



## Submissions to Consultation

### **Three Criteria Test on the Broadcasting Transmission Market**

#### **Submissions received from respondents**

<b>Document No:</b>	<b>11/24S</b>
<b>Date:</b>	<b>30/03/2011</b>

<b>Consultation:</b>	<b>10/98</b>
<b>Response to Consultation:</b>	<b>11/24</b>

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## **1 eircom Limited**

**eircom Group**

**Response to ComReg  
Consultation Paper 10/98  
of  
3rd December 2010**

**Three Criteria Test on the  
Broadcasting Transmission  
Market**



## A. Summary of response

eircom agrees with ComReg's conclusions regarding market definition as follows:-

- From a wholesale perspective, each broadcasting transmission platform is a separate, that is. non-substitutable market
- The national terrestrial broadcasting transmission services in Ireland is a distinct market irrespective of the technical means of delivery, that is, either analogue or digital transmission.
- Local, regional terrestrial broadcasting transmission services do not satisfy the three criteria test given the low barriers to market entry.

eircom supports ComReg's draft findings regarding the 3-Criteria test as applied to the national analogue and digital broadcasting transmission market as follows:-

- There are high and non-transitory barriers to entry given:
  - the high capital investment involved
  - the time-period required to satisfy town and country planning regulations in establishing an alternative network
  - spectrum limitations
  - the absence of a fit-for-purpose alternative technology platform and
  - the market power of the incumbent national transmission network company.
- There is insufficient evidence that the market will tend towards effective competition within a time-horizon that would be relevant to the commercial aspirations of potential market entrants. Furthermore, in terms of dynamics behind barriers to entry, there is a commercial incentive on the part of RTENL to exclude potential terrestrial competitors either through an unwillingness to negotiate in good faith or through the imposition of unreasonable commercial terms.
- Competition law alone could not adequately address the market failures concerned because of its ex-post nature. Such intervention could only take place after alleged abuses have happened and the length of time required to reach conclusions on the matter would not be reasonable for any party that would have been commercially damaged by the abusive behaviour.

eircom would request ComReg to move quickly to determine if RTENL has significant market power in the defined market and to impose appropriate regulatory remedies.

In this response, eircom does not intend to present in detail the legal and commercial arguments that support the draft recommendations. As an alternative, in an approach that may be considered to be complementary to ComReg's theoretical analysis, we will describe eircom's direct experience of attempting to enter the national digital broadcasting content market. We contend that our experience illustrates a significant competition problem in the wholesale broadcast transmission market that requires immediate remedies in order to allow full utilisation of the commercial opportunities with very significant benefits to the Irish economy.

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## **2 Independent Broadcasters of Ireland (IBI)**

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

**January 20<sup>th</sup>, 2010**

**Re: Submission re ComReg 10/98**

Dear Jason

Further to the ComReg consultation document entitled *Three Criteria Test on the Broadcasting Transmission Market*, the following are the views of the Independent Broadcasters of Ireland (IBI).

Certain members of the IBI have indicated some level of interest in the provision of programming on a future digital platform. Uncertainty exists amongst IBI members as a result of the absence of a stated digital radio policy. The dearth of information, direction and regulatory guidance on digital radio has resulted in an independent radio sector that cannot begin to think about digital radio broadcasting not to mention begin to plan for its implementation.

There are some fundamental difficulties facing digital radio broadcasting. As a result of the recent economic downturn there is a lack of financial resources available within radio stations for investment in all aspects of digital radio broadcasting, including investment in technology, marketing, additional human resources to name but a few. Technological uncertainty regarding whether DAB, DAB+ or another digital technology will be used in Ireland adds to the list of difficulties. When these are added to the lack of demand from consumers for digital radio and the dearth of consumer knowledge and awareness of digital radio broadcasting it is easy to understand why a move to digital radio would require further investigation before being accepted by the sector as a logical step.

It is vital that the introduction of digital radio broadcasting in Ireland is able to provide similar levels of coverage as is currently being provided by the market's main radio broadcasters. Equally important is the ability to provide an improved level of service with a guarantee of continuation of service at a lower cost than the current radio provider and the assurance that the significant financial, technical and human resources investments required by of the radio broadcaster will not be hampered by costs and charges associated with access to transmission platforms.

