



Commission for
Communications Regulation

Investigation into an alleged abuse of an alleged dominant position by RTÉ/RTÉNL, contrary to Section 5 of the Competition Act 2002, and/or Article 102 of the Treaty on the Functioning of the European Union

Information Notice

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Redacted Information

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1 Executive Summary

- 1 This Information Notice relates to an investigation (**'Investigation'**) by the Commission for Communications Regulation (**'ComReg'**) into a complaint (**'TV3 Complaint'**) submitted to ComReg by TV3 Television Network Limited (**'TV3'**).
- 2 The TV3 Complaint alleges that, contrary to section 5 of the Competition Act 2002 (as amended) and/or Article 102 of the Treaty on the Functioning of the European Union (**'TFEU'**), Raidió Teilifís Éireann (**'RTÉ'**) (and its wholly-owned subsidiary RTÉ Transmission Network Limited (**'RTÉNL'**)) abused a dominant position in the market for the supply of wholesale analogue terrestrial television transmission and distribution (**'ATTTD'**) services (the **'ATTTD Market'**).
- 3 The alleged abuses concern excessive and discriminatory pricing with respect to the charges levied by RTÉ/RTÉNL on TV3 during the period from 1998 to up until Analogue Switch Off (**'ASO'**)¹ in 2012. In this Information Notice we refer to this as the **'Period of Investigation'**.
- 4 RTÉ/RTÉNL, in supplying wholesale ATTTD services, provides downstream television and radio broadcasters with access to its national transmission and distribution network infrastructure, thereby enabling such broadcasters to provide terrestrial Free to Air (**'FTA'**) television (**'TV'**) and radio services to viewers/listeners. RTÉ/RTÉNL also supplies ATTTD services to its own downstream television and radio channels.
- 5 In investigating this matter, ComReg has been assisted by Deloitte Consulting (**'Deloitte'**) who were, in summary, contracted to provide an analysis of data gathered during the Investigation and ultimately to provide their views on whether or not, from an economic perspective, the alleged abuses were likely to have occurred. Deloitte presented their views to ComReg in a report dated December 2013 (**'Deloitte Report'**) and ComReg has had regard to this in reaching its conclusions on the TV3 Complaint.
- 6 Following its investigation, ComReg has decided to close the TV3 Complaint on the basis that there are insufficient grounds for action with respect to each of the alleged excessive and discriminatory pricing abuses.
- 7 Both TV3 and RTÉ/RTÉNL (the **'Parties'**) have been informed of ComReg's decision on this matter. ComReg is also providing a copy of the Deloitte Report to the Parties, redacted as appropriate to protect each of the Parties' commercially sensitive and/or confidential information.

¹ At ASO, television broadcasting moved from being broadcast in analogue format to a digital broadcasting format. Digital Terrestrial Television (**'DTT'**) is now broadcast from RTÉNL's Saorview platform. See www.saorview.ie.

- 8 This Information Notice describes, in a summary fashion, the non-confidential details of the Investigation and the reasons supporting the decision to close the investigation.

2 Background

2.1 ComReg's Role

- 9 ComReg is the statutory body responsible for the *ex ante* regulation of the electronic communications and postal sectors. However, following the introduction of the Communications Regulation (Amendment) Act 2007² ComReg was given the additional function of investigating *ex post* competition law breaches in the electronic communications sector. Before 2007 only the Competition Authority or the European Commission could investigate breaches of competition law in Ireland. ComReg now has the power to investigate competition law breaches under Irish law in the electronic communications sector. In addition, ComReg has been designated as a national competition authority pursuant to European Council Regulation 1/2003 and, as such, has the power to investigate breaches of European competition law in the electronic communications sector³.
- 10 Further details in relation to ComReg's role under competition law and the investigation of competition law based complaints in the electronic communications sector is set out in the Guidance Notice on Competition Complaints⁴.

2.2 The Parties and their Activities

2.2.1 RTÉ Group Companies

- 11 RTÉ⁵ is the national State-owned public service television and radio broadcaster. RTÉ is a statutory corporation established under the Broadcasting Authority Act 1960 and owns and, during the Period of Investigation, operated two principal free-to-air national analogue television channels, namely, RTÉ1 and RTÉ2 (formerly Network 2 but referred to throughout this Information Notice as RTÉ2)⁶ as well a number of radio stations. RTÉ1 and RTÉ2 are operated as internal divisions of RTÉ (i.e. they are not structurally separated entities).

² See <http://www.irishstatutebook.ie/pdf/2007/en.act.2007.0022.pdf>.

³ S.I. No. 525 of 2007 European Communities (Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty) (Amendment) Regulations.

⁴ Guidance on the Submission of Competition Complaints relating to the Electronic Communications Sector, Information Notice, [ComReg Document 10/110](#), December 2010.

⁵ See www.rte.ie.

⁶ RTÉ also broadcasts RTÉ+1 (a 'catch-up' television service) as well as RTÉ News Now and RTÉ Junior on its Digital Terrestrial Platform (DTT).

- 12 RTÉNL⁷ (now trading as '2RN' since April 2013 but referred to throughout this Information Notice as RTÉNL) is a wholly-owned subsidiary of RTÉ. RTÉNL was incorporated as a wholly-owned subsidiary of RTÉ in December 2002. RTÉNL provides wholesale terrestrial broadcast transmission and distribution services to a range of Irish national terrestrial television and radio broadcasters, including RTÉ's own radio and television channels, TG4, TV3, Today FM⁸ and Newstalk⁹. RTÉNL also provides access to its mast and tower infrastructure to a range of telecommunication service providers and operators. Prior to 2002, the national analogue transmission network was operated as an integrated division within RTÉ.
- 13 Prior to Analogue Switch Off ('**ASO**') on 24 October 2012, RTÉ/RTÉNL was the sole supplier of ATTTD services to terrestrial Free to Air ('**FTA**') TV and radio broadcasters in the State.
- 14 Prior to April 2007, RTÉ also operated the State-owned Irish language public service television channel TG4¹⁰. i.e. TG4, like RTÉ1 and RTÉ2, was operated as an internal division within RTÉ. However, TG4 subsequently became an independent statutory entity on 1 April 2007¹¹ (i.e. separated from RTÉ) and is partially funded through a subvention from the Irish Government. Prior to becoming independent from RTE in 2007, this subvention was provided directly to RTÉ to defray the costs associated with operating TG4.

⁷ See www.rtenl.ie or www.2rn.ie.

⁸ See www.todayfm.ie.

⁹ See www.newstalk.ie.

¹⁰ See www.TG4.ie. Prior to 1999, TG4 was known as Teilifís na Gaeilge ('**TnaG**') but for ease we refer to it throughout this Information Notice as TG4.

¹¹ This occurred on foot of the Teilifís na Gaeilge (Establishment Day) Order 2007 ([S.I. No. 98 of 2007](#)).

2.2.2 TV3

15 TV3 Television Network Limited (trading as TV3) is an independent, privately owned TV station in Ireland. It was launched in September 1998 and owns and operates the national FTA TV3 channel and the pay-TV¹² channel 3e. TV3 is classed as a 'Television Programme Service Contractor' as defined in section 70 of the Broadcasting Act 2009¹³. TV3 originally obtained its commercial broadcast licence from the then Independent Radio and Television Commission ('**IRTC**')¹⁴ and subsequently entered into a television programme service contract with the Broadcasting Commission of Ireland ('**BCI**') (now the Broadcasting Authority of Ireland ('**BAI**'))¹⁵ established under the Broadcasting Act 2009¹⁶.

2.3 TV3 Complaint

16 TV3 submitted an initial complaint to ComReg on 26 June 2008. The TV3 Complaint raised a number of issues in connection with RTÉ/RTÉNL's alleged non-compliance with its *ex ante* significant market power ('**SMP**') based obligations as imposed under the then 2004 Broadcasting Market Review¹⁷, as well as raising issues concerning RTÉ/RTÉNL's alleged pricing behaviour from an *ex post* competition law perspective.

¹² 3e is carried on, for example, UPC's cable and Sky's satellite pay television broadcasting platforms. Following ASO, 3e is now carried on a FTA basis on the Saorview DTT platform.

¹³ See <http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0018.pdf>.

¹⁴ The IRTC was replaced by the Broadcasting Commission of Ireland.

¹⁵ The BAI replaced the Broadcasting Commission of Ireland in 2009.

¹⁶ Section 70(5) of the Broadcasting Act 2009 states that the contract between TV3 and the BCI (now the BAI) under section 17 of the Radio and Television Act 1988 and section 6 of the Broadcasting Act 1990 continues in force as if entered into under section 70 of the Broadcasting Act 2009. The contract gives TV3 the right and duty to establish and maintain the TV3 programme service under section 70 of the Broadcasting Act 2009. 3e, part of the TV3 Group, is also broadcast under this TV programme contract.

¹⁷ Response to Consultation, Market Analysis - Wholesale Broadcasting Transmission Services, [ComReg Document No. 04/06](#) ComReg Decision No. D16/04 3 February 2004.

- 17 In relation to the *ex ante* issues, ComReg investigated the allegations of RTÉ/RTÉNL's non-compliance with its transparency and non-discrimination SMP based obligations, with the conclusions relating to the closing of this investigation published on ComReg's website¹⁸. It should be noted that under the 2004 Broadcasting Market Review, RTÉ/RTÉNL was not subject to *ex ante* price control obligations. The 2004 Broadcasting Market Review, has since been replaced by ComReg in 2013 with a new SMP Decision which imposes a suite of *ex ante* regulatory obligations including price control obligations on RTENL in Market A (the market for market for wholesale access to national terrestrial broadcast transmission services) and on RTE in Market B (the market for wholesale access to DTT Multiplexing Services).¹⁹
- 18 The Investigation described in this Information Notice only deals with those aspects of the TV3 Complaint relating to *ex post* competition law issues. Over a lengthy period of time²⁰, ComReg subsequently engaged with TV3 to determine the scope of the issues raised in its complaint. TV3 alleged that, contrary to section 5 of the Competition Act 2002 and/or Article 102 TFEU, RTÉ (including through its wholly-owned subsidiary RTÉNL) had and was continuing to abuse its purported dominant position in the market for the provision of wholesale ATTTD services.
- 19 The period over which the alleged abuses were alleged to have occurred was from 1998 onwards. In this respect, the Investigation of the TV3 Complaint effectively concerns the pricing conduct of RTÉ/RTÉNL in the period 1998 up until ASO in October 2012, being the Period of Investigation²¹.
- 20 With respect to the abuses in question, the TV3 Complaint alleged that, contrary to Section 5 of the Competition Act 2002 and Article 101 of the TFEU, RTÉNL engaged in pricing practices that consisted of:
- (a) imposing charges on TV3 for the provision of ATTTD services which are discriminatory in nature, in particular, that the level of charges imposed by

¹⁸ See http://www.comreg.ie/fileupload/File/compliance/Case_245.pdf.

¹⁹ Market Review, Broadcasting Transmission Services in Ireland, Response to Consultation and Decision, ComReg Document 13/71, Decision 11/13, July 2013 (the '**2013 Broadcasting Market Analysis Decision**').

²⁰ This included a period of time within which TV3 had requested ComReg not to pursue its investigation while its commercial negotiations with RTÉNL regarding DTT were ongoing; and a period of time whereby ComReg suspended its investigation (during this period ComReg commenced its *ex ante* based SMP review of the wholesale broadcasting transmission services market, -this being to update the analysis set out in the 2004 Broadcasting Market Review and eventually the adopting the new SMP Decision on 26 July 2013 in 2013 Broadcasting Market Analysis Decision.

²¹ The Period of Investigation was effectively communicated to TV3 in ComReg's notification of 8 February 2011 that it was opening an investigation into whether an abuse had occurred or was ongoing. This was further communicated in subsequent meeting/correspondence/emails to TV3. This notification of the opening of the Investigation was also communicated to RTE by ComReg on the 4 February 2011.

