComReg considers not only current and future barriers to entry and whether competition law is sufficient, but also any other statutory

powers that may apply to the broadcasting transmission market. In particular, this market is subject to the provisions of the Broadcasting Act 2009 ('the 2009 Act').

Below are summaries of the principal roles and responsibilities of ComReg, the Broadcasting Authority of Ireland ("BAI"), and the Minister for Communications, Energy and Natural Resources, as well as a description of the legislative provisions relevant to this analysis, which are found in, amongst other enactments, the Communications Act 2002, the Wireless Telegraphy Acts 1926 - 2009, the Broadcasting Act 2009, the Framework Directive 2002¹⁸ (transposed into Irish law by the Framework Regulations 2003¹⁹), and the Access Directive 2002²⁰ (transposed into Irish law by the Access Regulations 2003²¹).

Role of ComReg

One of ComReg's statutory functions, under section 10 of the Communications Regulation Act 2002, as amended, is to ensure the efficient management and use of all radio frequency spectrum (a State-owned and controlled resource). In regard to the broadcasting sector, ComReg also grants licences under the Wireless Telegraphy Acts 1926 – 2009. Such licences permit the possession and use of "apparatus for wireless telegraphy" and this definition encapsulates any broadcasting transmission equipment. All spectrum is allocated to third parties through licences granted by ComReg under the Wireless Telegraphy Acts 1926 – 2009. ComReg can attach certain conditions to such licences relating to technical and operational issues surrounding the use of spectrum and use of the particular types of apparatus.²²

Section 132 of the Broadcasting Act 2009 sets out ComReg's main duties in respect of digital terrestrial television (DTT) multiplexes. ComReg, at the request of RTÉ, *shall* grant a licence to RTÉ which will permit RTÉ to establish, maintain and operate a national television multiplex (NTM).²³ In addition, at the request of RTÉ and having consulted with the Minister and the BAI on the digital capacity requirements of TG4 and any other designated users

¹⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF>

¹⁹ S. I. No. 307 of 2003 European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

²⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0007:0020:EN:PDF>

²¹ S. I. No. 305 of 2003 European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

²² The range of conditions that may be attached to licences is set out in Part B of the Schedule to the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003, as amended (SI 306/2003).

²³ Digital terrestrial broadcast services are transmitted on multiplexes. A multiplex is a collection of television programme, radio and data services that are broadcast together in a digital signal that occupies less spectrum than analogue transmission, and therefore, is more efficient as it allows for greater network capacity which enables more channels to be broadcast to end-users.

of the RTÉ multiplex, ComReg *shall* grant RTÉ a licence to establish, maintain and operate “one further” NTM. In addition, at the request of the BAI, ComReg shall issue to the BAI licences for up to four additional NTMs and ComReg shall also consult with the BAI regarding the desirability of granting further NTM licences to the BAI.²⁴

ComReg has regulatory powers in respect of all electronic communications networks (“ECNs”) including those used for television and radio broadcasting purposes. Authorisation must be obtained by any party intending to operate an ECN, in accordance with the Authorisation Regulations 2003, and authorised entities are then subject to such conditions as ComReg may attach to the “General Authorisation” (see Regulation 8 of the Authorisation Regulations 2003).

Possession of unlicensed “apparatus for wireless telegraphy” and causing interference to any lawful wireless communications are both criminal offences under the Wireless Telegraphy Acts, 1926-2009. ComReg is responsible for investigating such offences. This often involves tracing the origin of illegal transmissions and, if required, taking enforcement actions such as search operations conducted on foot of a warrant issued by the District Court.

Aside from *ex ante* regulatory powers, ComReg also has *ex post* competition law powers in respect of any ECN or electronic communications service (“ECS”). This means that ComReg can apply the rules of competition law to the broadcasting transmission market, where it suspects that there is any collusive behaviour or abuse of dominance which is having the object or effect of restricting, distorting, or preventing competition in trade in the provision of any electronic communications service.²⁵

Role of the Broadcasting Authority of Ireland

The Broadcasting Act 2009 established the Broadcasting Authority of Ireland (“BAI”) as the single content regulator of broadcasting in Ireland. The BAI assumes the roles previously held by the Broadcasting Commission of Ireland (BCI) and the Broadcasting Complaints Commission (BCC) and takes on a range of additional responsibilities as set out in the Act. The objectives of the BAI are to ensure that the number and categories of broadcasting services made available in the State best serve the needs of the people of the island of Ireland (bearing in mind their languages and traditions and their religious, ethical and cultural diversity), to ensure that the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, are upheld, and to provide for open and pluralistic broadcasting services.

²⁴ ComReg has not issued a second multiplex licence to RTÉ as ComReg has not received a request for this licence to date. In addition, ComReg has not issued multiplex licences to the BAI as ComReg has not received a request for these licences to date.

²⁵ Sections 4 and 5 of the Competition Act 2002, as amended. The equivalent EU law is set out in Articles 101 or 102 of the Treaty on the Function of the European Union (TFEU).

The functions of the BAI, under the 2009 Act, include the development of a Strategy Statement as well as a Broadcasting Services Strategy which together will outline the Authority's approach to the licensing and regulation of broadcasting services in the State. Other functions include the licensing of television, radio, EPG and multiplex operators, the handling of broadcasting complaints from the public, devising a Right-of-Reply Scheme, developing broadcasting codes and rules. In addition, the BAI has a significant role with regard to the accountability of public service broadcasters with regard to their use of public funding. The Authority also consults with the Minister for Communications, Energy and Natural Resources on a range of issues, and consults with ComReg on frequency planning and allocation of spectrum for radio and television broadcast services. The BAI is also responsible for the operation of Broadcasting Funding Schemes which are financed by a proportion of the television licence fee. Currently one such scheme is operational, Sound & Vision II.

The BAI comprises an Authority and two committees - the Contracts Awards Committee ("CAC") and the Compliance Committee. The Authority enters into contracts with independent commercial and community broadcasters to award the spectrum licences it receives from ComReg and with digital television and radio broadcasters who make their own arrangements for carriage on a variety of platforms.

With regard to the licensing of multiplexes the BAI shall from time to time direct the CAC to invite applications for parties to enter into a multiplex contract with the BAI. Having reviewed all applications received, the CAC may then recommend to the BAI that it enter into a contract and the BAI shall follow such a recommendation. The BAI has already engaged in this process; however, to date the BAI has not entered into any multiplex contracts.

The BAI has a contract with a national independent television programme service (TV3), national and quasi-national radio broadcasting services (Today FM and Newstalk), four regional radio stations (Beat FM, Spin South West, iRadio Northwest, iRadio Northeast and Midlands), one multi-city service 4FM and fifty-three local, community, community of interest, special interest, institutional, radio stations.

The BAI's Compliance Committee monitors and enforces compliance by contractors with their terms and conditions of their contracts with the BAI and compliance by broadcasters with statutory provisions in respect of content standards as well as BAI codes and rules. The Committee also investigates and adjudicates on broadcasting complaints.

Role of the Minister for Communications, Energy and Natural Resources

Section 130(1) of the Broadcasting Act 2009 provides that RTÉ shall establish, maintain and operate a "national television multiplex" ("NTM") which shall provide for digital broadcasting of RTÉ 1, RTÉ 2, TG4, an Oireachtas Channel

and an Irish Film Channel (if required by the Minister), and such other television services *having the character of a public service* as the Minister may designate. Sub-sections 130(2)–(9) essentially provide that TG4 and any of the other potential television services shall make periodic payments to RTÉ for use of its NTM. In this regard, the Minister may “direct” the amount of such payments after the Minister has consulted with ComReg, RTÉ, and the particular user of the NTM.

In addition, sub-sections 130(10)–(12) of the Broadcasting Act 2009 deal with the specific situation where the Minister may direct RTÉ to make provision in its NTM for the broadcasting of the television services of a “*television programme service contractor*”²⁶ and again the Minister, after consultation with ComReg, RTÉ and the “*television programme service contractor*”, may direct the amount that such a party shall pay to RTÉ for access to its NTM. These provisions were written with specific regard to TV3.

In all of the above possible situations, it is the Minister who may “direct” the payment that shall be made to RTÉ for access to its NTM, following consultation with ComReg, RTÉ, and the particular party that shall make the payment. This power of the Minister is not necessarily equivalent to a price control remedy under the electronic communications regulatory framework, which may include an obligation for a price to be cost-oriented. Moreover, pricing remedies imposed by ComReg under the electronic communications framework must be based on the nature of the problem identified (SMP in a relevant market) and must be objective, transparent, proportionate and non-discriminatory. The provisions of the Broadcasting Act 2009 do not provide that any such control on prices is set in order to minimise the risk that they are set at an excessive rate or that they do not allow a squeeze on competitor’s margins. So although this may appear on the face of it to be a form of *ex ante* regulation in which the Minister may, following consultation, set access tariffs to RTÉ’s NTM, it does not necessarily fit in with the form of price control that may be imposed by ComReg under the electronic communications framework.

Other legislation relevant to this analysis

In analysing any wholesale market with a view to the impact on the retail market, there are two key concerns: access to that market by actual or potential competitors (barriers to entry), and the price paid for such access. *Ex ante* regulatory intervention in any electronic communications market, under the 2003 framework, is largely for the purpose of ensuring that open and fair access is being provided at reasonable and non-discriminatory prices. In time, normal competitive forces should reduce the requirement for regulatory intervention.

²⁶ A “*television programme service contract*” is defined in section 70 of the Act as a contract between the BAI and a person or persons “*who shall have the right and duty to establish and maintain a television programme service and ... to establish, maintain and operate television broadcasting transmitters for the purpose of transmitting the television programme service as a free-to-air service.*”

In applying the three criteria test to the market at issue, in addition to considering whether competition law alone is sufficient it is also necessary to consider whether there are any other laws in place which would be sufficient to address any failure(s) in the Irish broadcasting transmission market. If there are, then intervention by ComReg under the 2003 electronic communications framework may not be necessary.

Universal Service Directive:

To begin examining such other potential laws, Article 31 of the Universal Service Directive²⁷ allows Member States to impose reasonable "must carry" obligations on undertakings under their jurisdiction which provide ECNs for the distribution of radio or television broadcast channels to the public, where a significant number of retail end-users use those ECNs as their principal means to receive radio and television content. Such obligations may only be imposed where they are necessary to meet clearly defined general interest objectives, as defined by each Member State, and they must be proportionate and transparent and subject to periodic review.

Article 31 of the Universal Service Directive is not reflected in the European Communities (Electronic Communications) (Universal Service and Users' Rights) Regulations 2003²⁸, which is the main piece of legislation transposing said Directive into Irish law. However, Article 31 is reflected in certain provisions of the Broadcasting Act 2009.

Broadcasting Act 2009:

For the purposes of this consultation, the relevant provisions of the 2009 Act would appear to begin with section 77 which provides for must-carry and must-offer obligations in respect of any "appropriate network", defined as "*an electronic communications network provided by a person ("appropriate network provider") which is used for the distribution or transmission of broadcasting services to the public.*"

Section 77 of the Broadcasting Act 2009 provides that where the BAI, after consultation with ComReg, finds that a type or class of ECN used for broadcasting to the public is not used by a significant number of retail end-users as their principal means of receiving broadcast material, then the BAI may propose to the Minister the full or partial removal of any of the various obligations that may be imposed under sub-sections (3)-(10) incl. of section 77, and the Minister may make such an order. Unless an ECN provider is made exempt by such an Order of the Minister, that provider shall ensure the re-transmission of each free-to-air service provided by RTÉ, TG4, and any "*television service programme contractor*" (TV3).

However, Section 77 only goes so far as to provide that any "*appropriate network provider*" shall ensure the re-transmission through his or her network of the free-to-air television services provided by RTÉ, TG4, TV3 and in the case

²⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0051:0077:EN:PDF>

²⁸ S.I. 308/2003, as amended by S.I. 374/2007.

of where the appropriate network is a digital system, the Houses of the Oireachtas Channel and the Irish Film Channel. Section 77 specifically does not apply to digital multiplexes, multipoint microwave distribution (MMD) networks, broadcasting contractors operating with the permission of the BAI pursuant to section 59 of the 2009 Act, and RTÉ. Most of the major broadcasting transmission networks in the State are therefore excluded from the potential effects of Section 77. Further, the "must carry" obligation that may be imposed under Section 77 is not equivalent to the concept of network access or interconnection as it may be applied by ComReg under the 2003 regulatory framework.

Part 2, Section 7 of the Broadcasting Act 2009 (Sections 113 -116) contains "provisions specific to RTÉ". Section 114 lists RTÉ's ten principal statutory objectives and these include, at section 114(1) (j), "*to establish, maintain, and operate one or more national multiplexes*". In this regard, ComReg notes that the current national analogue broadcasting network is owned and operated by RTÉNL, a subsidiary of RTÉ (the 2009 Act contains no references to RTÉNL) whilst sections 114 and 130 of the 2009 Act state that the future digital multiplex network shall be built and operated by RTÉ, not by RTÉNL. Therefore, although there are some specific provisions in the Broadcasting Act 2009 which relate to digital transmission equipment (i.e. multiplexes) built and operated by RTÉ, there do not seem to be similar statutory provisions afforded to equipment/structures owned and operated by RTÉNL such as the towers and masts which are necessary to transmit terrestrial broadcasting signals. Therefore, while having specific regard to the fact that the three-criteria test is being applied to the national (analogue *and* digital) terrestrial TV and radio broadcasting transmission market, it should be noted that the relevant provisions of the Broadcasting Act 2009 mainly apply to the digital segment of the market, and not to the analogue segment (exceptions to this include such provisions as Section 115 of the 2009 Act, which applies to all forms of "sound broadcasting" whether by analogue or digital means).

Section 115 of the 2009 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"²⁹ in the use of any mast, tower, site or other installation or facility needed to provide transmission facilities for sound broadcasting services. The sound broadcaster shall pay RTÉ such amount as the Minister may direct (again following consultation with RTÉ and the BAI). This provision appears to empower the Minister to impose certain *ex ante* access obligations on RTÉ. However, the provision is specific to radio and to RTÉ and it may not be applied to other operators of radio broadcast infrastructure. In addition, there is no equivalent provision for television broadcasting. Section 130 of the 2009 Act provides for access by certain parties to RTÉ's digital television multiplex(es) but does not provide for access to other key infrastructure such as towers and masts.