Access to transmission platforms is important especially in the digital sphere. The IBI strongly believes that every broadcaster should be treated in the same manner, regardless of whether they are public service broadcasters or commercial broadcasters. The cost and associated charges of gaining access to transmission facilities has to be dealt with in a fair, reasonable and unbiased manner and the basis upon which the charges are levied has to be transparent, impartial and non-discriminatory.



I trust the above is in order and am available to your office to discuss the content in more detail.

Yours sincerely

A handwritten signature in black ink on a light green background. The signature reads "Scott Williams" in a cursive style, with a horizontal line underneath.

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**Scott Williams**  
**Chairman**  
**IBI**

### **3 Magnet Networks Limited**

Magnet Networks always welcomes a consultation that evaluates whether a market requires regulation or not.

**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.**

Magnet Networks agree that this section outlines and assesses all the relevant broadcasting legislation.

**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.**

Magnet Networks find this a difficult question to answer as the free to air TV service does not have a market per se as its free and broadcast as a public obligation as opposed to a commercial offering. Based on this the retail pay TV is one market and free to air TV is not a market in itself.

**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.**

Magnet Networks agree that the broadcasting transmission market is a separate market to the retail TV broadcasting market. The broadcasting transmission market is how the consumer receives the channel i.e. from where rather than what channels they receive.

**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.**

Magnet Networks agree that radio broadcasted over satellite and cable platforms is not in the same retail market as national terrestrial radio. The later is 'wireless' and accessible anywhere and requires very small equipment. The former requires a fixed piece of equipment namely a television with some form of set top box.

**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.**

Magnet Networks agree with ComReg's draft conclusion in the relation to national radio services and those received over other platforms.

**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.**

Magnet Networks agree that there is a high barrier to entry into the national terrestrial broadcasting transmission market as it requires sunk costs on masts, land and licences prior to a customer purchasing space on your platform. This creates a barrier to entry for potential providers.

**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.**

As there is only one transmission provider in the market there does not seem to be a tendency towards competition in Magnet Networks view. Thus, the second criterion of the three criteria test is satisfied.

**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.**

The third criterion is that competition law would adequately deal with any competition issues or infringements that may arise. As there is only one transmission provider, they will have recovered all their sunk costs at this point and any fee that that transmission company is now charging is recovering operating costs and the remainder is profit. Any new market entrant will have to recover sunk costs, operator costs and make a profit and would be required to charge a higher price than the current provider. This allows the current provider to lower prices to a level that the new provider can't provide at, thus foreclose the market. If the new provider was to rely solely on competition law to protect it, its investment would be redundant by the time the matter would be ruled on in court. Thus, it is necessary that ex ante regulation is put in place to ensure that any new market entrant in the broadcasting transmission market is not margin squeezed before they are able to establish themselves. Based on this competition law should not be left to regulate this market after the event has occurred.

**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.**

Based on the above answers provided by Magnet Networks, Magnet Networks agree with ComReg's draft findings in relation to the national terrestrial broadcasting transmission market.

**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.**

Magnet Networks has no further comments to make.

#### **4 RTÉ (Raidió Telifís Éireann) and RTÉNL (RTÉ Transmission Network Limited)**

**RTÉ and RTÉNL Response to the  
ComReg Three Criteria Test  
on the Broadcasting Market**

**20th January 2011**

## Introduction

RTÉ and RTÉNL welcome the opportunity to respond to ComReg's *Consultation on the Three Criteria Test on the Broadcasting Transmission Market, Document 10/98*.