RTÉNL on TV3 are discriminatory vis-à-vis the charges levied by RTÉNL on RTÉ1, RTÉ2 and TG4;

- (b) imposing unfair and excessive prices on TV3 for the provision of ATTTD services in relation to the economic value of the services provided; and
- (c) imposing charges on TV3 which are not proportionate to the cost to RTÉNL of providing the services being charged for.

- 21 Following consideration of the TV3 Complaint by ComReg, on 23 December 2010, it was decided to initiate an investigation into the above allegations as set out in the TV3 Complaint. For the purpose of the Investigation, items (b) and (c) above relates to the allegations of excessive pricing, while item (a) relates to the allegations of discriminatory pricing.
- 22 In accordance with section 47C of the Competition Act 2002, where ComReg seeks to exercise its competition law functions it is required to notify the Competition Authority (essentially to ensure that neither organisation is investigating a similar matter). ComReg informed the Competition Authority of its intention to investigate the matter on 23 December 2010.
- 23 On 24 December 2010, ComReg notified the European Commission of the opening of the case in accordance with requirements under Article 11 of the EU Modernisation Regulation 1/2003²². On 4 February 2011, ComReg wrote to RTÉ/RTÉNL and on 8 February 2011 ComReg wrote to TV3, in each case to notify them of the commencement of the Investigation.
- 24 ComReg also issued initial statutory requests for information to both RTÉ/RTÉNL²³ and TV3²⁴ using its powers under section 13D(1) of the Communications Regulation Act 2002 (as amended) (generally referred to throughout this Information Notice as '**13D Requests for Information**') in February 2011.

2.4 RTÉ/RTÉNL Charging Arrangements for ATTTD Services

- 25 Given the nature of the RTÉ/RTÉNL charging arrangements for its provision of wholesale ATTTD services is germane to understanding the overall nature of the TV3 Complaint and ComReg's assessment of it, such charging arrangements as they applied over the Period of Investigation are briefly described in general terms below.

²² See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN>.

²³ Section 13D request issued to RTÉNL dated 4 February 2011.

²⁴ Section 13D request issued to TV3 dated 23 February 2011.

- 26 In December 1997, TV3 entered into a ten-year contract with RTÉ and RTÉ Commercial Enterprises Limited (a wholly-owned subsidiary of RTÉ and the assignor to RTÉNL) for the provision and maintenance of a television distribution and transmission network (the “**1997 Agreement**”). The 1997 Agreement provided for a number of payments to be made by TV3 to RTE:
- an up-front payment of IR£[] to be held in escrow;
 - an annual fee of IR£[] reviewable in accordance with the Consumer Price Index (‘CPI’); and
 - an annual capital fee of IR£[] per annum.
- 27 From 1998 to 2008, TV3 was charged for broadcast transmission services in accordance with the 1997 Agreement.
- 28 From 1997 to 2003, given it was vertically integrated RTÉ had no internal transfer pricing mechanism in place for the supply of broadcast transmission and distribution services to its own downstream channels. In other words, RTÉ did not explicitly invoice/charge RTÉ1, RTÉ2 (and TG4) for the provision of ATTTD services. As a result, there is a significant information gap relating to the visibility of ATTTD charges levied on RTÉ1, RTÉ2 and TG4 for the period 1998 to 2003. Following a restructuring of RTÉ, in 2003 all of its transmission and distribution network assets were transferred to its newly established wholly-owned subsidiary, RTÉNL, with RTÉNL then charging the RTÉ channels (including TG4) for wholesale ATTTD services on an arm’s length basis. Therefore, from 2003/4 the availability of information relating to charges being levied on RTÉ1, RTÉ2 (and TG4) for ATTTD services improves.
- 29 In 2003, RTÉNL developed an analogue tariff model as a basis for calculating the charges to be applied to RTÉ1, RTÉ2 and TG4 for transmission and distribution services (‘**Tariff Model**’). While TV3 continued to be charged in accordance with the 1997 Agreement, from 2004 onwards, the Tariff Model was used to derive transmission services charges, while distribution charges were commercially negotiated. However, from 2005 onwards, both transmission and distribution charges were calculated via the Tariff Model.
- 30 Deloitte notes that the Tariff Model had a number of specific elements which distinguished it from a model which aims to produce a ‘regulated’ tariff. These elements, along with their impacts were considered in the Deloitte Report²⁵ and include:
- the capital asset base in the Tariff Model did not take account of any additions or disposals of assets that occurred;

²⁵ Section 2.2 and 4.3 of the Deloitte Report.

- the Tariff Model included a mark-up on operational expenditure ('opex') which has no apparent theoretical basis and is not linked to any calculation of an appropriate Weighted Average Cost of Capital ('**WACC**'); and
 - the Tariff Model charged a nominal return on capital which has no theoretical foundation and is not based on any calculation of a WACC
 - the Tariff Model is based on budgeted operating costs rather than actual costs.
- 31 As a result of these factors, Deloitte concluded that the Tariff Model could not be relied upon as providing a reasonable basis to assess whether excessive and/or discriminatory pricing had occurred and that it would be necessary to undertake a separate assessment to mitigate issues with the model that would otherwise limit its applicability to the assessment.
- 32 In 2008, following TV3 and RTÉNL subsequently entered into an agreement which employed new charging arrangement ('**2008 Contract**'). This charging arrangement was based on a modified version²⁶ of the Tariff Model, with such modifications related to how TV3 specific capital charges were treated in the Tariff Model and, therefore, their application to the resulting ATTTD service tariffs to be levied by RTÉNL on TV3.
- 33 From July 2011 onwards, RTÉ1, RTÉ2 and TG4 were charged on the basis of the '**Simulcast Tariff Model**', developed by RTÉNL to provide for charges associated with the simultaneous transmission and distribution of both analogue terrestrial television ('**ATT**') and digital terrestrial television ('**DTT**') pending ASO. TV3 was also charged under the Simulcast Tariff Model from July 2011, also with specific modifications relating to the recovery of TV3 specific capital charges.
- 34 Following ASO in October 2012, RTÉ1, RTÉ2, TG4 and TV3 were all charged on the basis of the DTT Tariff Model ('**DTT Tariff Model**').
- 35 Figure 1 below summarises the charging mechanisms/bases applied by RTÉNL to downstream TV broadcasters over the Period of Investigation, as well as an overview regarding the quality of information available to ComReg over this period to enable its Investigation.

²⁶ The modifications did not relate to the structure of the Tariff Model, but rather, related to a credit provided to TV3 subsequent to the ending of the 1997 Agreement in recognition of capital payments made by TV3 associated with TV3 specific equipment having been effectively recovered under the 1997 Agreement. This credit had the effect of lowering certain elements of the TV3 charges derived from the Tariff Model when applied to TV3 from 2008.

Figure 1: Timeline of charging bases and information availability



Source: Based on information supplied by RTE, RTÉNL and TV3

2.5 Coverage and Charging Arrangements

- 36 The coverage (in geographic/population terms) of the TV broadcasting services provided by RTÉ1, RTÉ2, TV3 and TG4 differed over the Period of Investigation. Such coverage differences are of relevance to the overall nature of the TV3 Complaint and ComReg’s assessment of it, including with respect to understanding how such coverage differences impact upon the cost to RTÉ/RTÉNL of providing ATTTD services and the resulting charges levied on broadcasters given their specific coverage requirements.
- 37 Table 1 below describes the coverage for the TV broadcasting services provided by RTÉ1, RTÉ2, TV3 and TG4 along with the nature of the charging arrangements which applied over the Period of Investigation.

Table 1: Method of Charging and No. of Sites from December 1997 to October 2012²⁷

Party & Number of Sites	Dec 1997 to Dec 2003	Jan 2004 to Dec 2004	Jan 2005 to Sept 2008	Oct 2008 to June 2011	June 2011 to Oct 2012
RTÉ1 and RTÉ2 100+ Sites	no visibility of charging basis	Tariff Model (Transmission only) ²⁸	Tariff Model (Transmission and Distribution)		Simulcast Tariff Model (Transmission and Distribution)
TG4 100+ Sites	no visibility of charging basis	Tariff Model (Transmission only)	Tariff Model (Transmission and Distribution)		Simulcast Tariff Model (Transmission and Distribution)
TV3 12 Sites	Charges based on those negotiated under 1997 Agreement			Tariff Model (Transmission and Distribution) with modifications relating to capital charges	Simulcast Tariff Model (Transmission and Distribution)

Note: Information in the table is derived from the TV3 Complaint and from RTÉNL's response to a statutory request for information issued to it by ComReg.

38 Between 1 September 1998 and 31 August 2008 TV3 was required to be available to approximately 85% of the population²⁹ (as a condition of the commercial broadcast licence received from the IRTC³⁰). Thereafter, TV3 was required to be available to approximately 90% of the population. This requirement was reaffirmed in the licence granted to TV3 by the BCI (now the BAI) in 2009³¹. This TV3 specific coverage requirement was effectively achieved by TV3 through the broadcast of its TV services from 12 of RTÉ/RTÉNL's transmission mast sites³² located across the country³³.

²⁷ Information in the table is derived from the TV3 Complaint and from RTÉNL's response to a 13D Request for Information issued by ComReg.

²⁸ For 2004, the Tariff Model charged for transmission services only, while distribution charges were commercially negotiated. From 2005 onwards, both transmission and distribution charges were levied via the Tariff Model.

²⁹ This requirement is set out in Section 8.11 of the contract between TV3 and IRTC dated 1 September 1998.

³⁰ The IRTC became the BCI, which then became the BAI.

³¹ This requirement is set out in Section 7.9 of the contract between TV3 and BCI dated 10 September 2009.

³² This 12 transmission sites included all of RTÉ's main transmission sites, as well as two additional relay sites (detailed in RTÉNL Response to 4 Feb 2011 13D Request for Information). The main sites are Cairn Hill, Clermont Carn, Holywell Hill, Kippure, Maghera, Mt. Leinster, Mullaghanish, Spur Hill, Three Rock and Truskmore. The two relay sites were Collins Barracks and Woodcock Hill.

³³ As set out in First Schedule of the 1997 Agreement between RTE and TV3.

- 39 10 of the sites from which TV3 was broadcast were RTÉ/RTÉNL's largest transmission sites in scale and height terms and, therefore, provide a broader coverage than would other smaller sites within its network. Given the nature of the infrastructure at these large sites, they also carry a higher cost associated with their establishment and ongoing operation (than say, in comparison to smaller sites). This illustrates that drawing definitive conclusions on the alleged abuses via a comparison of the average per site costs/charges³⁴ would, therefore, be too simplistic, given the cost of maintaining and operating sites is not uniform.
- 40 RTÉ was established as the national broadcaster³⁵ and its services were transmitted from over 100+ mast sites³⁶ over the Period of Investigation

2.6 Engagement with Deloitte

- 41 In October 2012 ComReg engaged Deloitte to assist it in the investigation of the TV3 Complaint. Deloitte's work consisted of developing and subsequently applying a robust methodology or methodologies for assessing excessive and discriminatory pricing in light of the information available.
- 42 ComReg worked with Deloitte in the period October 2012 to December 2013. On 3 December 2013, ComReg received the final report from Deloitte ("**the Deloitte Report**"). Thereafter, ComReg sought a number of confirmations from Deloitte to clarify certain suspects of the Deloitte Report, with these being provided in January 2014³⁷. A small number of minor typographical errors in the Deloitte Report were subsequently identified and these have been corrected by Deloitte.
- 43 This Information Notice incorporates the analysis conducted by Deloitte and, where relevant, is referred to throughout it. As noted in paragraph 6, ComReg is also providing a copy of the Deloitte Report to the Parties, redacted as appropriate to protect each of the Parties' commercially sensitive and/or confidential information

³⁴ For example, calculating an average cost by taking the total charges levied by RTÉ/RTÉNL on a TV broadcaster and dividing this by the total number of sites from which a TV broadcaster is broadcast.