²⁹ A "sound broadcasting contract" is defined in Section 58 of the 2009 Act, by reference to Section 63 of the 2009 Act which states that the BAI shall enter into sound broadcasting contracts "*with persons ('sound broadcasting contractors') under which the sound broadcasting contractors have ...the right and duty to establish, maintain and operate sound broadcasting transmitters serving the areas specified in the sound broadcasting contract ...*"

Part 8 of the of the 2009 Act (Sections 129-139) is titled “Digital Broadcasting and Analogue Switch-Off” and it sets down provisions for the transition from analogue to digital terrestrial television broadcasting. As already mentioned Section 130 details the establishment, maintenance and operation of a NTM and any payments related to this.

Sub-sections 130(1) (d) & (e) state that, in addition to the services that RTÉ must carry on its NTM, RTÉ may use any spare capacity on its NTM to broadcast other programme material on a commercial basis. While it would appear that this aspect of RTÉ’s business is subject to Ministerial approval in respect of the use of spare capacity, ComReg notes that the Minister does not have power in such instances to set or approve access tariffs.

Section 130 (13)-(14) provides for digital broadcasting through a national sound multiplex of services having the character of a public service as may be designated by the Minister. Again, payment to RTÉ may be directed by the Minister following consultation with ComReg, RTÉ and the sound broadcaster.

Access Directive:

Article 5(1) (B) and Article 6(1) of the EU Access Directive³⁰ provide for the imposition of obligations on conditional access operators to offer technical services allowing broadcasters’ services to be received by viewers and listeners on a fair, reasonable and non discriminatory basis and to keep separate financial accounts regarding their activity as conditional access³¹ providers. In addition the Directive provides for access to application program interfaces³² (APIs) and electronic programme guides³³ (EPGs) for digital broadcasting. Regulations 6 and 7 of the Access Regulations 2003³⁴ provide more detail on the accessibility and rules in relation to conditional access systems³⁵ while regulation 28 of the Framework Regulations sets out the rules regarding the interoperability of digital interactive television services.

³⁰ Directive 2002/19/EC, as amended by Directive 2009/140/EC

³¹ Conditional Access is the protection of content by requiring certain criteria to be met before granting access to this content.

³² An API is an interface implemented by a software programme which enables it to interact with other software to perform a particular function.

³³ An EPG is an on-screen listing of all programming and descriptive content for the viewer. EPGs are a feature of digital television systems.

³⁴ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. 305/2003) as amended by S.I. European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. 373/2007)

³⁵ http://www.dcenr.gov.ie/NR/rdonlyres/8C475F35-2AD6-4D25-8DEC-9AA58474C625/0/CommsReg_Access_final.doc

http://www.dcenr.gov.ie/NR/rdonlyres/30A1B6C4-04A2-47DF-BED2-9E62E20F058E/0/CommsReg_Framework_final.doc

Framework Directive:

Under Article 12 of the Framework Directive 2002³⁶, where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health or public security or to meet town and country planning objectives, Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network. Such sharing or co-ordination arrangements may include rules for apportioning the costs of facility or property sharing.

In Sum:

It should be noted therefore, that ComReg, when considering its draft decision on the three criteria test in Section 7, has taken into consideration the legislative provisions available in the Irish broadcasting market.

Q. 1. Do you agree that this section assesses all relevant legislation for analysis of the broadcasting transmission market? Are there any other relevant legislative provisions which ComReg has not addressed here? Please explain your answer.

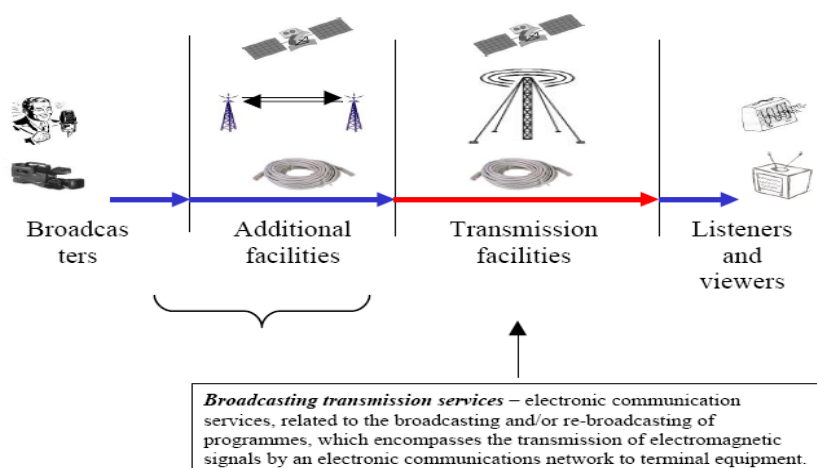
³⁶ Directive 2002/21/EC, as amended by Directive 2009/140/EC

5 Market Definition: Broadcasting Transmission Market

The services under examination in this consultation are those for transmission of broadcasting content to viewers/listeners.³⁷ As per the EU Commission’s explanatory note,³⁸ electronic communications services exclude services providing or exercising control over content transmitted using electronic communications networks and services. The provision of broadcasting content lies outside the scope of the regulatory framework. It is the transmission of content that constitutes an electronic communication service, and the networks used for such transmission constitute electronic communications networks. These services and networks are within the scope of the regulatory framework.

Figure 2 presents the broadcasting market value chain. On the far left are the broadcasters who make (or acquire) content which they believe listeners and viewers want. These listeners and viewers are presented on the far right. In the middle are the networks which deliver the content to the retail end-users.

Figure 2: Broadcasting Transmission Services



Source: ERG (06) 47, Experience Project, Market 18 Broadcasting Transmission Services to Deliver Broadcast Content to End-users

TV and radio broadcasting are dealt with separately in this section. In Section 5.1, ComReg defines the relevant retail TV broadcasting market(s) on the basis of demand substitution, and describes the various TV broadcasting transmission platforms in Ireland. In Section 5.2, ComReg defines the relevant retail radio broadcasting market(s), again on the basis of demand substitution, and describes the various radio broadcasting transmission platforms in Ireland. Section 5.3 examines supply substitution at the wholesale level and sets out ComReg’s

³⁷ Local/regional broadcasting transmission markets are not considered as ComReg believe that these markets do not satisfy the three criteria test as per ComReg’s previous analysis of this market, Doc. 04/06.

³⁸ Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC(2007) 1483, dated 13/11/2007 (the Explanatory Note).

conclusion on the market definition for the purposes of applying the three criteria test.

From a wholesale supply perspective, the boundaries between TV and radio broadcasting transmission services are increasingly becoming blurred, especially as the market moves from analogue to digital transmission. ComReg's draft finding in this consultation paper is that terrestrial TV and radio broadcasting transmission services are in a single market due to technical developments in the supply of such services.

5.1 Defining the retail TV broadcasting market(s)

Although it is not necessary to identify the relevant retail market in order to apply the three criteria test, it is a useful exercise to highlight the interactions between retail end-users' choices of platforms and the need for broadcasters to reach as many retail end-users as possible, or the most appropriate segment, in order to obtain advertising revenue.

For further detail of the retail TV market and the logic supporting the draft findings here please see **Appendix A**.

The EU Commission saw all pay TV transmission platforms as being in the same retail market as the Commission noted that, in the move to digital delivery, increased capacity on these platforms allows them to carry more channels and compete more at the retail level. It was for this reason that the Commission found that the three criteria are no longer met.

In areas where pay TV services over satellite and cable are both available in Ireland, such services can be deemed to be within the same retail market due to the relative ease with which most households can switch between these services and the national pricing strategy of the more widely available satellite platform. IPTV is not considered as ComReg does not believe IPTV will be a significant access means in Ireland in the timeframe of this review (i.e. within the next three years).

The question then is whether pay TV subscription packages are a substitute for the free to air services, or more precisely whether the lowest priced pay TV subscription service is a substitute for free to air services such that there is a full chain of substitution that covers the whole set of retail TV offerings. From the perspective of market definition, the question is – would a hypothetical monopolist be able to sustain a 5% increase above the competitive price of the basic pay TV package profitably?³⁹ It is ComReg's draft opinion that such a

³⁹ In the case where a service has no ongoing monthly price the notion of applying a SSNIP test clearly become problematic. In such a case we have to proceed with outlining the relevant market by a process of elimination. If FTA and pay TV are in the same relevant market then it would not be possible to sustain a definition of the market that is restricted to pay TV alone.

price increase could be profitably sustained. Furthermore, there are a number of differences in the characteristics of these services which affect a retail end-user's decision to choose either service, such as minimum contract commitments and content availability, among others.

For these reasons, at present it would seem that, for most Irish households that only have access to the Irish channels on a free to air terrestrial basis, pay TV subscription services are in a separate retail market to free to air TV services.

Q. 2. Do you agree with ComReg's draft finding that the retail pay TV (cable and satellite) and free to air terrestrial TV services, which are national in scope, are not in the same retail market? Please explain your answer and provide evidence where available.

As markets should be defined from a forward-looking perspective, it could be expected that the underlying retail market will tend towards the inclusion of both free to air and pay TV subscription packages over time.

However, this seems unlikely in the Irish market due to the possible incentives of RTÉ as a vertically integrated entity. As a vertically integrated entity, the impetus for RTÉ to provide offerings that more closely match pay TV offerings might be lower, as RTÉ may be concerned about the potential negative impact of such a move on the viewership of its own channels and therefore, on its position in the advertising market. Even with the possibility of a free to air satellite service (i.e. Saorsat) from which RTÉ may operate, as a significant number of households seem to have been unable or unwilling to erect a satellite dish it is unlikely that the impact of a free to air satellite service would be such that the dynamic towards potential competition would change in the timeframe of this review.⁴⁰

While analogue terrestrial TV broadcasting switch-off, in late 2012, might possibly result in a limited number of retail end-users moving between free to air and pay TV retail markets, ComReg does not believe it will be of an extent which would lead one to conclude that both products/services are in the same retail market. ComReg leaves open the possibility to consider its stated position after full analogue terrestrial transmission switch-off is completed.

Irrespective of this, each platform in the wholesale market is a separate market as broadcasters need to enter into contracts with each platform provider who can deliver a significant amount of households as potential viewers. As broadcasters acquire transmission services on a national basis the market can be defined as national in scope.

⁴⁰ Nielsen TV Audience Establishment Measurement Survey on behalf of TAM Ireland Ltd. shows that approximately 49% of households with a TV have a satellite dish.

5.1.1 TV Broadcasting Transmission Platforms - Terrestrial TV

For broadcasters who wish to provide free to air broadcast services, the change in technical means of delivery (i.e. from analogue to digital) will not change their desire to broadcast by terrestrial free to air platforms because if they did so then they would lose a significant number of viewers. Therefore, on a prospective basis, from a demand-side perspective, the market can be defined as the market for national terrestrial TV broadcasting transmission services regardless of whether they are delivered in analogue or digital format.

Analogue free to air terrestrial TV services to retail end-users are provided by Raidió Teilifís Éireann (RTÉ), TG4 and TV3. These broadcasters purchase analogue transmission along with other services (such as IT) either from companies they own (self-supply) or via wholesale arrangements from providers such as RTÉ Transmission Network Limited (RTÉNL).

RTÉ, as the national public service broadcaster, operates the national analogue terrestrial transmission platform through its network division, RTÉNL. As RTÉ is a vertically integrated entity, it self-supplies transmission and distribution services from its networks business RTÉNL to its retail broadcasting associate RTÉ.

National analogue terrestrial transmission services for TV broadcasters are provided by RTÉNL to RTÉ Television, TG4, and TV3.

RTÉ and TG4 have a statutory obligation to operate a free to air national television service. The *'television programme service contractor'* (i.e. TV3), as designated by the Minister, also has a statutory obligation to make its television services available on a free to air basis.

RTÉ's TV programme services are funded from commercial income and a TV licence fee. TG4 also receives funding through a number of sources including grant aid and commercial income. TV3 receives the vast amount of its funding through commercial income. All of these broadcasters also receive programming funds disbursed by the BAI through its Sound and Vision scheme.

Initial trialling tests of DTT by RTÉNL commenced in October 2010. Analogue transmission will run alongside DTT until 2012 when the analogue signal is due to be switched off.

The infrastructure necessary for DTT, which could in due course consist of six multiplexes (two public service and four commercial), is being built by RTÉ on 51 transmission sites throughout the country to provide 98% population coverage. RTÉ plans to use a new satellite service (Saorsat) which, while it will reach all households, is intended to cover the remaining 2% of population which may not be able to receive the DTT signal. It is intended that RTÉ services, TV3 and TG4 channels and potentially a new Irish Film Channel and the Oireachtas channel will be broadcast on the public service multiplex subject to agreement.

The costs these broadcasters incur for transmission will vary depending on their requirements for contribution, distribution and transmission⁴¹ which include elements such as:

- Operating costs (costs associated with usage of the transmission network such as power costs as well as rents etc.);
- Capital costs (equipment costs, and costs based on usage and occupancy of infrastructure such as masts, buildings etc.);
- Amount of multiplexes, up- and down links, and transmitters used; and,
- In digital transmission, the quality of the signal such as High Definition (HD), Standard Definition (SD), MPEG 2 or MPEG 4 will determine the amount of spectrum needed. The higher the quality of the signal the more spectrum is required and therefore the higher the spectrum costs.

The costs incurred by broadcasters, in paying RTÉNL for transmitting their free to air TV services are currently determined by RTÉNL's tariff model.⁴²

The spectrum used by RTÉ is licensed by ComReg to RTÉ in accordance with the Broadcasting Act 2009, while that used by the independent sector is licensed to the BAI who passes on the rights and obligations of its licences to independent broadcasters through contracts which it enters into with them. The BAI is responsible for awarding the licences it receives from ComReg for broadcasting services additional to those provided by RTÉ, TG4, the Houses of the Oireachtas channel and the Irish Film Channel.