In RTÉ and RTÉNL's *Response to the ComReg Broadcasting Questionnaire* in June 2010, the following statement was made:

*RTÉ is aware that ComReg as the NRA for the ROI market has the power to apply the Three Criteria Test. RTÉ and RTÉNL are of the view that the Three Criteria Test is not met in this instance and the continued regulation of the transmission markets previously identified by ComReg as warranting regulation should no longer be the subject of regulation. The market for wholesale broadcast transmission in Ireland is competitive as can be seen from the presence of satellite alone, where it is possible to enter the Irish market without the requirement of regulation within Ireland. The comprehensive must carry/must offer provisions within national broadcasting legislation and the comprehensive competition law remedies available would address any perceived market failure. RTÉ and RTÉNL would urge ComReg to take a modified approach as set out in the Commission Recommendation and, in so doing, take into consideration the comments here as well as those made further below in this Response to the Broadcasting Questionnaire.*

RTÉ and RTÉNL note ComReg's 'draft conclusion' (page 6 of the current *Consultation* document and elsewhere) and wish to reiterate that it is the belief of RTÉ and RTÉNL that the Three Criteria Test is *not* satisfied in the Irish broadcasting transmission market. ComReg's stated intent with regard to the regulation of this area is very clearly articulated in this document. However, RTÉ notes the implicit suggestion throughout this document that it is assumed that RTÉ would not support greater competition in the marketplace, a point-of-view which RTÉ must challenge. For example, on page 4 of this ComReg *Consultation* document it states the following:

*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.*

This view is repeated in various parts of the document, see, for example, page 41:

*...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.*

and is further developed on pages 53-54, which states:

*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.*

and continues regarding the ‘potential impact’ on RTÉ’s ‘position on the advertising market.’ RTÉ wishes to place on record its rejection of these assertions.

Furthermore, RTÉ rejects the suggestion that RTÉNL would ‘advantage its parent company,’ as stated on page 6 of this *Consultation* document:

*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.*

In summary, RTÉ and RTÉNL recognise the intent of ComReg’s legal and market analysis in this *Consultation*, but wish to question some of the underlying assumptions informing this approach.

## Response to 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.*

RTÉ notes that in its legal analysis ComReg acknowledges that the market is subject to the relevant provisions of the Broadcasting Act, 2009. RTÉ wishes to point out the specific provisions in the Broadcasting Act 2009 which deal with concerns of the nature raised by ComReg within its Executive Summary at Section 2, namely that a subsidiary (RTÉNL in this context) may seek to advantage its parent. In particular Sections 108 and 109 of the Broadcasting Act, 2009, set out how RTÉ is to conduct business with its commercial subsidiaries. In particular the *ex ante* nature of such provisions cannot be underestimated given the attendant powers of the BAI (at the direction of the Minister) to monitor compliance with the provisions of Section 108.

The thrust of the requirement of Section 108 is to ensure that transactions between public service and ‘commercial opportunities’ take place on an arm’s length basis and with regard for market investor principles. ComReg is asked to note the detailed accounting obligations imposed on RTÉ in this regard and the fact that RTÉNL is a separate company which files its own accounts. It should be noted also that Sections 108 and 109 of the Broadcasting Act, 2009, conform to the requirements of the European Commission’s *Guidelines* of 2009 dealing with State Aid and Public Service Broadcasting, the contents of which calls for some form of *ex ante* regulation, and independent monitoring and supervision of the role and remit of Public Service Broadcasters.



*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.*

RTÉ does not agree, and points to the take-up by circa 10% of the Irish population of the UK Free Satellite service, thereby proving that the free-to-air and Pay TV markets are becoming indistinguishable. The advent of Irish DTT and the existence of combination-receivers which can receive both terrestrial Irish DTT and free-to-air UK satellite services further underlines this development. In addition, the *Consultation* document refers to SAORSAT, the proposed free-to-air Irish satellite service, on pages 23 and 24, and RTÉ contends that given the variety of free-to-air services coming into the Irish market that the market could be expected to tend towards the inclusion of both pay TV and free-to-air over time.

*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.*

As in the answer provided to Q.2., above, RTÉ contends that any distinction between the free-to-air TV and Pay TV markets is becoming less distinct. In addition, the provision of other services, such as broadband, using the same receiver equipment, suggests that this 'market separation' is not visible from the demand side.

On page 26 of the *Consultation* document reference is made to the fact that satellite operators are not subject to the 'must carry' obligations of the Broadcasting Act, 2009; however, broadcasters are subject to the 'must offer' obligations as specified in Section 77 of the Act.

*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.*

As indicated above, RTÉ contends that there are now multiple means of receiving broadcasting services throughout the country, and therefore contests the concept of 'separated' retail markets for radio services.