³⁵ Established under the Broadcasting Authority Act, 1960.

³⁶ RTÉ Television Transmission Network – Technical Information 2003 (Document B12-01-0006, received from RTE in response to the February 2011 13D Request for Information).

³⁷ Such confirmations do not change the overall conclusions of the Deloitte Report.

3 Legal and Economic Framework

3.1 Legal Framework

3.1.1 National and EU Legislation

44 The alleged abuses in the TV3 Complaint are examined in the context of Section 5 of the Competition Act 2002 and/or Article 102 of the TFEU.

45 Section 5(1) of the Competition Act 2002 prohibits an abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State. Section 5(2)(a) and 5(2)(c) of the Competition Act, 2002 (relevant extracts below) are apply to the legal assessment of the alleged excessive and discriminatory pricing abuses respectively:

- (1) Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.**
- (2) Without prejudice to the generality of subsection (1), such abuse may, in particular, consist in-**
 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;**
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.**

46 Similar provisions to Section 5(2)(a) and 5(2)(c) of the Competition Act 2002 are reflected in Article 102(a) and 102(c) of the TFEU³⁸ with the relevant extract below:

102 Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;.....**
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;**

³⁸ Article 102 of the TFEU was formerly Article 82 of the EC Treaty.

3.1.2 Summary of Relevant Case Law and Decisions

Excessive Pricing

47 The legal test for the assessment of excessive prices under Article 102 of the TFEU has been set out by the Court of Justice of the European Union ('CJEU') in its judgement in the *United Brands*³⁹ case. In paragraph 250 of this judgement it states:

"...charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse."

48 A two stage test for the assessment of whether a price is excessive or not was set out in the *United Brands* judgement at paragraph 252. Firstly, it is necessary to establish the costs actually incurred and to compare these with the prices actually charged, with the difference between the two determining whether or not the prices were excessive. Secondly, the price charged must be either unfair in itself or in comparison with prices for other competing products.

*"The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."*⁴⁰

49 While the *United Brands* judgement did not specifically espouse a particular methodology for calculating the economic value, its notes at paragraph 251 that:

"...the excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which could disclose the amount of the profit margin".

50 The *United Brands* precedent has been adopted in other subsequent European cases and cases in other European jurisdictions involving the assessment of excessive pricing abuses, including *Scandlines Sverige AB v Port of Helsingborg*⁴¹ and *Attheraces*⁴².

³⁹ Case 27/76 *United Brands Co. v Commission* [1978] ECR 207.

⁴⁰ Case 27/76 *United Brands Co v Commission* [1078] ECR 207 at para 252

⁴¹ Case [COMP/A.36.568/D3](#) – *Scandlines Sverige AB v Port of Helsingborg*, in which the European Commission rejected a complaint by *Scandlines Sverige*.

⁴² *UK Court of Appeal Attheraces (UK) Limited v. The British Horseracing Board Limited*, Case No: A3/2006/0126. February 2007.

- 51 The European Commission, in *Scandlines Sverige AB v Port of Helsingborg* also emphasised the importance of carrying out the second stage test espoused in *United Brands* judgement relating to an assessment of whether prices charged are also unfair, wherein it noted that:

“It is important to note that the decisive test in United Brands focuses on the price charged, and its relation to the economic value of the product. While a comparison of prices and costs, which reveals the profit margin, of a particular company may serve as a first step in the analysis (if at all possible to calculate), this in itself cannot be conclusive as regards the existence of an abuse under Article 82.”⁴³

- 52 In the *Attheraces* case, the UK Court of Appeal overturned a UK High Court finding of excessive pricing. The UK Court of Appeal confirmed that, to establish an abuse by way of excessive pricing, it is not sufficient to demonstrate that the price charged is in excess of cost plus a reasonable return. It must be demonstrated that the price significantly exceeds the economic value of the product supplied. At paragraph 218 the UK Court of Appeal held:

“For all the above reasons we conclude that, in holding that the economic value of the pre-race data was the cost of compilation plus a reasonable return, the judge took too narrow a view of economic value in Article 82. In particular he was wrong to reject BHB’s contention on the relevance of the value of the pre-race data to ATR in determining the economic value of the pre-race data and whether the charges specified by BHB were excessive and unfair.”

- 53 In *Island Ferries Teoranta –v- the Minister for Communications, Marine and Natural Resources and Others*⁴⁴ Cooke, J. said that an abuse on the part of a dominant undertaking in the form of excessive pricing is not easily established in that it is usually necessary to demonstrate that the prices bear no reasonable relation to the economic value of what is supplied. At paragraph 80 Cooke J. held

“It is also the case that abuse on the part of a dominant undertaking in the form of excessive pricing is not easily established in that it is usually necessary to demonstrate that the prices bear no reasonable relation to the economic value of what is supplied. It is normally necessary to point to some comparative basis of pricing to demonstrate the degree of the alleged excess. (See for example United Brands and Case 30/87 Bodson v. Pompes Funebres [1988] ECR2479.)”

⁴³ *Scandlines Sverige AB v Port of Helsingborg*, paragraph 102.

⁴⁴ [2011] IEHC 388.

- 54 The same approach had been taken by the Irish Competition Authority in *Greenstar*⁴⁵ in 2005.
- 55 The legal framework outlined above with respect to the *United Brands* case is applied in ComReg's assessment of the excessive pricing aspects of the TV3 Complaint in section 5 of this Information Notice.

Discriminatory Pricing

- 56 The legal framework for the assessment of discriminatory pricing under Article 102 of the TFEU has been set out in various European judgments. In *Irish Sugar*⁴⁶ the General Court considered the matter and noted from paragraph 111 onwards that the Treaty:

"...prohibits a dominant undertaking from eliminating a competitor and thereby reinforcing its position by having recourse to means other than those within the scope of competition on the merits.... The prohibition laid down in Article [102] is also justified by the consideration that harm should not be caused to consumers."

- 57 In the *Irish Sugar* case the Court also held that discrimination by undertakings is prohibited unless there is an objective justification.

"The distortion of competition arises from the fact that the financial advantage granted by the undertaking in a dominant position is not based on any economic consideration justifying it...",⁴⁷

- 58 In Paragraph 115 the Court noted that the rule against abuse of a dominant position:

"...expressly provides that abusive practices may consist of applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".

⁴⁵ E/05/002 Decision of The Competition Authority (Case COM/108/02) Alleged excessive pricing by Greenstar Recycling Holdings Limited in the provision of household waste collection services in northeast Wicklow 30 August 2005 The Competition Authority concluded that the evidence did not substantiate the allegation that Greenstar's prices were unrelated to the cost and/or social/economic value of the service provided. Nor was it the case that Greenstar's prices were significantly higher than the prices charged by other private operators; they were in some cases cheaper than those charged by other private operators in the State.

⁴⁶ Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 114.

⁴⁷ Paragraph 114.

59 The need to consider whether pricing discrimination has an anti-competitive effect was affirmed by the CJEU in *British Airways*⁴⁸ where it considered the second limb of Article 102(c) i.e. the need for “competitive disadvantage”. In *Post Danmark*⁴⁹, the CJEU noted that the fact that the practice of a dominant firm may be described as “price discrimination” cannot of itself suggest that there exists an exclusionary abuse. The CJEU stated at paragraph 30:

“.., the fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as ‘price discrimination’, that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse. “

60 The CJEU further concluded at paragraph 44:

“In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers’ interests.”

61 The legal framework outlined above is applied in ComReg’s assessment of the discriminatory pricing aspects of the TV3 Complaint in section 5 of this Information Notice, namely whether dissimilar prices were applied without objective justification which produced an actual or likely exclusionary effect to the detriment of competition and thereby of consumers’ interests.

3.2 Economic Framework

3.2.1 Market Definition and Dominance

62 For the purpose of its Investigation, ComReg has not definitively assessed whether RTÉ/RTÉNL was actually dominant in the ATTTD Market during the Period of Investigation as it is considered unnecessary to do so, having regard to ComReg’s conclusions on the TV3 Complaint. However, to do so, ComReg notes that it would be required to:

- determine the relevant product/geographic market(s); and
- determine whether RTÉ/RTÉNL is likely to hold a dominant position in such a market.

⁴⁸ *British Airways Case C-95/04 P British Airways v Commission* [2007] ECR I-2331, paragraphs 142-149

⁴⁹ *Post Danmark, Case C-209/10* paragraphs 30 and 34. See also *British Airways Case C-95/04 P British Airways v Commission* [2007] ECR I-2331, paragraphs 142-149 where the CJEU considered the second limb of Article 102(c) i.e. the need for “competitive disadvantage”

- 63 Noting the above and, given amongst other things⁵⁰, RTÉ/RTÉNL was the sole provider of wholesale ATTTD services in Ireland during the Period of Investigation, ComReg proceeded with the Investigation on the assumption that the product market was that for the supply of wholesale ATTTD services and that it was national in scope.
- 64 ComReg notes that under the separate *ex ante* SMP based regulatory framework, in 2004 RTÉ/RTÉNL was found to have SMP in the wholesale ATTTD service market⁵¹. SMP, while a concept drawn from a different regulatory framework, is nonetheless aligned with competition law principles and is akin to dominance in an *ex post* sense. This would be somewhat supportive of the ComReg's views on the definition of the relevant market and RTÉ's/RTÉNL's position within it.
- 65 ComReg notes that it is possible that the market definition and dominance assessment would be disputed by RTÉ/RTÉNL were a definitive conclusion to be reached on this basis. Nevertheless, for the purpose of this Information Notice, we refer to RTÉNL as being allegedly dominant in the ATTTD services market and no definitive conclusions should be drawn from ComReg's comments in this respect.

3.2.2 Theory of Harm

- 66 RTÉ (through RTÉNL) is a vertically integrated undertaking and, over the Period of Investigation, it provided TV broadcast transmission and distribution services to its own downstream TV channels (RTÉ1 and RTÉ2) as well as to TV3 and TG4. As such, these wholesale ATTTD services were a key upstream input which facilitates downstream FTA TV broadcasting services (and related markets).
- 67 TV3 has alleged that RTÉ/RTÉNL engaged in two abuses. Firstly, that the prices charged for access to wholesale ATTTD services were excessive. In general, such an abuse is considered to be an 'exploitive' one, in that given the lack of effective competitive constraints imposed on the upstream dominant firm, it can use its market power to extract monopoly rents from its downstream customers. This results in a wealth transfer from the customer to the upstream firm, resulting in excessive profits being earned. In a competitive market structure, such an abuse would not be possible, given the constraints that competitors of the upstream input impose upon each other.

⁵⁰ For example, barriers to entry are likely to have been high and non-transitory; legal barriers exist such that TV3 and TG4 are required, whether through licence conditions or statute, to be carried on a FTA basis suggests that other alternative platforms such transmission via cable or satellite are likely to be viable alternatives; etc

⁵¹ See the 2004 Broadcasting Market Review.

- 68 Secondly, TV3 has also alleged that the prices charged by RTÉ/RTÉNL for access to wholesale ATTTD services were discriminatory, in that, different prices were charged to different customers for the same ATTTD service.
- 69 Market structures where vertically-integrated firms control key/bottleneck upstream inputs (in which the firm is dominant) to downstream products provided by both the vertically-integrated firm and downstream competitors can be susceptible to competition problems. In this respect, where a dominant firm is engaged in a vertically integrated supply chain, providing services to its own downstream operations and to third parties, discriminatory (and/or excessive) prices charged for the upstream market input can also ultimately impede effective competition in downstream markets and potentially cause consumer harm. In this Investigation, as the upstream ATTTD service input price forms part of downstream firm's (TV3, TG4, RTÉ1 and RTÉ2) costs structures, the allegedly dominant firm's actions could alter the cost structure of the rival downstream firms, thereby potentially damaging their ability to compete effectively in downstream markets (in which the upstream firm also competes) and give rise to consumer harm. We refer generally to these effects as *foreclosure/exclusionary* effects.
- 70 ComReg would note that, in general, the assessment of foreclosure/exclusionary effects does not necessarily mean that a rival firm has actually exited the market. Rather, a rival might be sufficiently disadvantaged such that it might be forced to leave the market due to a resulting inability to compete less effectively in the downstream market⁵².
- 71 Also of relevance is that anticompetitive effects arising from the actions of an upstream vertically integrated dominant firm will only arise in certain limited circumstances⁵³. Foreclosure (or exclusionary) effects are more likely to be a possibility when there are no effective substitutes for the upstream input (in this case ATTTD services) and barriers to entry in the upstream market are high and non-transitory⁵⁴.