ComReg issued a DTT licence to RTÉ in 2007 in respect of a single digital multiplex. ComReg is obliged to issue multiplex licences to BAI in respect of four multiplexes on receipt of a request for them. However, as the BAI process, to date, has not resulted in any award of multiplex contracts, the BAI has not yet requested multiplex licences from ComReg. In April 2008, the BCI (now the BAI) received applications from three groups following a competitive application process and the BCI entered into contract negotiations with the first placed group Boxer DTT Limited in July 2008. In April 2009, Boxer DTT Limited withdrew from the process citing a change in economic conditions as well as challenges in concluding a contract with RTÉNL to the satisfaction of both parties for transmission services. In May 2009, the BCI entered into contract negotiations with the second placed applicant OneVision. This group was also unable to conclude a contract for transmission services with RTÉNL to the satisfaction of both parties. The BAI withdrew from contract negotiations with the consortium in April 2010 and contracts were then offered to the third

⁴¹ Contribution services from regional broadcast centres are provided to RTÉ television and TG4. RTÉNL distributes programming signals from Donnybrook to its main transmission sites via a microwave link network. Transmission services are then provided from RTÉNL's network of transmission sites.

⁴² <http://www.rtenl.ie/downloads/1606081.pdf> <http://www.rtenl.ie/downloads/080220.pdf>

applicant, Easy TV, in May 2010. The BAI was subsequently advised by the Easy TV consortium that it had decided to decline the BAI's offer to pursue negotiations for the provision of three commercial DTT multiplex contracts.⁴³ The BAI has subsequently indicated that it considers it unlikely that commercial DTT can be rolled out before 2013 at the earliest.⁴⁴

5.1.2 TV Broadcasting Transmission Platforms - Satellite TV

SES Astra and Eutelsat both operate satellites, whose footprint includes Ireland, for the delivery of TV and radio services and are wholesale suppliers of satellite services in Ireland.

BSkyB is a vertically integrated pay TV provider in that it both produces and transmits programme services to end-users via satellite (Direct to Home). It leases transponder capacity from SES Astra and Eutelsat to broadcast its services to end-users. BSkyB's own programme services are uplinked to the Astra and Eutelsat satellites from the UK. However, BSkyB also sub-leases transponder capacity to RTÉ, TG4 and TV3 which is uplinked in Ireland.

Therefore, BSkyB operates both as a pay TV provider at the retail level and an intermediary wholesale reseller between the satellite operators and broadcasters. Programme service providers can pay satellite operators directly (i.e. Eutelsat or SES Astra) for transponder capacity or indirectly via a third party BSkyB. Satellite operators are not subject to the 'must carry' obligations of the Broadcasting Act, the details of which are discussed in Section 4.

It is estimated that over 600,000 households (circa 40% of TV homes) in Ireland are subscribers with BSkyB.⁴⁵ This compares to approximately 260,000 subscriptions in 2003 which represented circa 20% of TV homes at that time.

Broadcasting programme services over satellite are subject to conditional access; content is protected (encrypted) by requiring certain criteria to be met (such as purchase of a subscription) before granting access to this content to the end-user.

However, subject to obtaining rights, broadcasters can make their programming available by unencrypted 'free to air' satellite services (for example Freesat). These services offer a number of TV channels for a one off payment with no ongoing subscription fee required. Customers require a satellite dish receiver (pointed in the correct direction) and set top box. These services are potentially national in scope and can be regarded as a complement to terrestrial broadcast services as they are free to air (once initial equipment such as a dish or a set-top box has been purchased). It should be noted that the customer usually requires an aerial to receive RTÉ One, RTÉ Two, TG4 and TV3.

⁴³ http://www.bai.ie/about_news_art013.html

⁴⁴ http://www.bai.ie/about_news_art023.html

⁴⁵ Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd., September 2010. Based on 1,589,000 TV homes.

It would appear from Nielsen data⁴⁶ that less than 9% of TV homes receive some form of free to air satellite service.

As the number of satellites in orbit has continually increased over the last number of years and with a greater move to digital transmission, a lack of capacity to carry broadcasters has become less of an issue. This has encouraged pay TV satellite transmission providers to provide services to more broadcasters and therefore, has encouraged greater competition for broadcasters and retail end-users with other pay TV providers. Broadcasters' bargaining position with pay TV satellite transmission providers has thus improved over time. Therefore, this market is not one which should be subject to *ex ante* regulation. This is in line with the EU Commission's reasoning in its determination that the market did not satisfy the three criteria test at an EU-wide level i.e. because increased capacity allows pay TV satellite transmission platforms to carry more channels and compete more with other means of receiving pay TV, it can be concluded that this market remains one that should not be subject to *ex ante* regulation. This is in line with the uncontested findings of ComReg's existing market analysis.

5.1.3 TV Broadcasting Transmission Platforms - Cable (and MMDS) TV

Cable TV (including MMDS) is a system of providing television to consumers through fixed optical fibres or coaxial cables, as opposed to the over-the-air method used in traditional television broadcasting (i.e. radio waves) where a television antenna is required.

There are a number of cable TV operators in Ireland. UPC is the largest cable network operator providing TV/radio services over its hybrid fibre / coaxial cable network. UPC also extends its service to homes outside the reach of cable networks through MMDS⁴⁷. It is estimated that approximately 60% of total households in Ireland were passed for a TV connection by June 2010 by cable operators (i.e. a household could technically receive the service if they so wished).

In addition, there are a few smaller, geographically-specific operators such as Casey Cablevision and Crossan Cable. These cable networks were initially designed to provide television services, but some parts of the network have been upgraded to also provide broadband. All such providers have analogue and digital capabilities.

There is a mutually dependent relationship between cable operators and broadcasters. Contractual arrangements are entered into by both parties in order

⁴⁶ Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd., September 2010.

⁴⁷ MMDS is a wireless telecommunications technology, used as an alternative method of cable television programming reception. MMDS is usually used in sparsely populated rural areas, where laying cables is not economically viable.

to provide programming content to the retail end-user. The cable company sells a subscription service to the retail customer for a fee, while at the wholesale level the cable company enters into contractual relationships with broadcasters for content transmission. Broadcasters require access to the cable companies' networks in order to gain access to viewers and thereby increase their revenue opportunities, while cable operators want to offer as wide a variety of channels as possible to offer an attractive package to the retail consumer and thus induce the customer to pay for a TV subscription.

While there has been an increase in the number of companies providing cable services over the last number of years, there has also been a substantial increase in the proportion of viewers subscribing to digital cable services at the expense of analogue services as cable companies promote the roll-out of digital content to their customers. This has allowed cable companies to offer an increased variety of programming content as capacity becomes less of an issue in constraining the amount of content that can be made available. This allows cable companies to carry more channels and compete more vigorously at the retail level in the pay TV market.

As these developments have encouraged cable companies to compete more with other pay TV providers for broadcasters and retail end-users, broadcasters' bargaining position with these cable companies has improved over time. This is in line with the EU Commissions' reasoning in its determination that the market did not satisfy the three criteria test at an EU-wide level. This market can therefore be regarded as one which does not require the need for *ex ante* regulation.

Therefore, as per the EU Commission's determination⁴⁸ that fewer capacity constraints allow cable TV platforms to carry more channels and therefore, compete to a greater extent with other pay TV platforms, this market is one that should not be subject to *ex ante* regulation. This is in line with the uncontested findings of ComReg's existing market analysis.

5.1.4 TV Broadcasting Transmission Platforms - Internet TV

Managed Internet TV (i.e. IPTV) services can be regarded as another transmission platform for broadcasting TV supply where there are a significant number of retail end-users using such a service. However, there are very few households in Ireland with a subscription to IPTV services. Due to supply-side issues (e.g. high cost of network roll out, lack of adequate coverage etc.) and given that this is not currently a popular means of access by retail end-users (it is estimated that less than 1% of TV homes in Ireland have IPTV), it is unlikely that it will be a sufficiently attractive transmission proposition for broadcasters, particularly free to air broadcasters in the timeframe of this review (i.e. within the next three years).

⁴⁸ Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC(2007) 1483, dated 13/11/2007 (the Explanatory Note).

In addition, as IPTV is more likely to compete with other means of receiving pay TV it can be concluded that this market remains one that should not be subject to *ex ante* regulation. This is in line with the reasoning for all other pay TV platforms.

Q. 3. Do you agree with ComReg's draft finding that in light of the two sided nature of the market and ComReg's finding that the retail TV broadcasting market is separated between free to air and pay TV, that from a demand perspective the broadcasting transmission market is also in a separate market? Please explain your answer and provide evidence where possible.

5.2 Defining the retail radio broadcasting market(s)

As stated in Section 5.1, although it is not necessary to identify the relevant retail market in order to make an assessment of the three criteria test, it is useful in highlighting the interactions between retail end-user choices of platforms and the need for broadcasters to reach as many retail end-users as possible to get advertising revenue.

For further detail of the retail radio market and the basis for the draft findings set out here please see **Appendix A**.

In line with ComReg's previous market analysis findings, for broadcasters, broadcasting radio content over satellite or cable TV platforms is not a substitute for terrestrial transmission. The reason for this is that most end-users require mobility while listening to radio and there are limited portable devices available over which listeners can receive radio content via cable or satellite platforms.

Radio services could technically be delivered by a broadcaster over satellite to a radio set. However a retail end-user would need a special receiver to get a signal and as there is a lack of demand and so supply of such receivers in Ireland, this factor limits its viability as an alternative means of supply to terrestrial transmission of radio broadcasts.

Q. 4. Do you agree with ComReg's draft finding that radio broadcasting services over cable and satellite platforms are not in the same retail market as national terrestrial radio broadcasting? Please explain your answer and provide evidence where possible.

ComReg is also of the view that, in line with findings in its previous review of this market, that local/regional terrestrial broadcasting transmission services do not satisfy the three criteria test (due to low barriers to entry) and therefore, they are not considered further in this paper.

Therefore, the market under examination in this analysis is the national terrestrial radio broadcasting transmission market.

5.2.1 Radio Broadcasting Transmission Platforms - Terrestrial Radio

As is the case for TV broadcasters, for radio broadcasters who wish to provide free to air broadcast services nationally, the technical means (analogue or digital) of delivery will not change their desire to broadcast by free to air platforms because if they did so they would lose a significant number of retail end-users. Therefore, (from a demand perspective) the market can be defined as the market for national terrestrial radio broadcasting transmission services, regardless of whether they are delivered in analogue or digital format.

National terrestrial radio services to retail end-users are provided by RTÉ, Today FM, and Newstalk and at a non-national level by independent broadcasters who have entered into contractual arrangements with the BAI. These broadcasters purchase transmission along with other services (such as IT) via wholesale arrangements with RTÉNL and other third parties and or use self owned equipment.

RTÉ operates the national terrestrial transmission platform through its network division, RTÉNL. As RTÉ is a vertically integrated operator, it self-supplies transmission and distribution services from its networks business RTÉNL to its retail broadcasting associate RTÉ radio.

National analogue terrestrial transmission services for radio broadcasters are therefore provided by RTÉNL to RTÉ radio stations, Today FM and Newstalk. Transmission services are provided from RTÉNL's network of 150 transmission sites.

RTÉ radio programme services are funded from commercial income (e.g. advertising) and grant aid while commercial radio stations are funded through commercial incomes mainly.

The launch of independent national retail digital radio services is yet to be determined and will continue to be carried primarily by FM (though RTÉ does offer some digital radio content).

The costs radio broadcasters incur for transmission will vary depending on their requirements for contribution, distribution and transmission⁴⁹ which include elements such as:

- Operating costs (costs associated with usage of the transmission network such as power costs as well as rents etc.); and,
- Capital costs (site purchase, equipment, and installation/purchase of infrastructure such as masts, buildings etc.).

⁴⁹ Contribution services from regional broadcast centres are provided to RTÉ radio. A contribution service is also provided to Today FM. RTÉNL distributes programming signals from Donnybrook to its main transmission sites via a microwave link network. Transmission services are then provided from RTÉNL's network of transmission sites. RTÉNL also provide site hosting and engineering services to some quasi-national, regional/local and community radio broadcasters.

The costs incurred by broadcasters from RTÉNL for the purpose of transmitting their services are determined by RTÉNL's tariff model.⁵⁰

5.2.2 Radio Broadcasting Transmission Platforms - Satellite Radio

While satellite services, such as the proposed Saorsat service, could technically supply radio broadcasting services and therefore offer another transmission means for radio broadcasters, a listener would be required to purchase a satellite receiver to receive a radio signal by this means. There has been a lack of supply of such receivers in Ireland to date due to limited consumer demand, as consumers would be required to purchase these receivers to receive a signal. This situation is unlikely to change within the timeframe of this review.

Even if demand for such services were to increase, and a significant number of radio listeners switched to satellite receivers, radio broadcasters would still need to sign a contract with the terrestrial broadcasting transmission company in order to reach the majority of retail end-users who would continue to access radio services over terrestrial means.

Therefore, satellite radio is not considered an alternative to terrestrial transmission services for radio.

5.2.3 Radio Broadcasting Transmission Platforms - Cable (and MMDS) Radio

Given the limitations of radio access over this platform (subscription costs, need for additional equipment such as a set top box and lack of mobility, coverage limitations compared to terrestrial transmission etc.) retail demand for cable broadcasting services is predominantly driven by the demand for TV broadcasting content and therefore, in line with ComReg's previous market analysis findings, radio broadcasting services supplied over this platform are not considered a substitute to national terrestrial radio broadcasting transmission services.

5.2.4 Radio Broadcasting Transmission Platforms - Internet Radio

The Internet can be considered another means of transmission for radio broadcasting to the extent that it represents another means of retail end-user consumption, as services can be accessed easily over the Internet by means of a computer or other Internet-enabled device such as a gaming console. However, given the generally static nature of radio broadcasting over the Internet and quality issues limiting the number of simultaneous streams that can be downloaded, it is not likely to be regarded as a substitute to terrestrial supply by listeners and in turn an attractive substitute supply platform by broadcasters.

⁵⁰ <http://www.rtenl.ie/downloads/1606081.pdf> <http://www.rtenl.ie/downloads/080220.pdf>

ComReg consumer surveys⁵¹ indicate that this is not a frequently used access means in Ireland by radio listeners. Though use of such services may increase in the future, it is unlikely that such services will become a significant access means for radio services in Ireland in the timeframe of this review.

Q. 5. Do you agree with the draft conclusion that national radio services provided over the terrestrial platform and those provided over other platforms are not in the same broadcasting transmission market? Please explain your answer and provide evidence where possible.

5.3 Market definition conclusion

In ComReg's original analysis of the broadcasting transmission market (Doc. D04/06) it was found that analogue terrestrial TV and radio broadcasting were in separate markets. This was due to the view that there was insufficient supply substitution between them as new transmitters and antenna systems would need to be fitted.