*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.*

As stated in response to Q.4 above, the blurring of boundaries in the broadcasting transmission market points to the complexity of ‘separating’ markets.

*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.*

RTÉ and RTÉNL do not agree with this conclusion. As outlined in the above answers to Questions 2 and 3, RTÉ contends that, given recent and ongoing advances in technology, the distinction drawn by ComReg between the wholesale terrestrial market (and in particular the wholesale satellite market) is an artificial one. There is significant substitutability for broadcasters between the two. This will only increase as free-to-air satellite and DTT services develop.

It is not valid to suggest that household choice of platform informs the choice that a broadcaster will make. It is the case that in many households people are not aware of what platform they currently use, rather they are aware of the services (channels) to which they have access. There is a range of services available to the consumer which at the lower end of the satellite and digital cable offering is now indistinguishable from that on offer from the free-to-air option. Finally, there is an easy and affordable transfer path between any of the offerings on offer to consumers.

*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.*

It is the belief of RTÉ and RTÉNL that an increase in competition is an inevitable result of current market developments. Contrary to the view presented on page 41 of this document, it is in RTÉ’s interest ‘to expand its TV offerings in the digital world’ and RTÉ is interested to see that competition should increase, despite the other statement on page 41 of this *Consultation* document that:

*...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.*

Similarly, RTÉ disagrees with the statement on this same page that:

*Therefore, there is a possibility that a vertically integrated entity, such as RTÉ, might try to exclude potential terrestrial competitors and/or potentially charge them excessive transmission fees.*

Finally, RTÉ cannot agree with the expressed view on page 42 that despite the proposed free-to-air digital satellite service (SAORSAT) that ‘it is unlikely that households could adjust their dishes.’ Therefore, RTÉ and RTÉNL do not agree that the second criterion is satisfied in the Irish national terrestrial broadcasting 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.*

RTÉ recognises that throughout this document ComReg has consistently asserted that *ex post* competition law will not be sufficient for the proper regulation of the market under review. Therefore, while RTÉ and RTÉNL do not agree with this assertion, the conclusion by ComReg, on page 44, that ‘the provisions of the Broadcasting Act, 2009 do not remove the requirement for *ex ante* regulation’ in this market is very clear.

*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.*

As indicated above, RTÉ and RTÉNL do not agree with these conclusions but recognise the approach undertaken by ComReg in their analysis concerning the satisfaction of the Three Criteria Test in the Irish national terrestrial broadcasting transmission market.

*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.*

No further comment.

- RTÉ and RTÉNL, 20<sup>th</sup> January 2011.

## **5 Telefonica O2 Limited**

The background is a solid blue color. On the right side, there are several overlapping, semi-transparent blue spheres of varying sizes, creating a sense of depth and movement. The largest sphere is at the top right, and smaller ones are below it.

$O_2$

Response to consultation paper on the  
three criteria test on the broadcasting  
transmission market (10/98)

20<sup>th</sup> January, 2011

*O2 welcomes the consultation paper on the three criteria test on the broadcasting transmission market. O2 believes ComReg have a clear obligation to conduct the three criteria test and has had this obligation since the revision of the recommendation on relevant markets in 2007.*

*ComReg should proceed to complete a market review of the Broadcasting transmission market and implement effective remedies in this market to address the ongoing market failure.*

*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*

*Yes. ComReg clearly have an obligation to review this market and have had this obligation since 2003. O2 notes the large number of decision taken by other regulators in this market across Europe. O2 would ask ComReg to consider the remedies notified and accepted by the EU Commission by other regulators specifically remedies which aim to control the transmission costs applied to broadcasters.*

*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.*

*Yes O2 agrees with ComReg's finding*

*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.*

*O2 agrees with ComReg's approach and analysis however the question is unclear. O2 agrees there is a separate broadcasting transmission market but this is clearly a wholesale market.*

*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.*

*Yes O2 agrees with the draft finding.*

*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.*

*Yes O2 agrees with the draft conclusions.*

*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.*

*Yes O2 agrees that the first criterion is satisfied*

*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.*

*Yes O2 agrees with ComReg's conclusions, there has been no market entry or prospect of entry in the 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.*