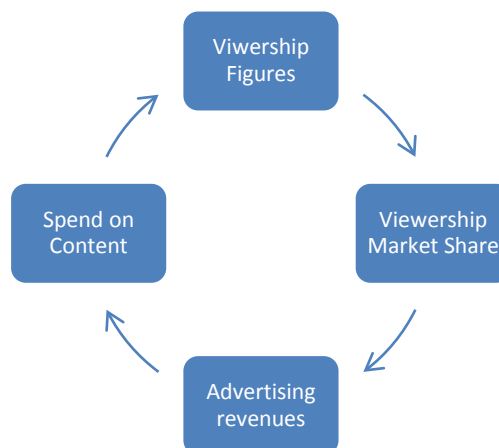
⁵² See Commission Decision of 4 July 2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – Wanadoo España v. Telefónica) at paragraph 586.

⁵³ Geradin and Petit, 'Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach', The Global Competition Law Centre Working Papers Series, GCLC Working Paper 07/05, College of Europe (Bruges).

⁵⁴ The existence of upstream substitutes can limit price discrimination by a vertically integrated firm as they may rather supply a downstream rival than have the rival supplied by an upstream competitor.

72 It is also worth noting that the downstream broadcasting markets within which TV3, TG4, RTÉ1 and RTÉ2 compete are considered to be ‘two-sided’ markets. Simplistically, the broadcast of a TV channel on the FTA TV platform brings audiences and advertisers together. Audiences are attracted by the programme content offered by the TV channel, while firms producing products/brands are drawn to purchasing advertising from the TV channel depending on its share of the total viewership (and potentially the demographic of such viewership)⁵⁵. TV channels also compete amongst each other, on the one hand, for the acquisition of content (whether acquiring programmes from outside parties or by seeking grants/finance for self-provided content creation) and, on the other hand, for advertising revenues as impacted through their viewership market shares⁵⁶. Advertising revenue, in turn, can facilitate the procurement of programme content. This somewhat circular relationship is outlined, in a stylised manner, in Figure 2 below.

Figure 2: The relationship between content and advertising revenues



73 In general, excessive pricing refers to the pricing strategy of a dominant firm whereby prices for products/services sold are maintained significantly above the price that would prevail in a competitive market outcome. i.e., above a reasonable measure of cost (including a reasonable rate of return). In the context of the TV3 Complaint, the upstream allegedly dominant firm (RTÉ/RTÉNL) is alleged to have charged a downstream broadcaster (TV3) an excessive price⁵⁷ for the supply of wholesale ATTTD services (also potentially giving rise to foreclosure effects in the related downstream broadcasting markets).

⁵⁵ It is worth noting at this point that TV3 and RTÉ were carried on multiple broadcast platforms during the Period of Investigation and that advertisers will be likely to consider a TV channels total viewership across all platforms (not specifically the FTA platforms) when purchasing advertising ‘slots’.

⁵⁶ Other relevant factors can be the demographic profile of the viewership etc.

⁵⁷ The allegations raised by TV3 as outlined in paragraph 20(b) 20(c) above, are considered in the context of the ComReg’s assessment of an alleged excessive pricing abuse.

- 74 To demonstrate that a firm is abusing its dominant position by charging excessive prices, it is necessary to show that the returns generated by the firm via the prices charged are significantly in excess of the return that would be expected to be achieved in a 'competitive market outcome'.
- 75 The TV3 Complaint also alleges that the level of charges imposed by RTÉ/RTÉNL on TV3 for wholesale ATTTD services are discriminatory vis-à-vis the charges levied by RTÉ/RTÉNL on other broadcasters (including RTÉ) operating in the downstream broadcasting or related markets. In assessing whether this is the case, it is necessary, in accordance with Section 5(2)(c) of the Competition Act 2002 and/or Article 102 (c) of the TFEU, to determine whether dissimilar prices were charged for equivalent transactions (note that transaction prices can potentially vary for several reasons, including the costs to the firm selling the product/service, the time the transaction occurred and differences in the buyers⁵⁸).
- 76 If dissimilar prices were charged for equivalent transactions, it is also necessary to consider whether there is any objective justification for such differences.
- 77 Lastly, having regard to Section 5(2)(c) of the Competition Act 2002 and Article 102(c) of the TFEU it is also necessary to assess the extent to which any application of dissimilar prices to equivalent transactions would have harmed the dominant firms trading partners by "...placing them at a competitive disadvantage". Such an assessment of "competitive disadvantage" implies that the upstream dominant firm's customers should be in competition with each other (including potentially with the dominant firm also being present in the downstream markets). This requirement means the finding of competitive harm/disadvantage is likely to be dependent on the nature of competition in a downstream market in which these firms compete.
- 78 The general economic framework outlined above is applied in ComReg's assessment of the TV3 Complaint in section 5 of this Information Notice.

⁵⁸ In *United Brands*, supra note 14 the ECJ indicated at §228 that: "[...] Differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling price [...]".

4 Investigative Steps

79 In February 2011 ComReg wrote to RTÉ/RTÉNL and TV3 notifying them of the commencement of the Investigation. Over the course of the Investigation, ComReg issued a number requests for information ('**RFIs**'), both using its statutory information gathering powers as well as on a non-statutory basis. ComReg does not describe within this Information Notice the detail of all of the relevant contacts with the Parties, suffice to say there was a substantial level of engagement, in particular, with RTÉ/RTÉNL.

80 A number of formal requests for information under section 13D of the Communications Regulation Act 2002 ('**13D RFIs**') were issued by ComReg to the Parties, with details of these summarised below:

- ComReg issued a 13D RFI to RTÉNL on 4 February 2011. ComReg received the response from RTÉNL on various dates between 6 April and 24 October 2011. At the request of RTÉNL, ComReg extended the the original deadline for RTÉ/RTÉNL's response to the 13D RFI on a number of occasions, in particular, having regard to the voluminous nature of the information requested and issues associated with the retrieval of information having regard to the relevant time period covered by the Investigation. In addition, in the context of RTÉNL responding to the 13D RFIs, issues arose concerning the treatment of potentially legally privileged material. These were ultimately resolved between ComReg and RTÉ (although this took a number of months to do so), with certain information eventually being provided to ComReg in April 2012.
- ComReg issued a 13D RFI to TV3 on 23 February 2011. At the request of TV3, ComReg extended the deadline for TV3's response to this request by 1 week and received the response from TV3 on 15 April 2011.
- On 15 February 2012 ComReg met with TV3 to discuss the investigation and other issues.
- On 5 April 2012 ComReg sent a further 13D RFI to RTÉNL seeking information relating to charges levied by RTÉNL. Following an extension to the response deadline, ComReg received the relevant information from RTÉNL on 16 May 2012.
- On 31 October 2012 ComReg issued a non-statutory based RFI to RTÉNL seeking additional information relating to the costs and other matters associated with its ATTTD network. RTÉNL's response to the October 2012 Information Request was provided to ComReg over various dates up to November 2012.

- On 6 February 2013 ComReg issued a non-statutory based RFI to TV3 and seeking additional information relating to the Investigation. On 5 March 2013 TV3 provided its response.
- On 31 January 2014 ComReg issued a non-statutory based RFI to TV3 seeking any additional information or evidence which TV3 considered relevant to ComReg's assessment of purported anti-competitive effects / competitive harm resulting from RTÉNL's alleged pricing conduct. On 14 February 2014 TV3 provided its response.

5 Analysis

5.1 Overview

- 81 As noted in paragraphs 62 to 65 above, ComReg has not definitively assessed whether RTÉ/RTÉNL was actually dominant in the ATTTD market during the Period of Investigation as it is considered unnecessary to do so having regard to ComReg's overall conclusions on the Investigation.
- 82 ComReg notes that RTÉ/RTÉNL was the sole wholesale provider of a national ATTTD service during the Period of Investigation and there is, therefore, likely to be a lack of effective existing competition. There are also likely to be high non-transitory barriers to entry associated with, amongst other things, the sunk costs associated with establishing and maintaining a nationwide ATTTD network and potential competition in the provision of wholesale ATTTD services is unlikely within the short to medium term.
- 83 However, ComReg is not making a definitive conclusion on these issues above as it would require additional analysis and investigation. In this respect, ComReg would be required to:
- assess the retail and wholesale broadcasting markets (including a demand-side and supply-side substitution and geographic assessment); and
 - examine whether any undertaking in the market was dominant during the Period of Investigation. This includes an assessment of market shares, barriers to entry, economies of scale/scope, vertical integration and evidence of countervailing buyer power.
- 84 ComReg's preliminary view is that, over the Period of Investigation, the relevant market is likely to have been the wholesale broadcasting market for the supply of analogue terrestrial television transmission and distribution services, with the market likely to have been national in scope.
- 85 ComReg notes that this preliminary view is supported by the analysis contained in ComReg's 2004 Broadcasting Market Review⁵⁹ within which, from an *ex ante* perspective, it defined an ATTTD services market. In this case, ComReg defined the broadcasting and transmission product market as "*the wholesale market for television broadcasting transmission services on analogue terrestrial networks*" and found the geographic market to be national. The 2004 Broadcasting Market Review designated RTE with SMP, a concept akin to dominance in the relevant market.

⁵⁹ See footnote 17 above.

86 ComReg has considered the alleged pricing abuses as set out in the TV3 Complaint, namely:

- Excessive Pricing contrary to Section 5 of the Competition Act/Article 102 of the TFEU; and
- Discriminatory Pricing contrary to Section 5 of the Competition Act/Article 102 of the TFEU.

87 In the following sections, ComReg summarises the analysis of these two alleged abuses conducted by Deloitte, and presents ComReg's views and conclusions on these.

88 Following its investigation, ComReg has ultimately decided to close the TV3 Complaint on the basis that there is insufficient evidence to substantiate TV3's allegations that RTÉ/RTÉNL's prices were excessive and/or discriminatory. ComReg's conclusions are, therefore, that there are insufficient grounds for action.

89 It should also be noted that Deloitte's and ComReg's assessment of the alleged excessive and discriminatory pricing abuses has been limited by a number of factors relating to the availability of information provided by the Parties in response to the various RFIs:

- **The availability of information given RTÉ's vertical integration:** from 1997 to 2003, RTÉ had no internal transfer pricing mechanism in place for the supply of ATTTD services to RTÉ1, RTÉ2 or TG4. As a result it is difficult to compare the charges levied on TV3 under the 1997 Agreement to the costs incurred by RTE, or indeed TV3's charges in comparison to charges levied by RTE on itself or others. Following the incorporation of RTÉNL in 2002, from 2003/4 onwards the availability of comparable charging information improves significantly. Consequently, Deloitte analysis of the alleged excessive and discriminatory pricing abuses primarily focused on two time periods, namely 2003 to 2008 and 2003 to 2011. The 2003 to 2008 time period is chosen as it represents the years TV3 was charged under the 1997 Agreement for which a reasonable level of information exists to have enabled an analysis. The second, longer time period, from 2003 to 2011 also incorporates the time period covered by the 2008 Contract agreed between RTÉNL and TV3, with 2012 being excluded as it represented a partial year due to ASO occurring in October 2012.
- **The passage of time:** given the alleged abuses relate to as early as 1997, the Parties ability to provide certain information over the earlier part of the Period of Investigation has been impacted due to the ability to find/retrieve records and relevant personnel no longer working within relevant Parties' organisations.