Increasingly these boundaries are being blurred, especially in light of the move to digital transmission as digital TV multiplexes can also be used to broadcast digital radio services. Moreover, any TV terrestrial transmission system would also be designed to deliver radio broadcasting (in both analogue and terrestrial format). TV networks, with their higher and denser networks of towers, are well positioned to offer terrestrial radio broadcasting transmission services. On the other hand, a radio broadcasting transmission network would not be able to deliver TV content as it could not easily change its network design to accommodate such services. Given that most high tower, high power transmission networks are designed for the delivery of TV and have additional capacity built into them to also be able to deliver radio, it seems reasonable to conclude that these markets can be combined through supply substitution.⁵²

For this reason, a hypothetical monopolist for national radio broadcasting transmission could not raise its prices above the competitive level as the TV broadcasting transmission company could easily enter within a reasonable time period and compete for radio customers.

⁵¹ ComReg Consumer ICT Survey, Q4 2008 (Doc. 09/07).

⁵² Given that most of the potential sunk costs relate to transmission sites and tower structures it would not make commercial sense for a transmission provider to build a national network which would only accommodate terrestrial radio broadcasting.

As markets must be defined prospectively, it is therefore proposed in this consultation paper that terrestrial TV and radio broadcasting transmission are in a single market, i.e. the national (analogue and digital) terrestrial broadcasting transmission market. This is the market definition to which ComReg will apply the three criteria test, in Section 6 of this document.

Though the market definition conclusion in this three criteria test differs to a certain extent from ComReg's market definition exercise in 2004 (that terrestrial radio and TV transmission are in the same market), the overall market definition conclusions are broadly in line with each other. ComReg, through its market definition process in 2004, concluded that cable and satellite TV and radio services were in the same market, separate to the market for terrestrial services.

In 2004, ComReg decided to define markets appropriate to national circumstances. The wholesale transmission markets which ComReg defined were as follows:

- The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks;
- The wholesale market for radio broadcasting transmission services on local/regional analogue terrestrial networks;
- The wholesale market for television broadcasting transmission services on analogue terrestrial networks; and,
- The wholesale market for broadcasting transmission services on cable and satellite networks.

ComReg identified two of these wholesale transmission markets on which to conduct an analysis of whether or not the market is effectively competitive by reference to whether any given undertaking or undertakings are deemed to hold significant market power (SMP) in that market:

- The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks; and,
- The wholesale market for television broadcasting transmission services on analogue terrestrial networks.

6 Three Criteria Test

Following on from the market definition conclusion in Section 5.3, this section analyses the three criteria test in relation to the market for national terrestrial broadcasting transmission services.

6.1 National Terrestrial Broadcasting Transmission Market

As previously outlined, the retail market is defined prospectively, to include analogue and digital broadcast services, as retail end-users' over-riding desire is to watch content while the means by which content is delivered is less important. However, the broadcasting transmission markets are split along platform lines as broadcasters have to sign agreements with each transmission platform individually in order to gain access to the households which have chosen that platform. Household choice on platforms (free to air terrestrial, free to air satellite, pay satellite, pay cable etc.) thus informs the choices that broadcasters make with regard to the transmission companies with whom they will enter into agreements.⁵³

Given that a significant proportion of people listen to terrestrial radio broadcasts and a significant proportion of Irish households (around 1 in 5) have free to air terrestrial TV as their primary means of receiving TV broadcasts, those broadcasters who wish to provide their content by terrestrial free to air means will seek to enter into agreements with providers of free to air terrestrial platforms.⁵⁴ The change in the technical means of delivery (that is from analogue to digital) will not change this fact. Hence, on a prospective basis the market can be defined as the national terrestrial broadcasting transmission market.

It should be noted that the launch of independent national commercial digital radio services is not expected to occur within the timeframe of this review, although RTE does provide some digital content (DAB radio) services as a complement to their existing analogue channels to a coverage area of approximately 52% of the population.⁵⁵

TV broadcasters will likely demand that their programming is available on both analogue and digital terrestrial in the overlap simulcast period. In the timeframe of this review, the demand for transmission over analogue means will fall off as more and more households make the switch to digital. In effect, the viewing

⁵³ Of course, household choice of TV platform is not independent of what channels that platform has on it. Households spend a disproportionate amount of time watching a relatively few national channels. A platform that did not offer these channels would not likely attract many households. However, such strategic issues do not normally arise due to other legislative controls on such channels such as must offer restrictions.

⁵⁴ TG4 licence obligations require that it provides a national free to air based service. TV3 is contracted by the BAI to provide television programmes services to 90% of the population on a free to air basis.

⁵⁵ <http://www.rte.ie/digitalradio/faq.html>

and transmission of analogue terrestrial signals will disappear with analogue switch-off in late 2012. Subject to staying within their legal obligations in terms of coverage, it may be possible for some terrestrial broadcasters to withdraw from analogue broadcasting earlier than this.

The other means of broadcasting transmission are not considered as, in line with ComReg's earlier analysis and the European Commission's Explanatory Note to the revised *Recommendation on Relevant Products and Services Markets*, the three criteria are not met in these cases.

The emergence of the Saorsat option, which is equivalent to the Freesat service in the UK, is proposed to fill in areas not currently reached by terrestrial means of delivery. Broadcasters that want their content available free to air will be able to negotiate directly with the satellite provider. The EPGs will be provided on an open access basis, including the ones certified by RTÉ. Thus, there is no need to consider this further in line with all the other means of providing broadcasting transmission services.

Hence, the remainder of the analysis looks solely at the three criteria test for the national terrestrial broadcasting transmission market.

6.1.1 Barriers to Entry

The market for the supply of wholesale broadcasting services to allow for the provision of national terrestrial free to air broadcast services is characterised by high and non-transitory entry barriers.

There is one market player, RTÉ Transmission Network Limited (RTÉNL), providing national terrestrial broadcasting transmission services in Ireland and it is envisaged that this will remain unchanged in the timeframe of this review. RTÉNL currently provides analogue TV and radio broadcasting transmission services. RTÉNL is currently in the process of upgrading its network to deliver TV and radio broadcasting transmission services in digital format.

There are substantial financial costs involved in the establishment of a national terrestrial transmission network, most of which relate to the development of a network of high towers capable of carrying equipment to broadcast content. These costs would be substantially sunk if the enterprise was to fail. Transmission equipment (be it for analogue or digital services) is more mobile and so would likely have a potential use elsewhere so that the costs of transmission equipment would not represent such a substantial entry barrier.

However, with the pending analogue terrestrial TV switch-off in late 2012, there would be a requirement to purchase all digital transmission equipment and associated linking infrastructure in the distribution chain (that is from the multiplexing facility to the transmission sites). The purchasing and maintenance of sites would be costly, planning permission would be required which can be difficult to obtain, and the timeframe and technological know-how required to

build an alternative network would make it uneconomical to compete with an established player such as RTÉNL.

Given the impending analogue TV switch-off date of late 2012, the business case for construction of an analogue network is poor.⁵⁶ In addition, as RTÉNL can use some of its existing infrastructure for the purposes of DTT, it may be in a position to offer better contractual terms to broadcasters than a new entrant, who may be required to recoup a greater level of return from a high risk greenfield investment. Also, RTÉNL has contracts with national free to air broadcasters so it would be difficult for a new entrant to offer a service that would attract broadcasters away from RTÉNL's network. Broadcasters may already be locked into long-term contracts for purchase of wholesale transmission – a typical contract can be in place for up to ten years. ComReg notes that new contracts would be required with the switch over to digital transmission.

Site location is important in terms of the height required for broadcasting to a national area on an analogue or digital terrestrial network (when this is deployed in a high tower, high power manner). RTÉNL has masts located in key, high-altitude sites around the country to enable this. Geographic location of masts would be an issue for any potential competitor and suitable high-altitude sites to provide the same level of national coverage may not be available, requiring a greater level of investment due to the need for a greater number of sites located at lower-altitude levels. In addition, it is unclear whether a level of similar coverage would be achievable in any event.

Furthermore, construction of transmission infrastructure, including towers and on-site buildings to house transmission equipment, requires appropriate planning permission. Given the propagation characteristics of the spectrum used for broadcasting, high-sites (sites typically located on mountains) are the preferred locations for broadcasting transmission infrastructure. Based on the locations of the main transmission sites for the national analogue and digital terrestrial network, there appear to be strategically important high-sites which enable large coverage areas of Ireland to be achieved (for example, Mullaghanish, Kippure, and Cairn Hill).

In addition, in relation to planning permission, there would likely be a high risk of rejection of applications for development of new high-sites (even where such sites offering adequate coverage could be readily identified) as these could potentially be viewed as obstructions on the landscape.

It is possible to implement a terrestrial digital broadcasting transmission network by a different means, using a denser network of lower towers. This was

⁵⁶ An analogue radio network could be built using a network of lower towers but it is likely that the requirement of a network capable of digital radio services will become more important in the coming years. In any case, such a network could not compete with an operator that placed radio equipment on its pre-existing TV transmission network.

the view of one party with whom ComReg met recently.⁵⁷ ComReg has considered the potential to offer broadcasting transmission services via existing mobile telecommunications networks. Use of existing mobile telecommunications masts to broadcast on a national scale would be commercially and technically difficult as these site locations are predominantly low-lying, implying that equipment would need to be placed on a greater number of sites to provide the same level of national coverage offered by RTÉNL's network, increasing the costs for broadcasters in such a case. It is likely there would be difficulty in signing a commercial agreement with the existing mobile network providers or in the alternative building of a new network. Critically, the costs of distribution would rise substantially in such a network structure. Broadcasters would have to set up a complex system for distribution to such a network of mobile towers, which would add an additional layer of cost and complexity. It is also unclear whether the level of coverage currently available via RTÉNL's network could be achieved through this means.

In theory, local analogue terrestrial network operators might be able to collectively provide transmission services to achieve national coverage for radio services. However, due to the differences between local and national transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters co-located at sites), there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could provide a substitutable service. Consequently, it is very unlikely that the local analogue terrestrial network operators would be able to put the current national terrestrial broadcasting transmission network operator under competitive pressure. Moreover, such a network would likely be unable to compete with a radio broadcasting transmission network that is leveraged off a network of high towers which has also been built to cater for the transmission of TV broadcasting services.

For these reasons, it is ComReg's draft finding that the market for national terrestrial broadcasting transmission services satisfies the first criterion.

Q. 6. Do you agree with the draft finding that the first criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.

⁵⁷ See **Appendix B** for more information on ComReg's consultation process in preparation for production of this consultation.

6.1.2 Tendency Towards Competition

The European Commission found that, in general, the second criterion was not satisfied in wholesale broadcasting markets⁵⁸, so that despite entry barriers that may exist, the market dynamics are such that the market structure tends towards effective competition over relevant time horizon. This criterion looks at likely future developments in the market and asks whether a tendency towards effective competition can be identified over the relevant time period. Hence, this criterion is examined in the context of the move from analogue to digital broadcasting transmission as this is the key known development in Irish broadcasting market in the timeframe of this review.

The European Commission formed their view on the basis that the transition from analogue to digital broadcasting leads to a significant increase in the capacity of each transmission platform to carry additional content. In the context of the two-sided nature of the market, these transmission platforms would intensify competition on the retail market by having the capacity to offer more content. Thus, the impetus for platforms to attract additional broadcasting content would give more power to broadcasters in their negotiations with transmission companies.

On an EU-wide level this reasoning was also seen to apply to free to air TV. However, as was discussed in Section 5, these markets are likely to remain separate in an Irish context so that the national terrestrial broadcasting transmission market requires separate analysis.

There is one player active in the national terrestrial broadcasting transmission market and no new parties have entered the market since ComReg's last market analysis in 2003/2004. The development of a digital terrestrial platform capable of providing transmission services for national digital content has been undertaken by RTÉNL though national independent digital radio services are not expected to be launched in the timeframe of this review. However, these towers will continue to host analogue radio broadcast equipment.

In the general EU context, there is a separation between transmission companies and broadcasters. This is not the case in Ireland. RTÉ provides both the most viewed TV and the most listened to national radio channels in the State⁵⁹ and its wholly owned subsidiary (RTÉNL) provides broadcasting transmission services for free to air reception to most households.

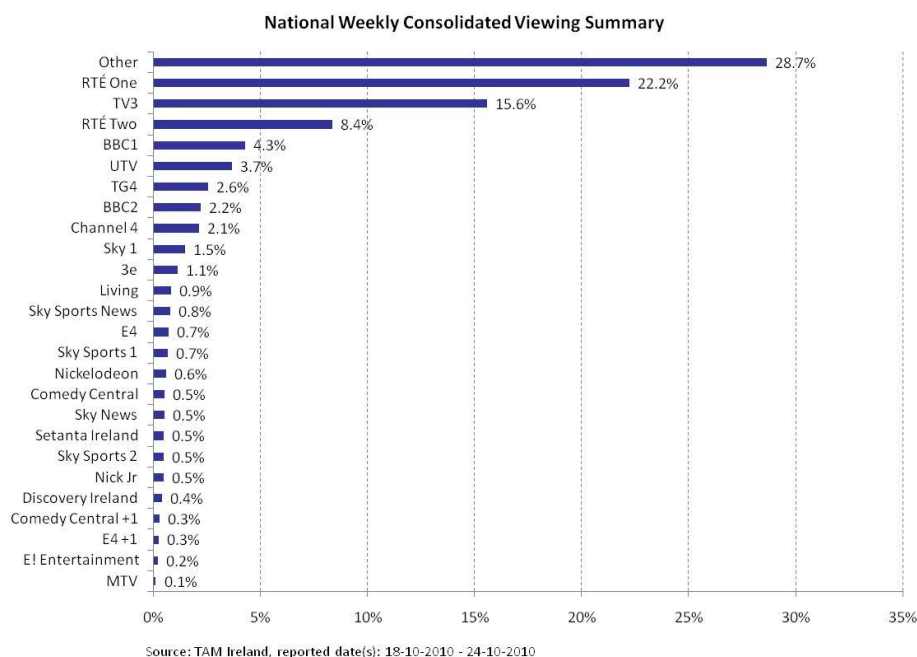
⁵⁸ Commission Staff working Document, Explanatory Note, Accompanying document to the Commission Recommendation on Relevant Products and Services Markets...Second Edition C(2007) 5406.