*Yes O2 agrees with ComReg's view on the third criterion. This market requires a regulated solution.*

*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.*

*Yes O2 agrees that the three criteria are satisfied in this case.*

*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*

*No further comments*

## **TG4 (Telifís na Gaeilge)**



Jason Cleary, Uasal  
An Coimisiún um Rialáil Cumarsáide,  
Abbey Court,  
Irish Life Centre  
Sráid na Mainistreach Íochtarach,  
Baile Átha Cliath 1

12 Eanáir 2011

### **Three criteria test for Broadcasting transmission market.**

A Jason, a chara

Beatha agus Sláinte chugat. Táim ag scríobh chugat maidir leis an gcáipéis chomhairliúcháin ar an ábhar thuas. Is mór againn an deis seo freagra TG4 a a sholáthar ar cháipéis an Choimisiúin, atá á sholáthar i mBéarla mar éascaíocht do léitheoirí eile.

TG4 welcomes the ComReg's consultation paper on the above subject and this opportunity to respond on this critical question at this important juncture. You will be aware that TG4 has been of the view since the revision of the recommendation on relevant markets in 2007 that the Commission has a clear obligation to conduct the three criteria test.

Indeed, in our view ComReg should proceed now to a market review of the Broadcasting Transmission Market and to identify and implement effective remedies to address the ongoing market failure. We note that in previous consultations ComReg has included three criteria tests, SMP designations and remedies in a single consultation. We are disappointed that on this occasion ComReg has chosen to delay making a determination on SMP and implementing remedies when there is clear market failure over which concerns have been consistently raised by broadcasters in this sector for the past two years.

You will find on the following pages TG4's answers to the specific questions posed in the ComReg consultation.

As ever, my TG4 colleagues and I are available to you to add to the points raised here and/or to clarify any queries you might have.

Is mise le meas

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Pól Ó Gallchóir  
Ardstiúrthóir

**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**

TG4 agrees that ComReg has a clear obligation to review this market and that this obligation has existed since 2003. It is salient to point out the large number of decision taken by regulators in this market in other European states. TG4 requests ComReg to consider the remedies notified and accepted by the EU Commission by other European regulators, particularly those remedies which aim to control the transmission costs applied to broadcasters. We also believe that a cost-oriented obligation on transmission charges is a requirement for this market. In that regard, we would welcome confirmation of this approach in the next consultation on this market from ComReg.

**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.**

TG4 agrees with ComReg's draft finding.

**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.**

TG4 agrees with ComReg's draft finding and with the approach and analysis. We consider the question is phrased in an unclear manner. While we agree that there is a separate broadcasting transmission market, it is the case that this is clearly a wholesale market.

**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.**

TG4 agrees with ComReg's draft finding.

**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.**

TG4 agrees with ComReg's draft conclusions.

**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.**

TG4 agrees that the first criterion is satisfied.

**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.**

TG4 agrees with ComReg's draft finding and that there has been no market entry or prospect of entry in the 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.**

TG4 agrees with ComReg's draft finding and that this market requires a regulated solution.

**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.**

TG4 agrees with ComReg's draft finding that the three criteria test is satisfied in this case.

**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**

TG4 has no further comments.

**6 TV3**

**COMREG CONSULTATION PAPER**  
**THREE CRITERIA TEST ON THE BROADCASTING  
TRANSMISSION MARKET**  
**TV3 RESPONSE**

**Executive Summary**

TV3 welcomes the issuance of this Consultation on the Three Criteria Test on the broadcasting transmission market.

TV3 sets out in detail below its answers to the relevant questions. Additionally, we believe it appropriate to summarise our overall view in respect of RTÉ<sup>1</sup>'s activities generally relating to the broadcasting transmission market (particularly in the context of digital terrestrial television (DTT)).

TV3 strongly believes that RTÉ has a dominant position in relation to the terrestrial transmission market ComReg identified that RTÉ had significant market power (SMP) in 2004 in relation to analogue transmission services in Ireland and there will be no difference in relation to the provision of transmission services by RTÉNL regarding DTT.