- **TV3 Cost-Benefit Analysis Information:** in its response to the February 2013 RFI, TV3 stated that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

90 The impact of these issues is, as appropriate, considered in the analysis below.

5.2 Excessive Pricing

91 ComReg has already outlined the general economic theory of harm with respect to excessive pricing in section 3.2.2. In the context of the assessment of the TV3 Complaint, the alleged upstream dominant firm (RTÉ/RTÉNL) providing wholesale ATTTD services is alleged to have charged a downstream broadcaster (TV3) an excessive price for wholesale ATTTD services, thereby limiting TV3's ability to compete effectively in downstream markets, potentially having an exclusionary effect.

5.2.1 Deloitte Analysis

92 The Deloitte Report identifies⁶⁰ and subsequently applies various methodologies for the assessment the alleged excessive pricing abuses. These include:⁶¹

- (a) **IRR Analysis**⁶²: a measure of profitability used to assess whether the return earned by a firm was excessive by comparing the firm's Internal Rate of Return ('IRR') to its Weighted Average Cost of Capital ('WACC') (considered in paragraphs 95 to 109 below);
- (b) **ROCE Analysis**⁶³: a similar measure of profitability based on a comparison between the Return on Capital Employed ('ROCE') and WACC (considered in paragraphs 110 to 112 below);
- (c) **Price/Cost Analysis**⁶⁴: a price/cost comparison, assessing the costs associated with RTÉ/RTÉNL's cost of providing ATTTD services to TV3 and establishing whether the prices set under the 1997 Agreement and 2008 Contract over the Period of Investigation can be considered to be

⁶⁰ Chapter 5 of the Deloitte Report.

⁶¹ Section 5.1.2.3 of the Deloitte report also refers to alternative profitability measures. They are considered by Deloitte to be less appropriate in their application to the current case.

⁶² Section 5.1.2 of the Deloitte Report.

⁶³ Section 5.1.2 of the Deloitte Report.

⁶⁴ Section 5.1.1 of the Deloitte Report.

‘reasonable’ relative to the costs incurred by RTÉ/RTÉNL (considered in paragraphs 113 to 120 below); and

(d) **Economic Value Analysis:**⁶⁵ an assessment of the economic value to TV3 of RTÉNL’s services (considered in paragraphs 121 to 124 below).

93 The Deloitte Report presents and discusses the benefits/downsides regarding the application of each of the above methodologies, with Deloitte considering an IRR Analysis to be the most appropriate method for assessing profitability and, therefore, whether or not excessive pricing was likely (nonetheless Deloitte also applies the other methodologies as a cross-check).

94 These various methodologies are applied below in assessing excessive pricing abuses as alleged in the TV3 Complaint.

IRR Analysis

95 The Deloitte Report presents⁶⁶ an IRR Analysis using truncated⁶⁷ IRR figures for the various RTÉNL provided services.

96 The truncated IRR methodology requires accurate estimation of the opening and closing asset values of the activity in question, using the ‘value to the owner’ principle⁶⁸. Deloitte, adopting this principle, calculates the value of RTÉ/RTÉNL’s assets using the Modern Equivalent Asset⁶⁹ (‘MEA’) and Net Realisable Value⁷⁰ (‘NRV’) methodologies. Deloitte calculates asset values using both methods, but concludes that the MEA is the appropriate method for this case and adopt it as the “central estimate” when computing the truncated IRR values⁷¹, i.e. ***the central estimate is a truncated IRR using a MEA methodology*** (‘IRR Analysis’). ComReg notes that the truncated IRR results using the NRV methodology do not alter the overall conclusions set out in the Deloitte Report.

⁶⁵ Section 5.2.6 of the Deloitte Report.

⁶⁶ Section 5.2.4 of the Deloitte Report.

⁶⁷ As noted in Section 5.1.2.1 of the Deloitte Report, a truncated IRR is used when the assets being examined have not yet reached the end of their economic life and thus it is necessary to estimate the closing asset value in order to allow cash flows to be measured over a shorter time period than the economic life of the asset. The truncated IRR allows cash flows to be measured over a limited time period when a full or ‘lifetime’ IRR cannot be computed.

⁶⁸ The ‘Value to the Owner’ principle is based on the assumption that the value of an asset is equivalent to the loss that the owner of the asset would incur if it was deprived of the asset.

⁶⁹ MEA value is the cost of replacing the RTÉNL network with a modern equivalent technology at current day prices. This is discussed further in Section 5.1.2.1 of the Deloitte Report.

⁷⁰ NRV means the Net Realisable Value of the assets in the RTÉNL network. This is discussed further in Section 5.1.2.1 of the Deloitte Report.

⁷¹ MEA and NRV are discussed further in Section 5.1.2.1 and Appendix C of the Deloitte Report.

- 97 In carrying out the IRR Analysis, Deloitte noted the need to ensure a proper allocation of costs between RTÉNL's 'products'⁷², in order to isolate costs relating to ATTTD services.
- 98 Deloitte also considered⁷³ various cost standards to be adopted in the IRR Analysis noting the need to allow recovery of all relevant costs incurred by RTÉNL over the period. Deloitte considered a Fully Allocated Cost ('**FAC**') standard to be most appropriate in this case, with this allowing for RTÉNL's common costs to be distributed to each of its products based on a selected allocation base. Its reasons included:
- **FAC allows for recovery of all incurred costs:** RTÉNL as a non-price controlled regulated entity would at least expect to recover its costs in order to continue operating. FAC is therefore considered to be a conservative costing methodology for the determination of excessive pricing;
 - **RTÉNL does not have numerous product offerings:** trying to allocate FAC among a series of different products can sometimes prove difficult and there is often the danger of incorrect or excessive allocation to particular products. This is not considered to be a significant issue in the case of RTÉNL as it has very few revenue streams which reduces the complexity involved in the allocation of costs; and
 - **Ex post rather than ex ante returns:** Given that this investigation is considering *ex post* rather than *ex ante* returns, the relevant costs are those actually incurred. Setting a cost standard in an *ex ante* situation is important in order to manage incentives for monopolists to perform efficiently. In an *ex post* situation, however, costs have already been incurred and it would be unreasonable to exclude these from a return calculated *ex post* unless they were thought to be highly inefficient.
- 99 The results of the Deloitte IRR Analysis presented below are based on its central estimate. It should be noted that these are Deloitte's proxy estimates of IRRs, having regard to the available information which, as noted in paragraph 89 above, has been subject to certain constraints.

⁷² Products in this sense refer to RTÉNL's provision of (i) ATTTD services (ii) radio transmission and distribution services and (iii) non-broadcast transmission and distribution services such as site/mast rental provided to telecommunications service providers.

⁷³ Section 5.1.4. of the Deloitte Report.

100 As replicated in Table 2 below, the Deloitte Report notes⁷⁴ the truncated IRR earned by RTÉ/RTÉNL is higher for TV3 (varying between [redacted %]⁷⁵ (2003-2011) and [redacted %]⁷⁶ (2003-2008)) than the truncated IRR for RTÉ1, RTÉ2 and TG4⁷⁷ (varying between [redacted %] and [redacted %] (2003-2008) and between [redacted %] and [redacted %] (2003-2011)).

Table 2: IRR Analysis Results [Redacted %]

Period	IRR (Central Estimate)			
	RTÉ1	RTÉ2	TG4	TV3
2003-2008	[redacted %]	[redacted %]	[redacted %]	[redacted %]
2003-2011	[redacted %]	[redacted %]	[redacted %]	[redacted %]

101 Having calculated the truncated IRRs likely to have been earned by RTÉ/RTÉNL from each customer, in the context of assessing whether or not the charges were excessive, the next step undertaken by Deloitte was to compare these truncated IRRs to a WACC.

102 A firm’s WACC is the rate that a company is expected to pay on average to all its security holders to finance its assets. The WACC is the minimum return that a company must earn on an existing asset base to satisfy its creditors, owners, and other providers of capital, or they will invest elsewhere.

103 Deloitte was not requested, within the scope of its work, to produce an actual estimated WACC for RTÉ/RTÉNL over the Period of Investigation. This was not considered by ComReg to produce any reliable result due to the likely limited amount of knowledge available regarding the risk landscape faced by RTÉNL at the time of the 1997 Agreement. As noted⁷⁸ by Deloitte, any bottom-up contemporaneous estimation of the WACC faced by RTÉ/RTÉNL at the time would be likely to be subject to significant uncertainties regarding the risk environment then faced.

⁷⁴ Section 5.2.4 of the Deloitte Report.

⁷⁵ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 6% to 9%.

⁷⁶ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 9% to 12%.

⁷⁷ While the specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 3%.

⁷⁸ Section 5.1.6 of the Deloitte Report, page 44.

- 104 The Deloitte Report⁷⁹, based on a review of documents provided by RTÉNL in response to an RFI⁸⁰, notes that RTÉ appeared to have considered various target IRRs prior to signing the 1997 Agreement with TV3. These figures suggest RTE, in negotiating the 1997 Agreement, contemplated a target IRR ranging between [REDACTED] and [REDACTED]. While providing some indication of the return RTÉNL were hoping to generate from the contract, these rates still do not provide a reliable estimate of RTÉNL's actual WACC. Therefore, Deloitte sought to benchmark the WACC against an appropriate industry comparator.⁸¹
- 105 Deloitte were requested to determine a competitive benchmark WACC for RTÉ/RTÉNL by reference to the WACC of an appropriate comparator firm⁸². Deloitte selected a benchmark WACC for RTÉNL by collating various WACC estimates across industries with similar characteristics to RTÉNL⁸³ (having regard to the Period of Investigation). The Deloitte Report presents various WACC figures for comparable companies offering broadcast transmission services⁸⁴. Deloitte ultimately considered that Arqiva, a UK based broadcast transmission and distribution service provider with a then pre-tax nominal WACC of 10.4%, was the most appropriate comparator for RTÉNL⁸⁵ for the Period of the Investigation. In this respect, Deloitte note that:
- “...these estimates are considered to provide a sufficiently robust starting point against which to draw inferences on RTÉNL's WACC for the period for which quantitative analysis has been feasible.”⁸⁶*
- 106 The Deloitte Report then assesses the comparability between IRR for TV3 and RTÉNL's benchmarked WACC (replicated in Table 3 below). To demonstrate that a RTENL is charging excessive prices, Deloitte notes that it is necessary to show that the returns generated (as represented by the IRR) are significantly in excess of RTENL's benchmarked WACC.

⁷⁹ Section 5.2.2 (Figure 8) of the Deloitte Report.

⁸⁰ RTÉ/RTÉNL response of 6 May 2011 to the February 2011 13D RFI.

⁸¹ Note that in the context of the existing separate SMP based *ex ante* obligations that apply to RTÉ/RTÉNL, ComReg is currently consulting on a WACC to be applied on a forward looking *ex ante* basis. In this respect, ComReg has proposed a WACC for RTÉ/RTÉNL of 8.68% (nominal pre tax) please see ComReg Document No. 14/28 published on 11 April 2014.

⁸² Section 5.2.2 of the Deloitte Report, page 46.

⁸³ Section 5.2.2 of the Deloitte Report.

⁸⁴ Table 10 of the Deloitte Report.

⁸⁵ Section 5.2.2 of the Deloitte Report. Other potential WACC comparators ranged from 8.37% (source: *WACC for broadcasting – Teracom, Copenhagen Economics, February 2007*) to 10.52% (source: *Assessment principles for the pricing of digital TV transmission services, Finnish Communications Regulatory Authority, December 2006*).

⁸⁶ Section 5.2.2 of the Deloitte Report, page 48.