⁵⁹ According to the latest TAM Ireland Ltd. data, RTÉ One and RTÉ Two had a combined audience share of just over 30% of the total TV audience in the week of the 18th of October 2010. <http://www.tamireland.ie/>

According to JNLR/Ipsos MRBI survey results over July 2009 to June 2010 RTÉ radio channels (RTÉ Radio 1, RTÉ 2fm and RTÉ Lyric FM) had a national market share (share of all minutes listened on a weekday between 7am and 7pm) of 33.5%. [http://www.bai.ie/pdfs/20100729_jnlr_bf%20\(4\).pdf](http://www.bai.ie/pdfs/20100729_jnlr_bf%20(4).pdf)

Figure 3 below shows that, according to Nielsen TV Audience Measurement data, in the week between the 18th and 24th October 2010, RTÉ channels were watched the most with a viewing market share of 30.6%, followed by TV3 with 15.6%. TG4 had 2.56% viewing market share. In total these channels represented just under 49% of channel viewing market share in that week.

Figure 3: National Weekly Consolidated Viewing Summary



It might be the view of some that, given the lack of new competing entrants in this market to date, it is unlikely that the competitive conditions in this market will change in the timeframe of this review; despite the potential for increased capacity with the transition to DTT, broadcasters would still be required to sign transmission agreements with RTÉ / RTÉNL in order to reach terrestrial viewers and listeners. However, it is the vertical integration of RTÉ that is the key issue to analysing the competitive conditions in this market.⁶⁰

The presence of a vertically integrated entity is an important consideration for the incentives for firms to enter into this market. As a vertically integrated entity, RTÉ, by its actions, can to a large extent shape the free to air broadcasting market. It could be expected that RTÉ will continue to supply terrestrial broadcast transmission to itself. Thus, the commercial opportunity for a competing wholesale service is reduced.

RTÉ both supplies key network services to some terrestrial broadcasters and competes with them in a number of important markets. In relation to TV, RTÉ competes with other terrestrial companies for the rights to screen particular

⁶⁰ Other NRAs (in Austria and Italy) have found the need for regulation in this market; designating SMP on vertically integrated entities in their terrestrial markets. In both cases the EU Commission did not contest these findings.

events and movies. Competition is particularly keen with respect to sporting events which are (by Ministerial order or by commercial decision of the rights owner) available on a free to air basis. In addition, terrestrial broadcasters compete for talent to host shows etc. Terrestrial channels then compete for audiences and the consequent advertising revenues that can be raised. Therefore, there is a possibility that a vertically integrated entity, such as RTÉ, might try to exclude potential terrestrial competitors and /or to potentially charge them excessive transmission fees.

Although RTÉ has an incentive to expand its TV offerings in the digital world, which will maintain and attract back households to free to air TV, it may not want to induce the pay TV companies to make offerings that more closely match those available free to air as pay TV companies might be inclined to view the free to air offering as more of a competitive threat. This is due to the higher likelihood of RTÉ's channels being viewed in a free to air environment than in a pay TV environment. This, in turn, raises the number of households watching RTÉ's content, which directly translates into higher advertising revenue for RTÉ.

In the broadcasting market there are a number of constraints on the scope for entry of national radio and TV broadcasters. Capacity on the analogue terrestrial network is limited due to the finite amount of spectrum available for a national service in bands allocated to broadcasting, reducing the potential of the market size by limiting scope of entry for further national broadcasters. The BAI has responsibility for issuing independent licences it receives from ComReg within the available spectrum limits and is also responsible for regulating diversity of broadcasting content, which could further act as a constraint on entry for national broadcasters. Although a network capable of providing national digital terrestrial radio and TV services would be expected to provide greater capacity and potentially change the competitive conditions of this market in the future, as broadcasters compete for advertising revenues, it would not be in RTÉ's interests to create competition which would result in a loss of market share of viewers/listeners to other national broadcasters. As the presence of competing national terrestrial broadcasters are likely to be dependent on the capacity available on RTÉ's multiplex(es) or multiplex(es) to be licenced by the BAI, if any, as well as constraints or limitations on additional services arising from BAI policy on the terms and conditions of access to the multiplex(es), there is a possibility that this might also act as a constraint on the entry of national terrestrial broadcasters in the future.⁶¹

For these reasons, it would appear that the second criterion would remain satisfied in the Irish context.

To date, satellite TV services (e.g. Sky and freesat) in Ireland have been carried by wide-band satellites in the KU spectrum (such as ASTRA 2D for example) which have a footprint greater than Ireland. A new narrow-band satellite

⁶¹ While use of competition law can be an option in cases where there may be competitive supply issues, the availability of capacity to carry a broadcaster on a network will limit such an option.

operating in a different frequency band (using Ka spectrum) and orbital position, which would have a spot beam transponder focused specifically on Ireland, is expected to be launched this year. It is envisaged that RTÉ's Saorsat option would use this satellite as this is expected to overcome any significant potential rights issues that might occur for RTÉ if they were to broadcast from any other existing satellite.

The Saorsat option has some potential to change the dynamic behind the entry barriers. If the vast majority of households had the ability and willingness to erect a satellite dish then the logic of the European Commission would naturally hold and the second criterion would no longer be met. However, data shows that around 49% of households with a TV have a satellite service.⁶² Although others may also have an inactive dish erected, it still remains the case that a significant number of households have so far been unable or unwilling to erect a satellite dish.

In addition, given that these existing household satellite dishes are pointing towards satellites such as ASTRA 2D; to receive Irish channels on a free to air basis, it is unlikely that households would adjust their dishes towards the direction of the narrow-band satellite from which Saorsat may operate and lose out on all the other services that they currently receive.⁶³ Thus, the impact of the Saorsat platform would not be such that the dynamic towards potential competition would change.

Therefore it is the draft finding of ComReg that the market for national terrestrial broadcasting transmission services satisfies the second criterion.

Q. 7. Do you agree with the draft finding that the second criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.

6.1.3 Sufficiency of Competition Law Alone

This criterion considers whether there is a need for *ex ante* regulation of terrestrial broadcast transmission markets in the first instance. If *ex post* competition law remedies are sufficient then there should be no need for a

⁶² Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd.

⁶³ While there may be satellite dishes available that could receive signals from both this free to air satellite and pay TV satellite there are a number of hindrances to the desirability of this method of reception; installation can be an issue such as the need for more wiring to the satellite dish, getting the correct levelling of the dish is important in order to receive the two signals while the cost of such a dish is likely to be expensive. Given the relatively greater size of these satellite dishes there is also likely to be greater difficulty in obtaining planning permission to install the dish in apartment blocks or property owner permission, in the case of rented accommodation for example.

separate regulatory regime. However, ComReg considers that competition law alone is insufficient to address 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 be sub-optimal.

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 its regulatory framework. Although competition law could be used to allow access to be granted to the terrestrial transmission network, 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. It would also be difficult to apply competition law in order to address strategic decisions which limit the possibility of new terrestrial channels entering the market. 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.

In addition to considering whether competition law is substitutable for *ex ante* regulation, the European Commission has also looked at the effect that other legislation may have on broadcast transmission markets. The European Commission pointed out that insofar as the content of a broadcast was such that it might be considered to meet a general interest objective, then it could be addressed under the “must carry” rules provided for in Article 31 of the Universal Service Directive.⁶⁴

The question which arises is whether the terms of access under legislation are such that the potential competition problems are addressed. For analogue terrestrial TV broadcasting there are no such provisions and hence, must carry rules would appear insufficient to address all the potential competition problems. However, for terrestrial radio broadcasting there are legislative provisions relating to the co-operation of RTÉ with a sound broadcaster to facilitate the provision of transmission facilities for sound broadcasting services at the behest of the BAI and Minister. These provisions under section 115 (1) of the Broadcasting Act 2009 cover some of the areas that are in other contexts addressed by *ex ante* regulation.

In terms of digital TV, section 130 of the Broadcasting Act 2009 provides for periodic payments for access to RTÉ national multiplex, to be set by the Minister, and ensuring that the capacity employed by RTÉ is adequate to carry other broadcasters’ content. These provisions cover many of the areas that in

⁶⁴ Directive 2002/22/EC.

other contexts are addressed by the electronic communications regulatory framework. For TV3, TG4, the Houses of the Oireachtas Channel, the Irish Film Channel, and any channel deemed by the Minister to have the character of a public service broadcaster who has a contract with the BAI, there would thus appear to be provisions in the Broadcasting Act 2009 that may duplicate some of the important elements of *ex ante* regulation with respect to the “national television multiplex”.

Similar provisions related to prescribed periodic payments and access are also made in the Broadcasting Act 2009 in respect of digital radio services, and access to a national sound multiplex operated by RTÉ. It would thus appear that for free to air broadcasters, those the character of a public service or those who have a sound broadcasting contract with the BAI, there are legislative provisions in place that could potentially duplicate some of the important elements of *ex ante* regulation.

RTÉ must make provision in its national television multiplex for the broadcast by digital means of the broadcast services described above. Those broadcasters shall make periodic payments to RTÉ for access to its multiplex and the Minister may direct the amount of those payments (following consultation with ComReg, RTÉ and the broadcaster). Near identical provisions apply to radio broadcasters and RTÉ’s national sound multiplex.

This is a particular form of price control but 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 charges itself in the same manner.

Further, application of section 109 of the Broadcasting Act 2009 would not necessarily result in transparent internal transfer pricing, in the same manner as would an accounting separation direction imposed by ComReg under its regulatory framework. Therefore, in the context of a vertically integrated national broadcaster that provides broadcasting transmission facilities to actual or potential competitors, the provisions of the Broadcasting Act, 2009 do not remove the requirement 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 the market through using an approach that is methodical, and well understood.

As a final point, if RTÉ has spare capacity on any other multiplex under its control, then under section 132(2) of the Broadcast Act 2009 it can broadcast other channels on a commercial basis. These channels are not subject to any of the provisions on access, prescribed periodic payments, or capacity. Hence, for such channels the third criterion would likely remain satisfied. For channels that could compete with RTÉ’s main broadcast channels, even in relation to certain key areas such as sports etc., it could be expected that such channels would not

be granted access to RTÉ's transmission sites, because if they became widely available on a free to air basis then they could potentially outbid RTÉ for key content and this would have a negative effect on advertising rates and revenues for RTÉ.

For the above reasons, it is the draft conclusion of ComReg that the third criterion remains satisfied in the national terrestrial broadcasting transmission market.

Q. 8. Do you agree with the draft finding that the third criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.

7 Draft conclusion

Based on this draft analysis, ComReg is of the opinion that the three criteria test is satisfied in the national terrestrial (analogue and digital format) broadcasting transmission market as there are high non-transitory barriers to entry, the market does not tend towards effective competition over time and competition law alone is insufficient to address market failure(s).

Q. 9. Do you agree with the draft finding that the three criteria test is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.

Q. 10. Do you have any further comments to make on the draft findings in this consultation paper? Please explain your answer and provide evidence where possible.

8 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 Friday, 3 December 2010 to Thursday, 20 January 2011, during which the Commission welcomes written comments on any of the issues raised in this paper.

Having analysed and considered the comments received, ComReg will review the three criteria test on the broadcasting transmission market and publish a report in March 2011 on the consultation which will, inter alia summarise the responses to the consultation.

In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24. We would request that electronic submissions be submitted in an unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.

Please note

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.

As it is ComReg's policy to make all responses available on its web-site and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response.

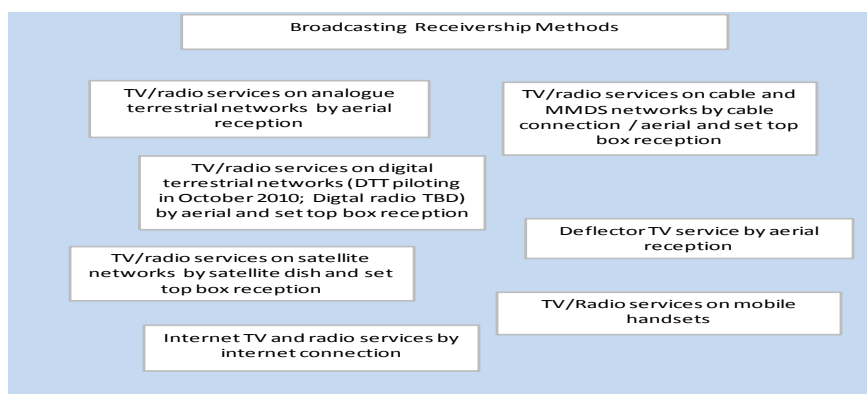
Such Information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

Appendix A – Retail Broadcasting Market

While the focus of this document is on the broadcasting transmission market, it is important to consider the retail market in tandem, as the ultimate aim of this review is to ensure that there is a sustainable competitive broadcasting market which serves the public interest. It is, therefore, of relevance to examine the behaviour of viewers/listeners when defining the relevant wholesale market(s) to the extent that a significant number of retail end-users depend upon a particular transmission platform, and the degree to which such users can affect wholesale market behaviour. This section therefore, provides a summary of the retail broadcasting market in Ireland highlighting the changes in consumer behaviour over time.

Viewers/listeners may receive radio and television broadcasting via a number of means. This can include provision via terrestrial networks⁶⁵, defectors⁶⁶, independent radio stations, cable and MMDS⁶⁷, direct to the home satellite, other satellite services such as Freesat⁶⁸, Freeview (a UK digital terrestrial service), over mobile handsets and through the Internet.

Figure 4: Broadcasting Receivership Methods



⁶⁵ Currently only analogue terrestrial TV services are available but an initial test launch of DTT is expected in October 2010 with analogue terrestrial transmission running in parallel until 2012. The launch of national digital radio transmission services has no set timeline at present.

⁶⁶ Deflectors intercept UK overspill signals at a high point and relay them in a particular locality. The ODTR licensed them in 1999 for four channels each in the UHF band, which enables them to relay the four main UK terrestrial channels. They now mostly take the signal from satellite, but still relay it locally in terrestrial analogue. There are 27 deflector operators which deliver services to rural parts of Ireland. Nielsen TAM data suggest that approximately 1% of TV homes in Ireland receive deflector services. Deflector services are fragmented, small and have low coverage capacity. Deflector operators are not wholesale broadcast transmission providers and so are not discussed in this document. Such services are generally considered to be a complement to the national analogue terrestrial network.

⁶⁷ MMDS is a wireless telecommunications technology, used as an alternative method of cable television programming reception. MMDS is usually used in sparsely populated rural areas, where laying cables is not economically viable.