RTÉ's activities, in respect of both DTT roll-out and the content of the first national digital multiplex, are, we believe, illuminating from the viewpoint of illustrating RTÉ's clear intent in respect of the digital terrestrial market. It will be clear from the information supplied below, firstly that RTÉ is in control of both infrastructure and spectrum and fully intends to remain so and, secondly, that the access to this infrastructure and spectrum by third parties will be in a very limited and controlled fashion. As a result, RTÉ will be able to act, to an appreciable extent, independently of its customers and competitors.

It should also be noted, with respect to access to RTÉ's network generally, that, as ComReg are well aware, none of the potential providers of a commercial multiplex service (Boxer, OneVision and Easy TV) were able to reach an agreement with RTÉ with regard to access to their network.

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<sup>1</sup> For "RTÉ" read RTÉ Group, to include its subsidiary RTÉNL, throughout.

**Question 1:**

**Do you agree that this section accesses 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.**

TV3 Answer:

*TV3 believes that ComReg has identified and analysed the appropriate Legislation. The analysis by ComReg at Section 6.1.3 is also very relevant. We believe that it is particularly noteworthy that subsection 130 (10) – (12) of the Broadcasting Act 2009 fails to provide for a price control remedy as set out in the EU Communication Regulatory Framework and there is no reference to objective, transparent, proportionate and non-discriminatory pricing. We believe it is noteworthy that the Broadcasting Act does not specify that the RTÉ Channels should be subject to a charge.*

**Question 2:**

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

TV3 Answer:

*TV3 agrees with ComReg's findings that the Pay TV market is separate to the free to air market, as this is a well-established principle of EU Competition Law, which sees the two markets as very distinct.*

*In NewsCorp/Telepiù<sup>2</sup>, with regard to broadcasting activities, the Commission held that Pay-TV and free-to-air TV operators are in two different product markets. Thus, in spite of the "undeniable interaction between the two markets" acknowledged in the decision, the Commission took account of the difference in the financing of the activities (subscription fees vs. advertising), the difference in the content provided (premium content was almost exclusively broadcast at the time of the merger on Pay-TV).*

*(see also Champions League Case<sup>3</sup> and subsequent cases)*

- *The key difference between the free to air and Pay platforms is an absolutely fundamental one. Free to air systems means the end-user does not have to pay, whereas Pay systems do encompass payments.*
- *The reality is that despite the existence of cable and satellite systems in Ireland for over 30 years, over 20% of households rely upon free to air coverage for their first receiving set.*

<sup>2</sup> Commission Decision on 4 April 2003, NewsCorp/Telepiù, O.J. (2004) L110/73

<sup>3</sup> Champions League Case COMP/C.2-37.398 and subsequent cases

- *There are clear geographical/technical limitations to the use of cable/MMDS technology as only approximately 30% of homes have cable television.*
- *In some areas, planning restrictions limit the installation of satellite receiving dishes*

*In relation to satellite, the cost and contractual limitations (length of terms etc) clearly show that satellite is not comparable to free to air.*

*In its 2005 Chorus/ntl merger determination, the Competition Authority noted that: “ The market investigation carried out by the Authority has established that freeview which includes free-to-air and freesat, is clearly separate from Pay-TV services and that the two cannot be combined to form a single retail multi-channel TV market”*

**Question 3:**

***Do you agree with ComReg’s draft findings, that in the light of the two-sided nature of the markets and ComReg’s finding, that the retail TV broadcasting market is separated between free to air and paid TV, that from a demand perspective the broadcasting transmission market is also a separate market? Please explain your answers and provide evidence where possible.***

*TV3 Answer:*

*With respect to retail TV broadcasting, TV3 believes, primarily for the reasons as set out at Answer 2, that there are separate markets.*

*In relation to the “demand side” – national terrestrial broadcasting transmission is vital to any free to air broadcaster. For the commercial broadcast sector, it is a clear statutory obligation (s.70 of 2009 Broadcast Act) that national commercial services be available in this manner.*

*While cable (to include analogue) and satellite systems are in use by approximately 80% of the population, approximately 30% of the population rely on free to air reception.*