Table 3: IRR Comparison to WACC [Partially Redacted X]

Time period	Estimated IRR	Benchmark WACC
2003 to 2008	[X █████ %] ⁸⁷	10.4%
2003 to 2011	[X █████ %] ⁸⁸	

107 As noted in section 3.1.2 above, while the case law suggests several approaches according to which economic value might be assessed, there is no formal or definitive guidance from the European Commission or elsewhere regarding how much a price (including a reasonable profit margin) must be above cost for it to be deemed to be excessive. However, Deloitte⁸⁹ notes that several cases/investigations in other jurisdictions have considered 5-10 percentage points⁹⁰ above the competitive market benchmark as being indicative of excessive pricing.

108 With respect to excessive pricing, the Deloitte Report ultimately finds that:

“The results of this analysis show that TV3’s IRR █████ the WACC for the 2003-08 period and █████ the WACC for 2003-2011. All other IRRs calculated sit below the WACC.”⁹¹

i.e. RTÉNL earned a lower return from its provision of wholesale ATTTD services provided to RTÉ1, RTÉ2 and TG4 than it did from its provision of services to TV3.

109 However, Deloitte’s ultimate conclusion with respect to excessive pricing using the IRR Analysis methodology is that:

“...the IRR of [X █████ %] for TV3 does not materially exceed the benchmark WACC and therefore is not illustrative of excessive pricing.”

⁸⁷ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 9% to 12%.

⁸⁸ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 6% to 9%.

⁸⁹ Deloitte Report, page 64.

⁹⁰ See Oxera, *Economics for Competition Lawyers*, April 2011, pages 268 – 282.

⁹¹ Section 5.2.4 of the Deloitte Report, page 54.

ROCE Analysis

- 110 The Deloitte Report⁹² also presents estimated ROCE figures for RTÉNL provided services ('**ROCE Analysis**'). Deloitte calculate the ROCE using the MEA and NRV methods discussed above (the presentation of the Deloitte analysis provided below only shows the ROCE calculated on the basis of the MEA methodology outlined in the Deloitte Report, as this is consisted by Deloitte to be the most appropriate methodology).
- 111 The Deloitte Report⁹³ estimates that the ROCE earned by RTÉ/ RTÉNL is higher for TV3 (varying between [Redacted %]⁹⁴ (2003-2011) and [Redacted %]⁹⁵ (2003-2008)) than the ROCE for RTÉ1, RTÉ2 and TG4 (varying⁹⁶ between [Redacted %] and [Redacted %] (2003-2011) and between [Redacted %] and [Redacted %] (2003-2008)).

**Table 4: ROCE Analysis results, 2003-2008 and 2003-2011, (central estimate)
[Redacted %]**

Period	ROCE				
	RTÉNL ATT ⁹⁷	RTÉ1	RTÉ2	TG4	TV3
2003-2008	[Redacted %]	[Redacted %]	[Redacted %]	[Redacted %]	[Redacted %]
2003-2011	[Redacted %]	[Redacted %]	[Redacted %]	[Redacted %]	[Redacted %]

- 112 Overall the Deloitte ROCE Analysis is broadly consistent with the IRR Analysis discussed above and Deloitte notes that the ROCE estimates do not materially impact its IRR Analysis conclusions with respect to excessive pricing in any way.

⁹² Section 5.2.4 of the Deloitte Report.

⁹³ Section 5.2.4 of the Deloitte Report.

⁹⁴ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 5% to 8%.

⁹⁵ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 9% to 12%.

⁹⁶ While the following specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 3%.

⁹⁷ This value represents the aggregate of returns (ROCE) earned by RTÉ/RTÉNL for RTÉ1, RTÉ2, TG4 and TV3.

Price/Cost Analysis

113 The Deloitte Report⁹⁸ presents the results of a price-cost analysis, with this being another possible methodology identified to assess excessive pricing cases⁹⁹ ('Price-Cost Analysis'). The Deloitte price-cost comparisons in Table 5 below compares the actual charges levied on TV3 by RTÉNL with an estimate of the costs incurred by RTÉ/RTÉNL in providing ATTTD services to TV3.¹⁰⁰

⁹⁸ Section 5.2.3 of the Deloitte Report.

⁹⁹ Section 5.1.1 of the Deloitte Report.

¹⁰⁰ This replicates Table 11 in the Deloitte Report.

Table 5: TV3 charges and RTÉNL estimated cost (€000) [Redacted X]

Metric	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
TV3 actual charges	[X]	[X]	[X]	[X]	[X]	[X]	[X] 1	[X]	[X]	
Estimated RTÉNL own costs (1)	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	
Margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X] 1
Less: return calculated on asset base (2)	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	
Balance of credit (3)	[X]	[X]	[X]	[X]	[X]	[X]	n/a	n/a	n/a	
Remaining margin	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X] [X]

Note (1): This amount includes depreciation and opex actually incurred.

Note (2): Return is based on proxy pre-tax nominal WACC of 10.4%

Note (3): In recognition of TV3’s repayment of capital over the 10 year life of the 1997 Agreement, RTÉ agreed to pay a credit of [X€] per annum to TV3 for the 4 years following the end of 2008. This is the only cashflow item included in the justifications provided in Appendix E of the Deloitte report (with this Appendix considering potential justifications put forward by RTÉNL to explain differences). This has been taken into account for the purposes of this analysis as it is a future cashflow which is due directly to the existence of the 1997 Agreement. As such, it is appropriate to consider the impact on the cashflows during the contract if these are considered on a discounted basis. For the purpose of discounting a rate of 10.4% was used (consistent with the proxy benchmark WACC employed in the IRR Analysis).

114 The 'Margin' identified above is the difference between the charges levied on TV3 and the estimated costs incurred by RTÉ/RTÉNL (including depreciation and opex incurred) to provide these services. This margin excludes any additional factors, or return on capex. Deloitte then assess what portion of this margin is explainable by examining the items below before then calculating a 'Remaining Margin':

- **Return on the Capital Asset Base:** Deloitte compute a proxy 'return on capital asset base' to act as an indicator of a competitive return on the ATTTD assets used by RTÉ/RTÉNL to supply services to TV3. This is based on the benchmark WACC of 10.4% identified by Deloitte. This proxy 'return on capital asset base' is applied in the Price/Cost Analysis employed by Deloitte as the 1997 Agreement does not contain details about the return on the asset base to be earned by RTÉ from providing services to TV3.
- **Balance of Credit¹⁰¹:** This relates to the nominal amount reimbursed by RTÉNL to TV3 in relation to the 1997 Agreement. For four years following the completion of the 1997 Agreement (i.e. under the 2008 Contract), RTÉNL agreed to give TV3 a credit of [X€] per annum in recognition of TV3's repayment of capital over the 10 year life of the 1997 Agreement. The capital assets purchased by RTÉ on behalf of TV3 in 1998 continued to be used under the 2008 Agreement, but had been fully paid for and depreciated. Thus the capital costs associated with these assets were no longer charged. RTÉNL continued to use these assets to provide services to TV3 until ASO. As part of the reconciliation to RTÉNL actual costs for 1998 to 2008, a 'balance of credit' of [X€] for each of the years up to 2008 is included in Deloitte's Price/Cost Analysis to account for this.

115 In addition, ComReg requested information from RTÉNL on factors RTÉNL considered relevant in explaining the differences observed between the actual TV3 charges relative to Deloitte's estimate of RTÉNL's own costs of providing services to TV3¹⁰². In response, RTÉNL provided details on seven specific cost elements¹⁰³. These explanations related to:

- (a) A margin on Opex;¹⁰⁴
- (b) TV3's purported request that Opex charges be indexed to CPI rather than RTÉNL's own internal costs;¹⁰⁵

¹⁰¹ Appendix E of the Deloitte Report deals further with the balance of credit.

¹⁰² ComReg request for information dated 5 April 2012, Information Request Reconciliation.xlsm and Information Request - [.....]- 5 April 2012 unsigned.docx.

¹⁰³ Further details in relation to each of these and Deloitte's views on them are set out in Appendix E of the Deloitte Report.

¹⁰⁴ Deloitte considered that this explanation was not likely to be validly justified.

¹⁰⁵ Deloitte considered that this explanation may be validly justified but would require further investigation and consideration.

- (c) RTÉNL's suggestion that they charged TV3 for the credit exposure on the commercial value of the fixed price contract between RTÉ and TV3;¹⁰⁶
 - (d) A credit adjustment for Capital Exposure;¹⁰⁷
 - (e) A fixed/variable interest rate variance;¹⁰⁸
 - (f) A suggested return of [X€█████%] be applied to Capex;¹⁰⁹
 - (g) A balance of Credit being paid;¹¹⁰ and
 - (h) An accelerated capital payment.¹¹¹
- 116 While Deloitte considered some of these justifications¹¹² as potentially valid, rather than examining each of these justifications in further detail, Deloitte adopted a worst case scenario and considered what 'Remaining Margin' or overcharge would exist if none of these justifications were accepted.
- 117 On average, between 2003 and 2008, Deloitte estimate that the price charged to TV3 exceeds the cost (including a rate of return) of providing services to TV3 by approximately [X€█████] per annum. Between 2003 and 2008 this value ranges between a maximum value of [X€█████] in 2003 and a minimum of [X€█████] in 2004. Once the 2008 Contract between RTÉNL and TV3 came into force the 'Remaining Margin' turns negative, suggesting TV3 was undercharged (or RTÉNL under-recovered) for these services from 2008 onwards.

¹⁰⁶ Deloitte considered that this explanation may be a valid justification (but would require further investigation and consideration).

¹⁰⁷ Deloitte considered that this explanation was not likely to be validly justified.

¹⁰⁸ Deloitte considered that this explanation was not likely to be validly justified.

¹⁰⁹ Deloitte considered that this explanation was not likely to be validly justified.

¹¹⁰ Deloitte considered that this explanation was likely to be a valid justification.

¹¹¹ Deloitte considered that this explanation was likely to be validly justified.

¹¹² These are outlined in Appendix E of the Deloitte Report.

- 118 Deloitte note that it is not possible to analyse whether the average 'Remaining Margin' would be representative of the earlier period (between 1997 and 2003), given the absence of reliable data. However, if this were assumed to be the case, a simple estimate of the maximum remaining margin over the 10 year period would be [X€████████] (based on the [X€████████] average per annum Remaining Margin over the 10 years of the 1997 Agreement). Deloitte consider that this is likely to represent an upper boundary of the impact of the price-cost differentials on TV3 over the period as it assumes returns are exactly equal to the benchmark WACC of 10.4% (i.e. no significant threshold above the benchmark WACC is included). Furthermore this does not take the lower rates of return earned by RTÉ/RTÉNL over the extended period (including 2008-2011) into account¹¹³.
- 119 Deloitte, noting that it does not consider the [X€████████] average per annum price-cost differential over the period 2003 to 2008 to provide evidence of excessive pricing, states:
- “Given that a nominal level of fluctuation in returns would be expected in a competitive market, Deloitte does not consider this to provide evidence of a significant breach of the competitive benchmark.”¹¹⁴*
- 120 Furthermore, Deloitte notes that the annual estimates of the 'Remaining Margin' are likely to include more uncertainty than the IRR Analysis outlined above, as they require an accurate annual calculation of the asset base in each year, with this being avoided through use of the truncated IRR (as this only needs a reasonable estimate of the opening and closing asset base). In addition, Deloitte notes¹¹⁵ that the Price/Cost Analysis (and the ROCE Analysis) is more reliant on the accuracy of depreciation information as this is included on an annual basis (which is avoided through use of the truncated IRR Analysis as this only needs a reasonable estimate of the opening and closing asset base).

Economic Value of Services to TV3

- 121 In addition to the IRR, ROCE and Price/Cost Analysis conducted, Deloitte also considered it useful to assess the alleged excessive pricing abuses by reference to the economic value of the goods and services in question to TV3 (albeit at a high level).