⁶⁸ An unencrypted satellite service which allows one to get a number of satellite channels with no subscription fee.

Retail TV Broadcasting Market

Households watch TV for content including, news, current affairs, sports, drama etc. The technical means by which this content is delivered, be it analogue or digital, does not change this fact.

Broadcasters produce and/or buy in programming that they think will attract viewers. Broadcasters sell advertising during breaks in programming. This can be used to cover the cost of programming which is particularly important when the channel is available on a free to air basis as there is no ongoing charge for viewers of the free to air content.⁶⁹ In Ireland, RTÉ One, RTÉ Two, TV3 and TG4 are available on a free to air basis. Content from the UK is available free to air on the basis of inadvertent spill over of signals.⁷⁰ TV content is also available by way of subscription to pay TV services.

Advertisers target specific demographics on behalf of their clients. In doing so, advertisers examine the viewership a particular programme gets and how many households the programme is able to reach. This in turn determines the charges that broadcasters can demand from advertisers e.g. if a channel is not available on all platforms this will impact the advertising rates it can command. Advertising is just one area where broadcasters compete with each other. They also compete over exclusive access to content and talent. These interactions between broadcasters, when one of them is supplying a terrestrial transmission input to the other, are discussed when examining the three criteria test (see Section 6).

Most Irish households have the option of paying a subscription to get more channels, including premium content (sports and films etc). A large proportion of households in the State have the choice of subscribing to a cable or satellite pay TV service.⁷¹ A small number of households (estimated at less than 1% of TV homes) also subscribe to managed TV over the Internet (IPTV).⁷² This service is limited mainly to large urban cities.⁷³ IPTV is unlikely to become a significant TV access means for retail end-users in Ireland in the timeframe of this review (i.e. within the next three years).

⁶⁹ All holders of equipment capable of viewing TV broadcast signals must be licensed. An annual fee is charged. These monies are disbursed to fund public service broadcasting. This is distinct from the decision to opt for free to air or pay TV.

⁷⁰ Data from Nielsen's TV Audience Measurement Establishment Survey conducted on behalf of TAM Ireland Ltd. suggests that circa 1% of TV homes have a digital freeview reception method. These signals are available to a minority of the Irish population generally in certain areas along the east coast of Ireland and near the Northern Ireland border. Subject to rights issues, broadcasters can also make their programming available by unencrypted free to air satellite services (for example freesat) which offer a number of TV channels for a one off payment with no ongoing subscription required. These services are potentially national in scope. It would seem that, based on Nielsen's TV Audience Measurement Survey data conducted on behalf of TAM Ireland Ltd., that less than 9% of TV homes in Ireland have a free to air satellite service.

⁷¹ While many Western European countries have the choice of accessing a satellite or cable service, in Ireland, compared to the majority of EU27 countries, the proportion of homes passed for cable is lower.

⁷² Based on data collected in ComReg's Quarterly Key Data Questionnaires.

⁷³ Magnet and Smart Telecom (a subsidiary of Digiweb) are the main IPTV providers in Ireland.

In areas where both cable and satellite platforms are available, they compete for household subscriptions. Satellite, which has a national footprint, does not differentiate between its potential customers in cable and non-cable areas.⁷⁴ Pay TV providers (such as UPC and BSkyB) sign contracts with the terrestrial broadcasters to carry their programming content, both for commercial reasons (that is to attract advertisers as well as viewers) and due to must-carry provisions. Some terrestrial broadcasters also have must-offer obligations.⁷⁵

The European Commission in its explanatory note to the revised *Recommendation* left open the question of whether cable and satellite TV services are in separate retail markets.⁷⁶ Further discussion on this issue was considered unnecessary as the wholesale cable and satellite broadcasting markets were found to be in separate markets in any case. This is on the basis that the two-sided nature⁷⁷ of the broadcast market would require many broadcasters to sign contracts with any service provider (over any platform) providing TV services, to even a small but significant number of households. This would be required to ensure that their programming would be available to the largest number of households, which would in turn affect the advertising rates they might be able to command.

Figure 5 shows a representation of this structure of the television supply chain. This draft consultation paper is only concerned with the transmission of broadcasting content. Other areas such as rights to content and advertising are only considered from the perspective that they influence a broadcaster's decision to contract with a particular transmission platform in order to reach retail end-users. Because broadcasters acquire TV transmission services on a national basis, the market can be defined as national in scope.

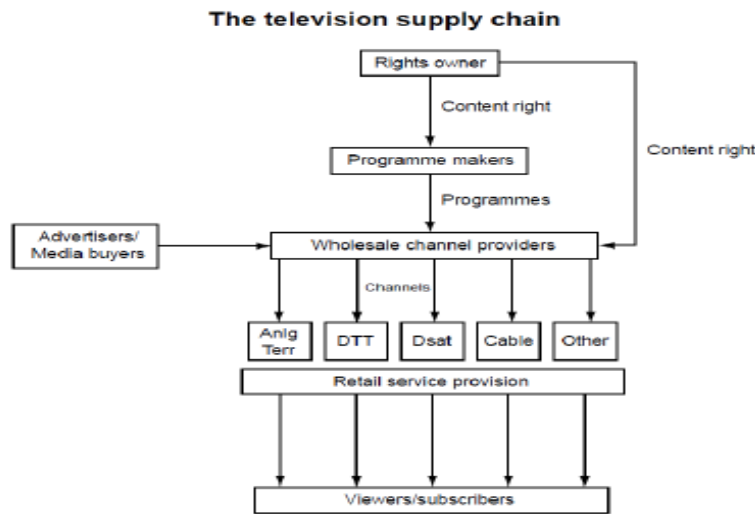
⁷⁴ While satellite services have a national footprint, according to Nielsen's TV Audience Measurement Survey conducted on behalf of TAM Ireland Ltd., circa 40% of TV homes in Ireland have a pay TV satellite service. Cable TV coverage in Ireland is estimated at around 60% of total households in Ireland at the end of June 2010. Cable TV networks mainly serve large urban cities and towns in Ireland. MMDS wireless platforms are used by cable operators to reach more rural areas of Ireland.

⁷⁵ The detail of must carry and must offer etc. is dealt with in Section 4.

⁷⁶ Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC(2007) 1483, dated 13/11/2007 (the Explanatory Note).

⁷⁷ This occurs where broadcast delivery platforms bring together users and providers of content. Households wish to access broadcasting content. Broadcasters produce content and use advertising income to cover their costs. Advertisers seek to reach the largest possible number of retail end-users. Therefore, broadcasters, in order to get advertising revenues and so satisfy advertisers' demands, sign transmission agreements with any transmission platform which has access to even a small but significant number of retail end-users.

Figure 5: TV Broadcasting Supply Chain



Source: CC based on Ofcom Diagram.

The Commission’s logic implies that all pay TV transmission platforms are in the same retail market, when the Commission noted that increased capacity (as a result of the transition from analogue to digital delivery platforms) on these platforms would allow them to carry more channels and hence compete more vigorously at the retail level. It was for this reason that the Commission finds that the three criteria are no longer met.

The question then arises whether terrestrial free to air (FTA) means of receiving broadcasting content is contained within the same retail market as pay TV.

In areas where pay TV services over satellite and cable are both available, they can be found to be within the same retail market. Cable is estimated to be available to circa 60% of households in Ireland while satellite has a national footprint. If either type of operator increased its price over the competitive level, it would lose sufficient numbers of households to make the price increase unprofitable. This is due to the relative ease with which most households can switch (with the cable/satellite provider often taking up the switching costs on the basis of signing up to a 1 year contract) and the national pricing strategy of the more widely available satellite platform. However, it should be noted that there can be some difficulties in switching for some people; for example, the need to erect a satellite dish.

Free to air TV has traditionally only covered the basic Irish channels throughout the whole geography of the Irish State. In areas close to the UK however, there has always been an amount of inadvertent terrestrial spill over of signals. In recent times, those households with a satellite dish pointed at the Astra 2D satellite can receive many TV channels without a monthly subscription on a spill over basis. This does not include the Irish terrestrial channels which, to date have only been available by subscription on satellite services. With the

introduction of the public service multiplex(es) for DTT, there will be an increase in the number of channels available in the coming years.

The question arises whether pay TV subscription packages are a substitute for the free to air services, or more precisely, whether the lowest priced pay TV subscription service is a substitute for free to air services such that there is a full chain of substitution that covers the whole set of retail TV offerings. Basic analogue services with the largest cable company start from €24.75 per month including VAT. This package includes all the terrestrial free to air channels, the basic UK terrestrial channels, Setanta Ireland, 3e etc. The basic package on satellite which offers the same basic channels (but with more channels than cable) has a monthly subscription fee of €23 per month including VAT. From the perspective of market definition, the question is whether a hypothetical monopolist would be able to sustain a 5% increase above the competitive price of the basic pay TV package profitably?⁷⁸ Customers would have only three options: stay on the basic package, move to a different package with their current provider or drop the pay TV subscription.

Despite its accepted use in competition law, looking at the response of customers to changes in existing retail prices may be misleading if there is reason to believe that these prices are not at the competitive level.⁷⁹ If a firm has the ability to raise prices above the competitive level it will naturally raise them up to the point where any further rises would be unprofitable due to substitution. Therefore, a monopolist will set its prices at a monopoly level where two products may appear as close substitutes, but (as per the Cellophane Fallacy) if prices were truly competitive, they would not in fact be substitutes. This may lead to the erroneous result of defining the market too broadly on the basis that products and services are substitutes when they are not.

However, it is possible to prove a negative result. If at current prices a price rise of 5% for all basic pay TV packages would be profitable then we can conclude that FTA cannot be included in the pay TV market, as the degree of substitution would be even smaller at the lower notionally competitive prices.

Households currently pay in the region of €23-25 for their basic pay TV package. On the basis of an average price of €24, a 5% price rise would represent a permanent price increase of €1.20 per month. Allowing a 30-40% contribution margin on retailing pay TV services, the question becomes would 11-14% of pay TV customers move to free to air TV in response to such a price

⁷⁸ In the case where a service has no ongoing monthly price the notion of applying a SSNIP test clearly become problematic. In such a case we have to proceed with outlining the relevant market by a process of elimination. If FTA and pay TV are in the same relevant market then it would not be possible to sustain a definition of the market that is restricted to pay TV alone.

⁷⁹ This potential problem is known as the 'Cellophane Fallacy' after the Du Pont (cellophane producer) case. Du Pont argued that cellophane was not in a separate market since it competed with package materials. Du Pont was the sole producer of cellophane and had set a price at the monopoly level and it was at this level that consumers viewed the other products as substitutes. However, at the competitive price level cellophane was viewed as a separate relevant market. The US Supreme Court in its decision that Du Pont had not exercised monopoly power, failed to recognise that high price elasticity may mean a firm is already exercising monopoly power.

increase?⁸⁰ If losses were less than this, then the retail pay TV market would be separate from the free to air market.⁸¹ Given the continued popularity of content available through pay TV subscriptions in Ireland despite price increases for subscription packages, which have not resulted in any significant transition of viewers to free to air TV, it is highly unlikely that such a number of households (11 – 14%) would opt out of pay TV services in response to such a price increase. In a sense, given the larger volume and diversity of content available to retail end-users through pay TV subscriptions compared to free to air content, pay TV services could be viewed as an ‘experience good’⁸²; once subscribed, there is likely to be less propensity among pay TV retail end-users to terminate their subscription in favour of free to air television.⁸³

Furthermore, pay TV subscriptions entail a minimum contract commitment for retail end-users (e.g. 12 months for BSkyB satellite TV services and UPC cable TV services) and so retail end-users would incur a cancellation fee should they terminate their subscription before this contract period is completed. This is also likely to reduce the incentive of pay TV retail end-users to switch to free to air television.

A retail end-user’s decision to choose pay TV or free to air TV services will be affected by the differences of the product/service characteristics of each service. Aside from the fact that pay TV services require a recurring subscription fee whereas free to air services do not, there would be switching costs for any viewer who wished to move from free to air services to pay TV services. This is because the equipment used for free to air viewing is currently relatively minimal compared equipment needed to view pay TV services though it should be noted that free to air viewers will require a set top box and possibly in some cases a new dish to view digital free to air services. Even with the transition to digital free to air services the content available on pay TV subscriptions will remain far greater and diverse than that available on free to air platforms. Some programmes are likely to remain available only through a pay TV subscription e.g. rights to certain sporting events. In terms of coverage and penetration, free to air services are available to almost all households in Ireland. Some pay TV services such as cable for example are not available to all TV households with an estimated 60% of households passed for cable services.

⁸⁰ In this we are suppressing the option to move to a higher pay TV package. The extent to which households upgrade in response to a price increase in the basic package would affect the level of profit.

⁸¹ 11-14% of pay TV customers would represent a very large increase in the number of total free to air households.

⁸² An experience good is a product or service where product characteristics such as quality or price are difficult to observe in advance, but these characteristics can be ascertained upon consumption. Experience goods generally have lower price elasticity than search goods (products and services which have characteristics easily evaluated before purchase), as consumers fear that lower prices may be due to unobservable problems or quality issues.

⁸³ Although more targeted at showing general consumer behaviour in response to spending cutbacks, a recent survey by Ofcom suggests that if forced to cut spending only 17% of consumers would be willing to cut back on spending in relation to pay TV subscriptions unlike other items such as night/meals out (53% of respondents) or holiday/weekends away (41%). <http://www.ofcom.org.uk/static/cmr-10/UKCM-1.57.html>

For these reasons, we can conclude that there are separate retail markets in Ireland for pay TV and free to air TV services.

At present it would seem that for most Irish households that only have access to the Irish channels on a free to air terrestrial basis, pay TV subscription services are in a separate retail market to free to air TV services.

Towards the end of this year DTT will begin to be switched on throughout the Irish State on an incremental basis and a full service is expected to be launched by Q4 2011⁸⁴. RTÉNL plans⁸⁵ to place the channels it will broadcast on DTT on a new satellite transponder that is focused on the Irish State. This will enable these services to be available on satellite without charge (this is likely to be marketed as Saorsat). Additional capacity will be available on this transponder and there will be open access to the Electronic Programming Guide (EPG) on the hybrid (that is combined DTT and digital satellite) set-top box. For these reasons, it might be expected that the offerings on free to air in the coming two years would bridge the gap in the chain of substitution between free to air and basic subscription TV packages.⁸⁶

As markets should be defined from a forward-looking perspective, it could be expected that the underlying retail market will tend towards the inclusion of both free to air and pay TV subscription packages over time. This seems to be supported by the findings of Ofcom⁸⁷ and the Competition Commission in the UK in a recent premium content investigation and also in the Sky/ITV cross shareholding cases,⁸⁸ which, though both analyses had a very different focal point, seem indicative of a trend towards defining a broader market. In both cases, the emergence of Freeview⁸⁹ in the UK appeared to be an important element in bridging the gap between the free and pay markets.