*It could also be argued that if terrestrial distribution was delivered by an existing, properly operating market, there would be a number of channel providers/operators trying to enter this market. This is not the case, and, as such, new channels only enter on other platforms e.g. Channel 6, City Channel and Bubble Hits.*

**Question 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.**

TV3 Answer:

*TV3 agrees with ComReg's finding that radio broadcasting services over cable and satellite platforms are not in the same retail market as national terrestrial radio broadcasting. We believe that mobility is indeed fundamental to most radio listeners, as many people would listen to the radio primarily in the car on through personal stereo systems. We would also point out that to receive radio broadcasts over a cable or satellite platform would incur additional cost for the listener.*

**Question 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.**

TV3 Answer:

*TV3 agree with ComReg's conclusion that national radio services provided over the terrestrial platform and those provided over other platforms are not in the same broadcasting transmission market. Firstly, we would reiterate the point about mobility in radio being a requirement for most end users. With platforms other than the terrestrial platform there are mobility issues as it is difficult to receive cable/satellite and internet signals while mobile. Secondly, there are several cost issues to be considered with the use of other platforms. The broadcaster has to pay a tariff to RTÉNL for transmission over the DTT platform. Additionally, in order to receive satellite radio, an end user would have to purchase a satellite receiver. Therefore, it is evident that terrestrial radio services are in a different broadcast transmission market to those provided over other platforms.*



**Question 6:**

**Do you agree with the draft findings that the first criterion is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where appropriate.**

TV3 Answer:

*In respect of the existence of high and non-transitory barriers to entry, TV3 believes that ComReg's findings are undoubtedly correct.*

*TV3 does not provide wholesale national TV broadcast transmission services. TV3 believes that RTE NL's broadcast transmission and distribution infrastructure would be extremely difficult to duplicate by a competitor or a potential competitor given the extensive assets and infrastructure needed to replicate the system in Ireland.*

*For example, under EU and Irish competition law principles, entry must be timely, likely and sufficient in scope. Any such entry is highly unlikely given the material financial and technical impediments to entry and any such entry would not be within 2 years (i.e. the period regarded under EU and Irish competition law as likely to constitute a competitive constraint). Such a timeframe is not feasible to enter broadcast transmission in Ireland. Costs of entry would be very significant for the reasons outlined above and given the technological know-how required to build such a system.*

*TV3 believes the following points to be fundamental:*

- *It would be extremely difficult and extremely expensive to acquire/negotiate the physical space/technical equipment necessary to replicate the RTÉNL network. Planning issues, at suitable sites, in particular would be extremely difficult.*
- *Given the Licence requirement on the commercial sector to have 90% (at least) coverage, and the number of sites that RTÉ use to fulfil this need, a larger number of more accessible sites would be cost-prohibitive, particularly given the fact that there would be a limited number of potential customers.*

**Question 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 appropriate.**

TV3 Answer:

*We would agree with ComReg's finding that the second criterion is satisfied in respect of the national broadcasting transmission market. TV3 believes that the recent unsuccessful attempt to find a commercial multiplex provider shows the extent to which RTÉ, control access to terrestrial transmission in broadcasting and as such a tendency towards competition is unlikely to occur in the next 3 – 5 years.*

*With reference to other platforms and their possible contribution to opening up the national transmission market generally, it is evident that neither cable nor satellite can be expected to provide for a free to air network – given the costs and rights clearances issue (i.e. in the clear satellite broadcasting) that arise.*

*RTÉ's proposed Saorsat platform, whilst meeting the need to reach the "final 2%" of Irish homes, does present the end user with an expensive alternative to free-to-air reception (currently estimated at €375). End users would have to purchase set-top boxes capable of receiving the Ka band. Promotion by the state broadcaster of hybrid boxes capable of Ka and Ku band signals, at what is likely a higher price, present possible state aid issues regarding the promotion of a competing satellite platform capable of receiving non-Irish channels, that currently exist "in the clear".*

**Question 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.**

*TV3 fully agrees that there is a need for ex ante regulation of terrestrial broadcast transmission markets in the first instance.*

*In the context of the national terrestrial broadcasting transmission market, ex post competition law remedies are insufficient. There is a clear need for a separate regulatory regime.*