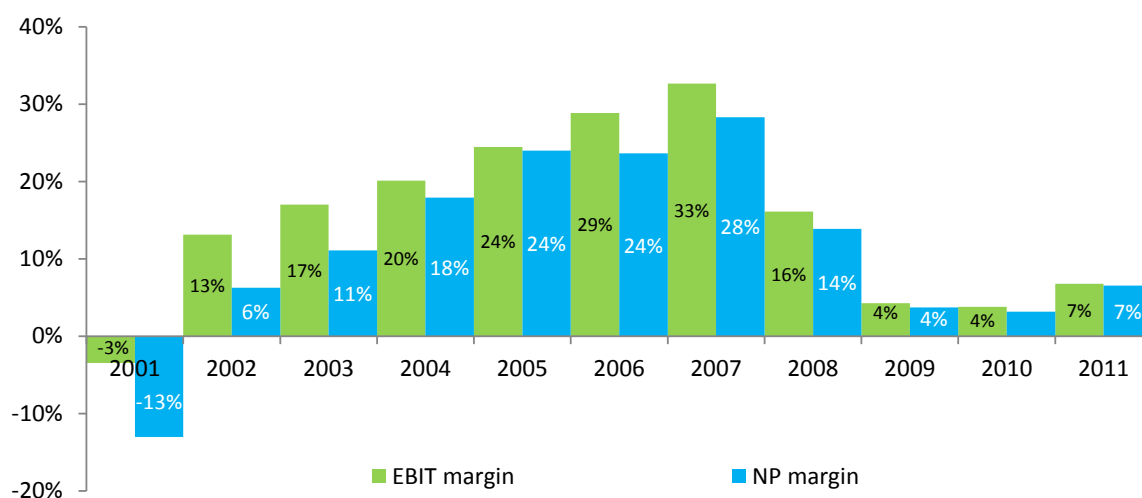
¹¹³ 2012 is not included in the Deloitte analysis as it represents a partial year due to ASO in October 2012.

¹¹⁴ Section 5.3.2 of the Deloitte Report.

¹¹⁵ See page 50 of the Deloitte Report.

- 122 Deloitte examined TV3's 'earnings before interest and tax' ('**EBIT**') margin and 'net profit' margin to measure the profitability of TV3. This was considered relevant in order to understand whether a profit was generated by TV3 before and after financing and taxation costs are taken into account.
- 123 The margins earned by TV3 over the period 2001 to 2011 are shown in Figure 3 below. Deloitte find that TV3 was able to generate positive and increasing returns up until 2008, being the period during which RTÉNL were charging TV3 on the basis of the 1997 Agreement.

Figure 3: TV3 earnings margins for the period 2001-2011



Source: Deloitte analysis based on TV3 publicly available financial statements. Note that there was insufficient data available to produce meaningful results prior to 2001 or after 2011.

- 124 Deloitte views TV3's ability to generate increasing margins in the period up to 2008 as an indication of the value of RTÉNL's services to TV3. Deloitte note that the dip in TV3's margins after 2008 is likely to be largely due to a dip in the Irish advertising market as impacted by the recessionary period, and the resulting impact on earnings of TV3. This view is supported by information provided by TV3.¹¹⁶

Overall Deloitte Conclusions on Excessive Pricing

- 125 Deloitte concludes in Section 5 of its report by stating that:

¹¹⁶ Source: 'Budget Presentation 2009.ppt' provided by TV3 to ComReg in response to a February 2013 RFI.

“Evidence in the round indicates that returns generated by RTÉNL in relation to its provision of ATT transmission and distribution services do not appear to be significantly in excess of the level expected in a competitive market. ... Overall there does not appear to be sufficient evidence from an economic perspective to support a case of excessive pricing.”¹¹⁷

5.2.2 ComReg Analysis

- 126 ComReg notes the lack of sufficiently granular and disaggregated data relating to RTÉ’s internal transfer pricing prior to 2003 (given it was vertically integrated and RTÉNL had not yet been established as an operational standalone entity). This has clearly impacted the ability to conduct any meaningful analysis for this period and ComReg considers that it is not possible to draw meaningful and definitive conclusions with respect to the excessive pricing allegations for this period. ComReg further notes that the conclusions reached in the Deloitte Report are therefore based solely on data relating to the period from 2003 onwards. While Deloitte attempts to extrapolate its post 2003 analysis to the pre-2003 period, ComReg considers that this is, at best, illustrative and cannot be definitively relied upon to reach firm conclusions.
- 127 ComReg considers that the IRR Analysis conducted by Deloitte is an appropriate methodology to employ when assessing excessive pricing cases, noting that it has been adopted by other relevant bodies¹¹⁸. Although, as noted by Deloitte, it is not without its difficulties¹¹⁹. The Deloitte IRR Analysis indicates that the prices charged by RTÉ/RTÉNL to TV3 over the Period of Investigation do not substantially exceed the benchmarked WACC of 10.4%. ComReg considers the benchmark WACC of 10.4% to be a reasonable estimate of the WACC faced by RTÉ/RTÉNL over the Period of Investigation, particularly in the context of not having data to contemporaneously conclude on an actual WACC.
- 128 ComReg considers that the relativity between the IRR earned by RTÉ/RTÉNL with respect to the TV3 charges and the benchmark WACC to be suggestive that the return earned by RTÉNL did not likely sufficiently exceed the cost of providing those services such that it could be found to be excessive. As such, the evidence available is not suggestive of an excessive pricing abuse having taken place.

¹¹⁷ Section 5.3.4 of the Deloitte Report, page 66.

¹¹⁸ See the Oxera Report for the OFT and Graham and Harvey (2001) “*The Theory and Practice of Corporate Finance - Evidence from the field*”, Journal of Financial Economics (61 – 2001).

¹¹⁹ Deloitte notes that the WACC was informed through benchmarking as opposed to a bottom up calculation due to the limited amount of knowledge available regarding the risk landscape faced by RTÉNL at the time. This means that it is not possible to contemporaneously, with the requisite degree of certainty, conclude on an actual WACC faced by RTÉ/RTÉNL.

- 129 ComReg further notes that similar conclusions regarding the IRR Analysis would be reached if Deloitte had chosen to use one of the alternative benchmarked WACCs detailed¹²⁰ of the Deloitte Report (replicated below in Table 6 below).

Table 6: WACC benchmarks

Market	Country	Year	WACC	Source reference
Terrestrial broadcast transmission services	UK	2006	10.4%	1 ¹²¹
Digital television transmission services	Finland	2006	10.52%	2 ¹²²
Telecommunications (TDF)	France	2012	9.90%	3 ¹²³
Broadcasting	Sweden	2007	8.37%	4 ¹²⁴

- 130 ComReg notes that in the context of the existing separate *ex ante* SMP obligations that apply to RTÉ/RTÉNL¹²⁵, ComReg is currently consulting¹²⁶ on a WACC to be applied on a forward looking basis based on information it now has available to it. In this respect, ComReg has proposed a WACC for RTÉ/RTÉNL of 8.68% (nominal pre tax). Even at this level of a WACC, ComReg does not consider that it would materially alter its conclusions with respect to the assessment of alleged excessive pricing abuses.
- 131 ComReg also notes that while Deloitte considers the IRR Analysis to be the preferred methodology for the excessive pricing assessment, its views and conclusions remain broadly the same in circumstances where the alternative methodologies are adopted, namely the ROCE Analysis and Price/Cost Analysis methods.
- 132 Having regard to the Deloitte analysis, ComReg considers that there are insufficient grounds to suggest that the price charged by RTÉ/RTÉNL to TV3 over the Period of Investigation was excessive.

¹²⁰ Section 5.2.2 of the Deloitte Report, Table 10.

¹²¹ The cost of capital in relation to broadcast transmission, A report for Office of the Adjudicator – Broadcast Transmission Services, Plum Consulting, July 2010.

¹²² Assessment principles for the pricing of digital TV transmission services, Finnish Communications Regulatory Authority, December 2006.

¹²³ French Legal and Regulatory Update – July – August 2012, Hogan Lovells, 2012, This source also states that “As a reminder, in decision No. 2010-0003, the ARCEP had set the anticipated rate of return on capital to 11.7% for 2010 and 2011.”

¹²⁴ WACC for broadcasting – Teracom, Copenhagen Economics, February 2007.

¹²⁵ Market Review, Broadcasting Transmission Services in Ireland, Response to Consultation and Decision, ComReg Document 13/71, Decision 11/13, July 2013 (the ‘**2013 Broadcasting Market Analysis Decision**’).

¹²⁶ Review of Cost of Capital, Consultation, ComReg Document 14/28, April 2014.

5.2.3 ComReg's Overall Conclusions on Excessive Pricing

- 133 Notwithstanding the difficulties regarding the availability of information prior to 2003 and the absence of an actual WACC for RTÉ/RTÉNL over the Period of Investigation, ComReg considers that the analysis of excessive pricing contained in the Deloitte Report to be robust. It can, therefore, be relied upon to inform ComReg's assessment of the excessive pricing allegations set out in the TV3 Complaint.
- 134 The IRR Analysis of profitability (and the alternative methodologies utilised) is not suggestive that the difference between the costs incurred and the price actually charged by RTÉ/RTÉNL for ATTTD services was excessive. Given ComReg does not consider the price to be excessive, it does not consider it necessary to investigate whether the price imposed is either unfair in itself or when compared to other competing products.
- 135 ComReg, therefore, concludes that there are insufficient grounds to support TV3's claim that, contrary to Section 5 of the Competition Act 2002 and/or Article 102 of TFEU, RTÉ/RTÉNL is likely to have engaged in excessive pricing with respect to its provision of ATTTD services to TV3 over the Period of Investigation.

5.3 Discriminatory Pricing

- 136 As noted in paragraphs 45 and 46, discriminatory pricing by a dominant undertaking is prohibited by Section 5(2)(c) of the Competition Act 2002, and/or Article 102(c) of the TFEU.
- 137 The TV3 Complaint alleges that RTÉ/RTÉNL has engaged in discriminatory pricing against TV3 by charging it a higher price than RTÉNL charges to its downstream channels (RTÉ1 and RTÉ2) and TG4.

5.3.1 Deloitte Analysis

- 138 The Deloitte Report develops and subsequently applies a methodology capable of assessing whether RTÉ/RTÉNL is likely to have engaged in discriminatory pricing. This methodology considers the following:
- an analysis as to whether there are differences between the characteristics of the services provided by RTÉ/RTÉNL to its downstream channels and to third parties;
 - an analysis as to whether there are differences between the terms and conditions according to which the services have been supplied by RTÉ/RTÉNL to its downstream channels and to third parties;
 - a quantification and assessment of the materiality of any differences in the prices charged for the relevant services to each customer;

- an assessment of any objective justification for any differences observed in the pricing or other characteristics; and
- an analysis of whether, in light of any such differences, there is evidence of harm to the competitive process.

139 A summary of Deloitte's analysis on the above issues is set out below.

Characteristics of the services provided by RTÉ/RTÉNL

140 The first step in Deloitte's analysis was to examine whether there are any differences in the services being supplied by RTÉ/RTÉNL to itself and other broadcasters. This was necessary given that any such differences could potentially justify differences in prices being charged to various broadcasters, including to RTÉ's own downstream channels.

141 The Deloitte Report¹²⁷ notes that a difference exists between the Free-To-Air (FTA) service coverage obligations imposed on TV3¹²⁸, RTÉ¹²⁹ and TG4. TV3 is legally obliged to provide its television services to 90%¹³⁰ of the population, while RTÉ and TG4 are required to be available whole community on the island of Ireland. As noted in section 2.5 of this Information Note, these coverage differences are reflected in the number of sites within RTÉ/RTÉNL's ATTTD network from which each TV channel is broadcast. Such coverage differences also feed into the differences in the charges levied by RTÉ/RTÉNL on its customers.

142 In terms of assessing other service quality differences, Deloitte notes that TV3 entered into a Service Level Agreement ('SLA') with RTÉNL in 2004. RTÉ1, RTÉ2 and TG4 entered into similar SLAs with RTÉNL at the same time. Deloitte notes that the introduction of a uniform SLA (which was driven by *ex ante* regulation pursuant to the 2004 Broadcasting Market Review) sought to ensure that ATTTD service customers were provided with essentially the same basic service levels.