However, such a scenario in the Irish market seems less likely. This is because unlike other EU markets where there is generally separation of the transmission provider and broadcasters, RTÉ is a vertically integrated entity. Therefore, as a vertically integrated entity, the impetus for RTÉ to provide offerings that more closely match pay TV offerings might be lower. While RTÉNL would likely wish to do so if it were an independent entity, as this would increase the attractiveness of its wholesale platform, RTÉ may be concerned about the

⁸⁴<http://www.dcenr.gov.ie/Press+Releases/Minister+Ryan+announces+switch-on+of+Digital+Television.htm>

⁸⁵ Based on a statement by Conor Hayes, CFO of RTÉ to the Joint Committee on Communications, Energy and Natural Resources on the 14th of July 2010.

⁸⁶ The Boxer consortium (which was involved in a bidding process for commercial multiplexes) planned to offer entry level pay TV services at €9.99.

http://www.communicorp.ie/press_release.php?id=58

⁸⁷ http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf

⁸⁸ <http://www.ofcom.gov.uk/news-and-updates/78a-07>

⁸⁹ The UK Freeview service is a collection of free to air services on the DTT platform in the UK run by BBC, ITV, Channel 4, Sky and Arqiva. Some households in Ireland can receive channels such as BBC1 and 2, UTV and Channel 4 as a result of overspill from the UK terrestrial TV network.

potential impact of such a move on its position on the advertising market.⁹⁰ Multichannel advertising revenues are approximately one third of those from terrestrial advertising in Ireland according to a PWC report.⁹¹ The offering of a superior free to air service or of a relatively cheap pay TV (offering a very small amount of pay channels) could, potentially, reduce the viewership of RTÉ's own channels as choice for households expands. Even with the transition to DTT, the breadth and diversity of programmes available on this platform will not match those provided over pay TV. If pay TV providers feared that viewers would move away from their pay TV packages, it is likely that they would respond with a more competitive package. This would have the potential to further reduce the proportion of households that can be seen as "locked in" to RTÉ's schedules.

A significant number of households seem to have been unable or unwilling to erect a satellite dish such that the impact of a free to air satellite service would not be such that the dynamic towards potential competition would change.⁹² ComReg notes that with analogue terrestrial switch off, terrestrial viewers will have to make a decision to the means by which they will continue to receive their TV services.

As households with existing satellite dishes are pointing towards satellites that operate in a different orbital position to the free to air satellite service from which RTÉ (Saorsat) may operate, households are unlikely to adjust their satellite dishes towards the satellite from which Saorsat may operate as they would lose out on all the other services that they currently receive.⁹³ Moreover, it is currently unclear what channels may be available on the Saorsat service; thus its attractiveness even to households with a satellite dish may be low.

Hence, a preliminary conclusion would be that a free to air satellite service targeted at the Irish State would be unlikely to bring about a significant change in market dynamics at the retail level in the period of this review.

⁹⁰ RTÉ made €131.7 million in advertising revenue last year, a figure considerably down from the €195.6 million made from advertising in 2008.

⁹¹ PriceWaterHouseCoopers, Global Entertainment and Media Outlook: 2008 - 2012

⁹² Nielsen TV Audience Establishment Measurement Survey on behalf of TAM Ireland Ltd. shows that approximately 49% of households with a TV have a satellite dish.

⁹³ There may be satellite dishes available that could receive signals from both this free to air satellite and pay TV satellite but there are a number of hindrances to the desirability of this method of reception; installation can be an issue such as the need for more wiring to the satellite dish, getting the correct levelling of the dish is important in order to receive the two signals while the cost of such a dish is likely to be expensive. Given the relatively greater size of these satellite dishes there is also likely to be greater difficulty in obtaining planning permission to install the dish in apartment blocks or property owner permission, in the case of rented accommodation for example.

Retail TV Broadcasting Statistics

TV ownership in the home is almost universal in Ireland. Data from the Nielsen TV Audience Measurement Establishment Survey⁹⁴ indicates that there were approximately 1,589,000 homes with a TV in Ireland in September 2010 which represents a 96% penetration rate based on a total household base of 1,651,000 households in Q1 2010.

The figure below shows total TV homes classified by the reception method through which the highest number of TV channels is received, between 2003 and September 2010. Though the proportion of homes which receive terrestrial TV channels only has declined by 27%, there remain a substantial proportion of TV households who access terrestrial TV channels only (circa 206,000). In addition, it is estimated that there are approximately 127,000 households who receive free-to-air UK terrestrial services in addition to Irish terrestrial services through one aerial (i.e. Irish terrestrial and UK terrestrial via spill over). This means that at least 21% of TV households have an Irish terrestrial TV service compared to 39% in 2003. Cable/MMDS/satellite TV homes have a large presence in the market with approximately 79% of the market compared to 61% in 2003.⁹⁵

Figure 6: TV homes by reception type

	2010 (September)	2003	September 2010 as a % of Total TV Homes	% Change 2003 - 2010 (September)
Reception	(000s)	(000s)		
Irish Terrestrial	206	282	13.0%	-27.0%
Multi Total	1383	1061	87.0%	+30.3%
Multi Terrestrial	127	236	8.0%	-46.2%
Cable/Sat Analogue	153	489	9.6%	-68.7%
Cable/Sat	1103	336	69.4%	+228.4%

⁹⁴ The 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 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 such as age etc.

⁹⁵ MMDS (Multichannel Multipoint Distribution Service) is included under cable/satellite.

Three Criteria Test on the Broadcasting Transmission Market

Digital				
Total Cable/Sat	1256	1061	79.0%	+52.2%
Total TV Homes	1589	1343		+18.3%
RECEPTION: This is determined by the channels the TV home receives.				
Multi Total: Made up of Multi Terrestrial homes plus Cable/Satellite homes and is therefore any home which receives more than just the four Irish terrestrial channels (RTÉ One, RTÉ Two, TV3, TG4).				
Irish Terrestrial Homes which only receive the four Irish terrestrial channels (RTÉ One, RTÉ Two, TV3, TG4).				
Multi Terrestrial: Homes which receive at least one of the UK channels (BBC, UTV, Channel 4, HTV, S4C, Channel 5), but do not receive any Cable/Satellite channels.				
Cable/Satellite: Homes which receive any Cable/Satellite channels (Sky One, Sky News, Sports channels, MTV, E4, Movie channels, etc.).				
Digital: Have digital reception either via dish or cable service.				

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

Figure 7 shows TV homes by reception method⁹⁶ from 2003 to September 2010. Cable/Satellite (mostly Sky and UPC) reception methods have increased from 63% to 70%, while other/local supplier (deflector/relay services), digital freeview, and other satellite (including free-to-air services such as freesat) services⁹⁷ are received by a minority of TV homes. Aerial reception methods have declined from 56% to 36% over the same period. Based on this data it would appear that approximately 46% (aerial, other/local supplier, freeview and other satellite) TV homes receive a free-to-air service which represents a substantial proportion of the market. It should be noted that this chart refers to homes that receive more than one reception type e.g. one home could have an aerial and cable TV connection, as the survey asks respondents to detail their reception method by their main TV set and up to 9 TV sets. Therefore, the numbers reported here do not refer to homes dependent solely on one particular TV platform.

⁹⁶ This is determined by the method by which the homes receive their channels. Each home can have more than one method of reception e.g. aerial and cable or digital satellite, digital satellite and cable, etc. The question is asked for their main and up to 9 TV sets. For this reason, the total for the reception methods adds up to more than 100%.

⁹⁷ Other satellite service includes respondents who said “don’t know”, and satellites that receive foreign language stations including freesat.

Figure 7: TV Homes by Reception Method, 2003 - 2010

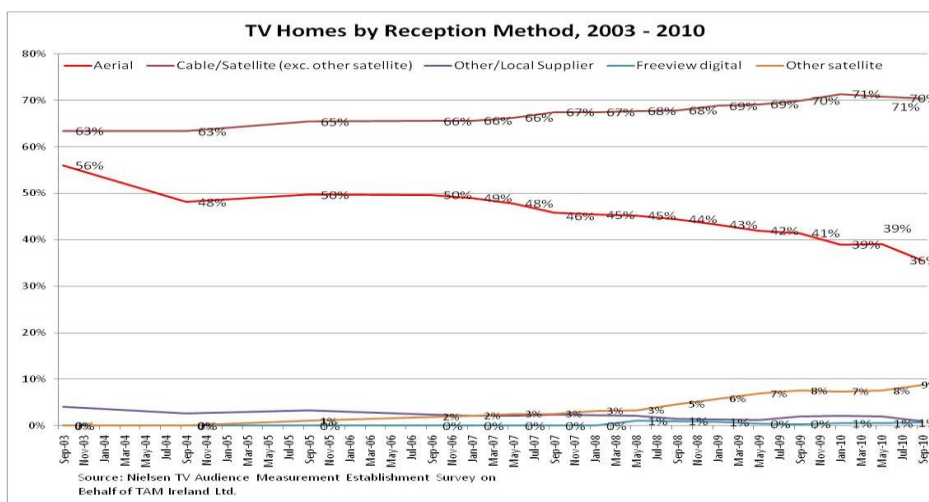
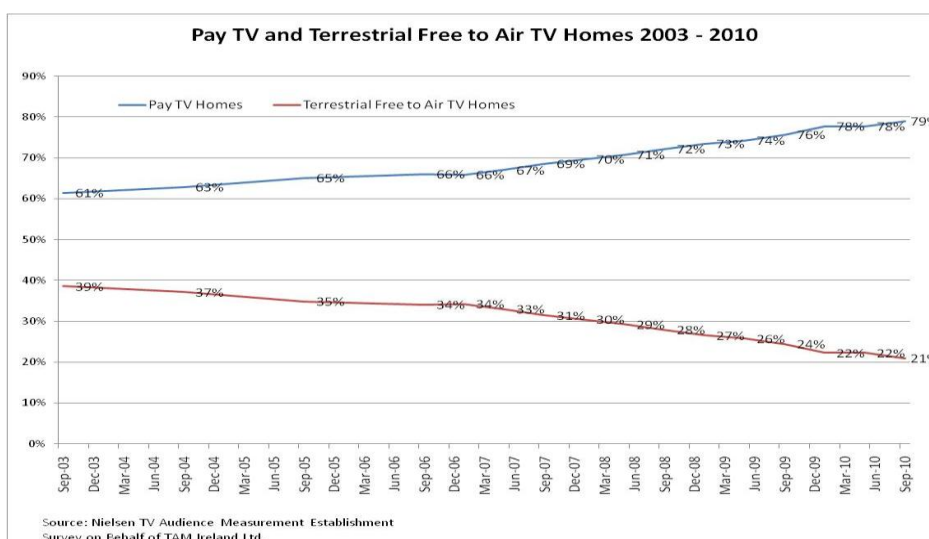


Figure 8 below shows the proportion of pay TV and terrestrial free to air TV homes between 2003 and 2010, as determined by channels received. This chart has been derived by ComReg using Nielsen TAM data. It should be noted that this is not a classification reported explicitly by Nielsen itself. Pay TV homes (that is cable/MMDS/satellite TV homes) have increased by circa 18 percentage points over the period, and the proportion of terrestrial free to air homes has declined by the same amount in this time period. Although this suggests that pay TV platforms continue to gain popularity at the expense of free to air platforms, the proportion of retail end-users dependent on free to air television is still a substantial proportion of the market. It should be noted that free to air satellite services might be included under the pay TV homes category, such that the proportion of pay TV homes may be overstated here.

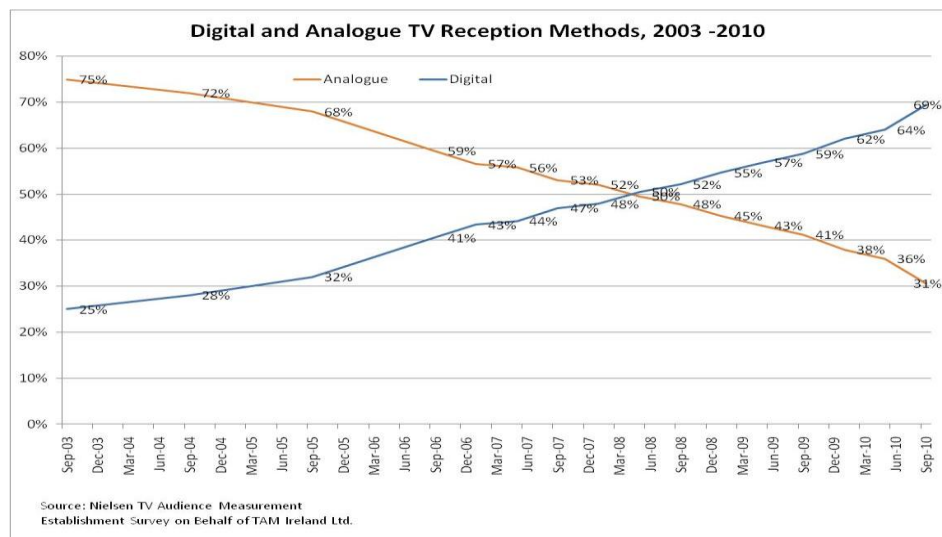
Figure 8: Pay TV and Terrestrial Free to Air TV homes 2003 -2010⁹⁸



⁹⁸ Determined by the platform through which the highest number of TV channels are received.

Figure 9 shows the trend in uptake of digital TV viewing at the expense of analogue TV viewing between 2003 and 2010, as determined by channel reception method. Between 2003 and 2010 digital TV reception has increased from 25% to 69% while analogue TV reception has fallen from 75% to 31%.