*Traditionally, the electronic communications regulatory framework applied ex ante. Despite the removal of broadcasting transmission as a recommended market, the features of the Irish market are such that RTE has a position of significant market power (as previously found by ComReg in 2004) and the characteristics have not changed. There is no effective competition in Ireland in relation to broadcasting transmission services.*

*EU and Irish competition law is confined to ex post investigation and enforcement action. As evidenced by the duration of complaints before the Irish Competition Authority, the European Commission and judicial proceedings, such investigations and enforcement actions can take considerable time to complete (irrespective of rights of appeal). Obtaining any appropriate relief in relation to anti-competitive behaviour in a market in which RTE has such market power would probably take too long and the damage caused may be too severe before any such relief is obtained.*

*A Court applying competition law will be very reluctant to mandate any specific prices or pricing methodologies be used. That is not the role of the Courts. As with the application of merger control or general anti-trust remedies, the Courts will not monitor these prices on an ongoing basis, as ComReg has the ability to do under its regulatory framework.*

*If an undertaking engages in discriminatory behaviour, the ex post application of competition law cannot prevent, in any meaningful or effective way, such behaviour. Competition law could not be effectively applied to address strategic decisions which limit the possibility of new terrestrial channels entering the market. At best, competition law might be used to apply for an injunction in the Courts or a possible remedy agreed by the party involved before the Irish Competition Authority or possibly the European Commission. However, these remedies are difficult to obtain, they take a long time to obtain and they do not tend to be based on strategy but rather prevention. In the context of regulating the future behaviour of, in particular RTE, in relation to the transmission market in Ireland, TV3 agrees that the application of competition law would not enable a sufficient suite of remedies to be applied that would address the range of problems that might potentially arise.*

*In this context, ComReg has referred to the fact that 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. The terms of access under such legislation simply do not address the potential competition problems.*

*No such provisions exist for analogue terrestrial TV broadcasting and must carry rules do not address all the potential competition problems.*

*In terms of digital TV, section 130 of the Broadcasting Act 2009 which provides for periodic payments for access to RTÉ national multiplex, to be set by the Minister, would not ensure that the capacity employed by RTÉ is adequate to carry other broadcasters’ content. Even if for TV3 having the character of a public service broadcaster and with a contract with the BAI, such provisions are insufficient to be regarded as duplicating the important elements of*

*ex ante regulation with respect to the “national television multiplex”. TV3 believes it is imperative to specifically and clearly provide for fair, reasonable and non-discriminatory terms for access to the RTE transmission network to be in a position to offer such services but also to ensure a competitive and vibrant DTT market in Ireland.*

*While RTÉ must make provision in its national television multiplex for the broadcast by digital means of broadcast services and while those broadcasters shall make periodic payments to RTÉ for access to its multiplex, vertical integration in this sector in Ireland would not provide for appropriate cost accounting obligations. As ComReg recognised when it designated RTENL in 2004 as having SMP in relation to the provision of wholesale analogue transmission services in Ireland, there must be associated remedies of transparency and non-discrimination. Ex ante regulation will continue to be needed in relation to transmission services in Ireland irrespective of the Broadcasting Act 2009.*

*An accounting separation direction imposed by ComReg under its regulatory framework would be a necessary regulatory step for ComReg to take particularly in the context of a vertically integrated national broadcaster (i.e. RTE) that provides broadcasting transmission facilities to actual or potential competitors. The market needs regulatory certainty and only ex ante regulation provides that certainty.*

*Fair, reasonable access to RTE’s transmission network is imperative for sustainable competition. Given RTE’s position of dominance and its vertical structure, ex ante regulation is a necessity. Ex post competition law is insufficient to ensure such competition.*

**Question 9:**

**Do you agree with the draft findings that the Three Criteria Test is satisfied in the national terrestrial broadcasting transmission market? Please explain your answer and provide evidence where possible.**

TV3 Answer:

*TV3 believes that all characteristics of Three Criteria Test are fully met.*

**Question 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.**

TV3 Answer:

*TV3 believe that this Consultation is an opportunity to open up the sector to full competition, through appropriate ex ante regulation and enforcement of such regulation.*