Figure 9 Digital and Analogue TV Reception Methods, 2003 -2010



TV broadcasters are also now using the Internet as a means to provide access to programmes after live broadcast, in the form of non-linear TV broadcasts. For example, in Ireland TV3 launched its catch-up service in October 2008, RTÉ launched its catch up player service in April 2009 and TG4 launched an upgraded streaming and catch-up service in April 2010. All of these services allow consumers to view programmes over the Internet after they have been aired on their respective channels. Though this is an emerging market, this is becoming a popular service in terms of visitors and the number of streams demanded.

The increasing rise in broadband coverage and take-up, coupled with improved speeds and better quality of service can be expected to increase the demand for Internet TV services in the future.

However delivery of TV services over the Internet suffers from capacity issues as strong consumer demand for high quality content is bandwidth intensive. Quality of service (QoS) is a key issue for consumers and has implications especially for unmanaged services where QoS cannot always be guaranteed. High capacity networks are required which are costly to deploy. The low density and geographic spread of Ireland’s housing⁹⁹ makes this even more difficult.¹⁰⁰

⁹⁹ See CSO map.

<http://www.cso.ie/census/documents/Map%202020%27Population%20Density%20of%20Electoral%20Divisions,%202006.pdf>

¹⁰⁰ According to the most recently available data from the EU based on a survey by IDATE, cable and DSL are the main means of broadband access across the EU. Though the urban rural broadband gap has been decreasing, at the end of 2008 there were disparities between availability in rural and urban areas. In

Competition from existing players in the broadcast market (particularly based on pay TV penetration which is high in Ireland at 79%) also reduces the potential market size attainable, thereby making it more difficult for Internet companies to justify the costs of rolling out the infrastructure needed to compete at a greater level with other broadcast platforms in the broadcast market. A minimum level of customers would be required to ensure recovery of cost outlays in a suitable timeframe and encourage content providers to broadcast on such networks. Any potential wholesale offerings would also require certain quality of service guarantees to ensure end-user quality.

In terms of linear broadcast television (e.g. IPTV) the need to acquire rights over content can act as a substantial barrier to its development as these have to be negotiated with parties, which can be difficult to obtain and expensive. There is also the added complication of the requirement for a multitude of agreements with content providers, and manufacturers. The product offering also needs to be enhanced to attract a sufficient number of customers such as the inclusion of PVR¹⁰¹, live rewind, and HD¹⁰² content, which can be costly to implement.

IPTV has been increasing in popularity in Europe. However, according to the European Audiovisual Observatory, in most European countries penetration of IPTV is still low despite relative success in some countries such as France and Slovenia (in which more than 20% of households have IPTV subscriptions). In Ireland the European Audiovisual Observatory estimated that there were approximately 23,000 IPTV households in Ireland in 2008.¹⁰³ Despite relatively poor take-up to date, Informa Telecoms and Media forecasts that IPTV households will represent approximately 10% of all TV households by 2015 in Western Europe and 6% of all TV households in Ireland by 2015.¹⁰⁴

In Ireland access to TV programmes over the Internet has yet to become widespread. According to a ComReg survey in 2009 around 14% of Internet users stream movies or TV shows, 14% download movies over the Internet and 21% watch online videos in Ireland.¹⁰⁵

Mobile TV (TV services provided by mobile operators on a mobile handset) is another means through which a TV signal can be received. This covers a

Ireland DSL coverage was 100%, 99%, 77% in urban, suburban and rural areas respectively. Coverage for cable was lower at 45%, 40% and 18% for urban, suburban and rural area. Mobile broadband 3G coverage as a percentage of the population was 100%, 95% and 70% among urban, suburban and rural areas respectively. Under the National Broadband Scheme 3 has been awarded the contract to rollout mobile broadband services in remote areas along with a satellite complement in some of these areas.
http://ec.europa.eu/information_society/europe/i2010/docs/benchmarking/broadband_coverage_in_europe.pdf

¹⁰¹ A PVR records and plays back television programmes but unlike the VCR it stores the programs in digital rather than analogue format, for example Sky+ box or UPC digital video recorder.

¹⁰² High-definition (HD) television refers to video having a resolution much higher than traditional television systems. In general, two TV broadcast formats of HD are currently available, 1080i and 720p.

¹⁰³ European Audiovisual Observatory, Trends in European Television, 2009.

¹⁰⁴ Informa Telecoms and Media, Intelligence Centre, Global IPTV Forecasts, 2005 – 2015.

¹⁰⁵ ComReg, Residential ICT survey, Q4 2009 (Doc. 10/22).

number of delivery methods: 3G/2G television based (streaming video and data over a 3G network) on cellular networks or mobile broadcast television (DVB-H or T-DMB standard) which involves distribution in broadcast mode (using specific frequencies). While unicast (over 3G/2G networks) services tend to be more popular with mobile operators due to their ability to run these services on their established networks, these services are not easily able to support simultaneous access to the same video or data clip by multiple users, tending to degrade at high speeds and when used indoors. Broadcast TV presents more challenges. A lack of a compelling business case due to in part a lack of content and choice of channels, high costs of gaining access rights, lack of strong consumer demand, and lack of access to prime spectrum are substantial hindrances to its establishment.¹⁰⁶

Data from the European Audiovisual Observatory indicates that while the number of 3G television service subscribers was increasing by Q4 2008 (nearly 4 million in Europe at the end of 2008), in Ireland it remained low at around 7,500 which is approximately 0.1% of total mobile subscriptions (including mobile broadband). Mobile broadcast television had only 1.1 million users in Europe at the end of 2008 (735,000 of these in Italy) and at the end of 2009 these services were only operational in nine European countries. Such services are currently not provided in Ireland.

Capacity constraints and technical limitations on mobile networks constrain the delivery of high-quality TV broadcasting services. However, with potential future development of mobile technologies such as integrated mobile broadcast¹⁰⁷, LTE¹⁰⁸ and with the increasing sophistication of smartphones such as the iPhone, these limitations may be overcome.

Retail Radio Broadcasting Market

People listen to the radio for a range of content related services from music to current affairs to sports among others. Radio broadcasting services can be accessed by the retail end-user via a variety of means which include the radio set or transistor, mobile phone, on the TV set through cable and satellite and over the Internet via a computer or other Internet-enabled device such as a gaming console. The main means of delivery is free to air. The retail radio market is highly segmented much like the newspaper market and advertising spend is targeted along audience lines. It is not necessary to delve further into these issues for the purposes of this consultation.

¹⁰⁶ http://broadcastengineering.com/RF/unicast_versus_broadcast_mobile_0219/

¹⁰⁷ <http://www.rethink-wireless.com/2010/06/24/uk-cellcos-team-mobile-tv-trial.htm>

¹⁰⁸ The current generation of mobile telecommunication networks is known as 3G. Long term Evolution (LTE) is a 4th generation standard of radio technologies designed to increase the capacity and speed of mobile telephone networks.

Radio broadcasters are primarily funded through advertising revenues though some broadcasters may also be in receipt of public funding. Broadcasters produce or buy in programming that they think will attract listeners. The BAI has responsibility for regulating content on indigenous services and so determines the type of programming content available from radio broadcasters. Broadcasters then sell advertising space in breaks between these programmes, receiving a price which is based on their audience market share. Therefore radio stations compete directly for audience market share to boost their advertising revenues. To maximise profit, a radio broadcaster will weigh the costs of broadcasting on any given transmission platform against the potential advertising revenues it can achieve by using that platform.

All radio broadcasters primarily use terrestrial transmission to broadcast their services. This is because a retail end-user does not have to pay to access any radio content by terrestrial transmission means and can receive all radio broadcast content either at a fixed location such as the home or while mobile (e.g. in car radio) and at an acceptable quality¹⁰⁹. Therefore the vast majority of people listen to the radio through terrestrial means. In line with ComReg's previous market analysis findings, supplying broadcasting radio content over either satellite or cable TV platforms is not a substitute for broadcasters to terrestrial transmission given the limited devices (i.e. the user demand for mobility while listening to the radio) over which listeners can receive audio content via cable or satellite platforms. Therefore satellite and cable TV platforms are clearly in a separate market to the terrestrial platform.

Radio services could technically be delivered by a broadcaster over satellite to a radio set. However a retail end-user would need a special receiver to get a signal and as there is a lack of such receivers in Ireland, this factor limits its viability as an alternative means of supply to terrestrial transmission of radio broadcasts. Though use of such services may increase in the future, such services will not become a significant access means for radio services in Ireland in the timeframe of this review (i.e. within the next three years).

At a geographic level, radio broadcasting licences in Ireland are delineated by local/regional and national based services. There are approximately 32 regional/local based radio stations and five national and one quasi-national radio station in Ireland as well as a number of independent community-based radio stations.

ComReg is of the view that, in line with findings in its previous review of this market, that local/regional terrestrial broadcasting transmission services do not satisfy the three criteria test (due to low barriers to entry) and therefore, they are not considered in this paper.

Unlike the impending switchover from analogue terrestrial television to digital terrestrial television transmission, independent national digital terrestrial radio

¹⁰⁹ A ComReg Consumer Survey in Q4 2008 (Doc. 09/07) found that 81% of respondents listen to the radio through the radio set and 48% in the car. Survey data by JNLR/TNS MRBI in 2009 found that fixed radio was most prevalent among Irish households (88%) followed by the car radio (87%).

services are not expected to be launched in the timeframe of this review. Radio broadcasting will continue to be carried primarily over FM for the foreseeable future. RTÉ does provide some digital radio services (DAB) but due to a number of reasons such as, uncertainty regarding technology (e.g. DAB v DAB+) among others, the launch of independent and commercial digital radio broadcasting services is not expected to occur in the timeframe of this review.

Retail Radio Broadcasting Statistics

There are a number of ways in which radio services can be accessed by a retail end-user. Radio programme content is mostly deployed over terrestrial broadcast networks transmitted to in home or in car radios, although cable and satellite subscription customers can also access some radio content from their television. In addition, radio services can be accessed over an Internet connection and through a mobile handset. Based on a ComReg consumer survey in Q4 2008, accessing the radio over a radio set was the most popular means of accessing radio content (81%), followed by in the car (48%), over the mobile phone (7%), through the Internet (5%), by satellite TV (4%) and by cable/MMDS (which was negligible).¹¹⁰

Furthermore, a recent BAI report on digital radio for Ireland highlighted that listenership via devices other than fixed and car radio is low. However, while most receivers in Ireland are either via a fixed radio (88%) or car radio (87%), there is a growing diversity of platforms for listening to the radio such as on a PC or a mobile phone.¹¹¹

Radio services can be accessed relatively easily over the mobile phone, by means of FM tuners which pick up terrestrial broadcast signals and such services can also be accessed easily through the Internet. However, they are not a very popular means of radio access. Such services over the Internet are likely to be used particularly by listeners abroad who wish to keep in contact with events in Ireland. Though use of such services may increase in the future, it is unlikely that such services will become a significant access means for radio services in Ireland in the short to medium term.

In terms of listenership, figures from the latest JNLR/TNSmrb survey for October 2009 to September 2010 indicate that approximately 85% of the adult population was listening to a daily mix of national, regional and local radio. Approximately, 46.2% of listeners (based on length of minutes) listened to a national radio service during the weekday, the vast majority (32.4%) of which was represented by RTÉ radio stations (i.e. RTÉ Radio 1, RTÉ 2 FM and RTÉ Lyric FM) and the remainder by independent radio stations Today FM (9.3%) and Newstalk (4.1%).¹¹²

¹¹⁰ ComReg Consumer ICT Survey, Q4 2008 (Doc. 09/07).

¹¹¹ Broadcasting Commission of Ireland,(2009) Digital Radio for Ireland: Competing Options Public Expectations.

¹¹² http://www.bai.ie/pdfs/20101028_jnlr_oct09sept10_bf.pdf

Appendix B – Process to date

As a key input to this consultation, ComReg issued a questionnaire to a number of broadcasters, broadcasting transmission providers and other relevant parties, inviting them to submit their comments and views in respect to market conditions in the broadcasting transmission market. Responses were received from the following:

- RTÉ (Raidió Teilifís Éireann) – the national public service broadcaster, and RTÉNL (RTÉ’s wholly owned subsidiary) – the terrestrial transmission network provider
- TG4 – Irish free to air TV broadcaster
- TV3 – free to air TV broadcaster
- UPC – cable network provider
- Magnet – IPTV provider
- Digiweb – IPTV provider
- Today FM – national radio broadcaster
- Independent Broadcasters of Ireland (IBI) – representative body for Ireland’s independent commercial radio stations
- Eircom Ltd on behalf of the OneVision consortium who was involved in the bidding process for commercial multiplexes

Subsequent to this, ComReg held discussions with a number of parties to further explain the process that it was undertaking and get detail on their views. These parties were:

- RTÉ and RTÉNL
- TG4
- Today FM
- IBI
- TV3
- Eircom Ltd.
- Broadcast Technical Services (BTS)
- Institute of Advertising Practitioners in Ireland (IAPI)
- Broadcasting Authority of Ireland (BAI)

Appendix C – Consultation Questions

- Q. 1. Do you agree that this section assesses all relevant legislation for analysis of the broadcasting transmission market? Are there any other relevant legislative provisions which ComReg has not addressed here? Please explain your answer.20
- Q. 2. Do you agree with ComReg’s draft finding that the retail pay TV (cable and satellite) and free to air terrestrial TV services, which are national in scope, are not in the same retail market? Please explain your answer and provide evidence where available. 23
- Q. 3. Do you agree with ComReg’s draft finding that in light of the two sided nature of the market and ComReg’s finding that the retail TV broadcasting market is separated between free to air and pay TV, that from a demand perspective the broadcasting transmission market is also in a separate market? Please explain your answer and provide evidence where possible.29
- Q. 4. Do you agree with ComReg’s draft finding that radio broadcasting services over cable and satellite platforms are not in the same retail market as national terrestrial radio broadcasting? Please explain your answer and provide evidence where possible. 30
- Q. 5. Do you agree with the draft conclusion that national radio services provided over the terrestrial platform and those provided over other platforms are not in the same broadcasting transmission market? Please explain your answer and provide evidence where possible. 33
- Q. 6. Do you agree with the draft finding that the first criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.38
- Q. 7. Do you agree with the draft finding that the second criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible. 42
- Q. 8. Do you agree with the draft finding that the third criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible. 45
- Q. 9. Do you agree with the draft finding that the three criteria test is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible. 46
- Q. 10. Do you have any further comments to make on the draft findings in this consultation paper? Please explain your answer and provide evidence where possible. 46