143 As was the case with respect to Deloitte's consideration of excessive pricing, a comparison of any service quality differences in the period 1998-2003 was not possible, as given RTÉ/RTÉNL was vertically integrated the services being provided by RTÉ to its downstream arm and to TG4 were not formally documented.

¹²⁷ Section 6.2.1 of the Deloitte Report.

¹²⁸ TV3's coverage obligations are derived from its contract with the BCI (now BAI).

¹²⁹ RTÉ's coverage obligations are derived from the Broadcasting Act 2009.

¹³⁰ Between 1 September 1998 and 31 August 2008, TV3 was required to be available to approximately 85% of the population as a condition of its commercial broadcast licence from the IRTC.

- 144 Overall, the primary differences on service characteristics identified by Deloitte relate to coverage, with this largely being driven by customer requirements (which emanate from legal/licensing requirements).

Terms and Conditions of Supply

- 145 The Deloitte Report¹³¹ outlines the terms and conditions of supply applied by RTÉ/RTÉNL over the Period of Investigation to each of TV3, RTÉ1, RTÉ2 and TG4. Section 2.5 of this Information Notice has already set out details of the nature of the contracts in place between RTÉ/RTÉNL on the one hand and RTÉ1, RTÉ2, TV3 and TG4 on the other. TV3 was charged pursuant to the terms of the 1997 Agreement and the subsequent 2008 Contract, whereas from 2003 both TG4 and RTÉ's downstream channels were charged on the basis of a Tariff Model. Table 1 in this Information Notice has also outlined the different contracts in place between RTÉ/RTÉNL and its ATTTD customers between 1998 and 2012.
- 146 From 1997 to 2003, RTÉ had no internal transfer pricing mechanism in place for the supply of ATTTD services to its own downstream channels. In other words, RTÉ did not explicitly invoice RTÉ1, RTÉ2 and TG4 for the provision of ATTTD services. As a result, there is a significant information gap relating to visibility of charges applied to RTÉ1, RTÉ2 and TG4 for the period 1998 to 2003. From 2003 onwards, following the establishment of RTÉNL and using its financial statements and the Tariff Model, it was possible to identify the key terms of supply and the amount that was charged by RTÉNL to each downstream broadcaster for the supply of ATTTD services.
- 147 Having identified what differences in terms and conditions of supply existed for RTÉNL's customers, Deloitte went on to examine whether the prices charged to different customers for equivalent transactions were justifiable.

Price and Return Differentials

- 148 The Deloitte Report¹³² presents an analysis of the charges actually levied by RTÉNL on TV3 and RTÉ1, RTÉ2 and TG4 over the Period of Investigation. These are presented in Table 7 below. Deloitte note that a simple comparison of absolute price levels is, however, insufficient to assess whether or not there has been price discrimination as, for example, the asset bases (sites used etc.) attributable to each customer are different¹³³.

¹³¹ Section 6.2.2 of the Deloitte Report.

¹³² Section 6.2.3 of the Deloitte Report.

¹³³ See section 2.5 of this Information Notice.

149 During the period 1998 to 2003, no transfer pricing existed between RTE and its downstream channels at that time (RTÉ1, RTÉ2 and TG4¹³⁴). RTÉNL, in response to an April 2012 13D RFI from ComReg, provided a reconciliation of the estimated the charges that would have been notionally levied on RTÉ1, RTÉ2 and TG4 for this period with this set out in Table 7 below (highlighted in shading below). In providing these figures to ComReg, RTÉNL stated¹³⁵:

[REDACTED]

150 These figures are, therefore, only indicative of the notional internal transfer charges that might have applied to RTÉ. Given the lack of a firm evidential basis for these figures, they are not used to inform the assessment of alleged price discrimination in the Deloitte Report or by ComReg in respect of the conclusions set out in this Information Notice.

¹³⁴ TG4 became an independent broadcaster (separate from RTE in 2007).

¹³⁵ In response to the April 2012 Request for Information. Response dated 16/17 May 2012.

Table 7: Comparison of RTÉNL charges, 1998-2011, €000s [Redacted X] ¹³⁶

Channel	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
TV3	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]
TG4	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]
RTÉ1	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]
RTÉ 2	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]	[Redacted X]

¹³⁶ RTÉNL response April 2012 13D RFI dated 14 May 2012. Note, the 2011 charges were not included in the RTÉNL response to the April 2012 13D RFI. The charges for 2011 were calculated by Deloitte as part of its analysis.

- 151 Deloitte note that the charges levied on TG4 in the period 1998 to 2003 were subject to considerations reflecting TG4's role in public service broadcasting of the Irish language¹³⁷. Deloitte also notes that charges for RTÉ1 and RTÉ2 in the period 1998 to 2003 have been reverse engineered by RTÉNL based on its 2004 charges (which are based on the Tariff Model) using, amongst other factors, information on national wage agreements to deflate labour charges.
- 152 Further to Deloitte's analysis, in order to derive a more appropriate comparison of prices, in particular, to take account of the differences in the costs of supply which are driven by different network utilisation levels as a result of broadcast coverage differences, Deloitte use the IRR Analysis. This analysis explicitly incorporates the difference in the costs of supply driven by different network utilisation as a result of the coverage of broadcast services supplied as well as the value of the assets used to serve specific customers¹³⁸. Deloitte notes¹³⁹ that if the IRRs for the supply of services to different customer types are similar, this would indicate that different charging levels were driven by different costs of supply and that there would be no basis for pursuing the discrimination element of the TV3 Complaint.
- 153 The Deloitte Report¹⁴⁰ (replicated in Figure 4 below) shows that the rate of return (calculated using the IRR Analysis or ROCE Analysis methodologies) earned by RTÉNL in providing services to TV3 was consistently higher than the rate of return earned by RTÉNL in providing services to RTÉ1, RTÉ2 and TG4.

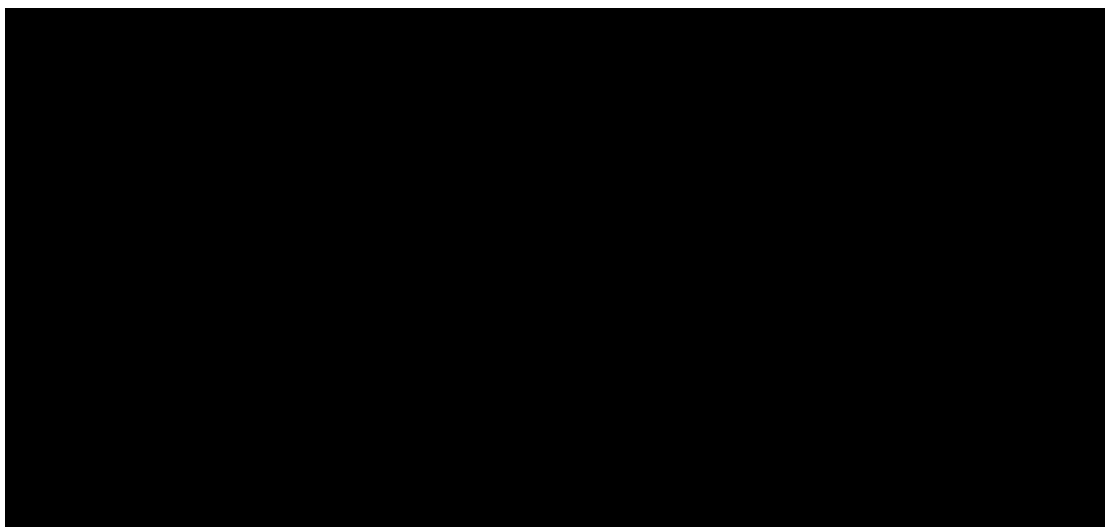
¹³⁷ RTÉNL in its 6 May 2011 response to the Feb 2011 13D RFI stated that "...RTÉ was required to provide the transmission infrastructure for the broadcasting of the new service and required to support TG4 in terms of content. This support included the provision by RTÉ at no cost to the new service of one hour of Irish language programming per day. This is an obligation which continues to this day"

¹³⁸ It should be noted that the IRRs figures presented take coverage differences into account. The IRR calculations allocate tower and mast costs (and other relevant costs) cost on a customer specific basis depending on site/mast occupancy of the individual customer. See Sections 2.4 and 2.5 of this Information Notice for further details.

¹³⁹ Section 6.2.3 of the Deloitte Report.

¹⁴⁰ Section 6.2.3 of the Deloitte Report, Figure 18.

Figure 4: IRR and ROCE, 2003-2008 and 2003-2011, TV3 and RTÉNL (Central Estimate) [Redacted ✕]



Note that the upper end of the bars corresponds to the 2003-2008 IRR and ROCE, while the lower end of the bars corresponds to the 2003-2011 IRR and ROCE

- 154 As can be seen from Figure 4 above, between 2003 and 2008 the IRR earned by RTÉNL from the provision of ATTTD services to TV3 was higher, namely [Redacted] ¹⁴¹, compared to ¹⁴² [Redacted] to [Redacted] for RTÉ1/ RTÉ2 and [Redacted] for TG4 (over the same period).
- 155 Over the period 2003-2011 the IRR earned by RTÉNL from the provision of ATTTD services to TV3 was higher, namely [Redacted] ¹⁴³, compared to ¹⁴⁴ [Redacted] to [Redacted] for RTÉ1/ RTÉ2 and [Redacted] for TG4.

¹⁴¹ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 9% to 12%.

¹⁴² While the following specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 3%.

¹⁴³ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 6% to 9%.

¹⁴⁴ While the following specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 3%.

156 Taking the ROCE figures over the period 2003-2008, these show that the rate of return earned by RTÉNL from the provision of ATTTD services to TV3 was higher, namely [REDACTED]¹⁴⁵, compared to¹⁴⁶ [REDACTED] to [REDACTED] for RTÉ1/ RTÉ2 and [REDACTED] for TG4. Taking the ROCE figures over the period 2003-2011, these show that the rate of return earned by RTÉNL from the provision of ATTTD services to TV3 was higher, namely [REDACTED]¹⁴⁷, compared to¹⁴⁸ [REDACTED] to [REDACTED] for RTÉ1/ RTÉ2 and [REDACTED] for TG4.

Justification of observed return differentials

157 The Deloitte Report¹⁴⁹ notes that a number of the price and rate of return differentials identified may be justifiable. If, for example, RTÉNL had faced extra costs or risks associated with supplying services to TV3 as opposed to supplying other customers. Deloitte note that any such risks would not be captured in the rate of return analyses.

158 RTÉNL provided a number of purported justifications for the observed price/charging differentials between TV3 and the other downstream broadcasters. These justifications are summarised and considered in the Deloitte Report¹⁵⁰. As set out in paragraph 116 of this Information Notice, Deloitte considered some of these justifications as potentially valid¹⁵¹, but rather than examining each of these justifications in further detail, Deloitte adopted a worst case scenario and considered what 'Remaining Margin' or price differential would exist if these justifications were not accepted. Only if an analysis on this basis was suggestive of discriminatory pricing would Deloitte have given more detailed consideration to the justifications put forward by RTÉ/ RTÉNL to explain the price differentials.

¹⁴⁵ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 9% to 12%.

¹⁴⁶ While the following specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 3%.

¹⁴⁷ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that this figure is in the range 6% to 8%.

¹⁴⁸ While the following specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 3%.

¹⁴⁹ Section 6.2.4 of the Deloitte Report.

¹⁵⁰ Section 6.2.4 and Appendix E of the Deloitte Report.

¹⁵¹ Of the 8 justifications offered, 2 were considered likely to be validly justified, 4 were not considered likely to be validly justified, while the remaining two may be likely to be validly justified but would require further investigation and consideration.

159 In this respect, Deloitte decided to first consider whether or not, on the basis of the full extent of the price differentials identified, there was likely to be harm to the competitive process¹⁵². As set out below, Deloitte was ultimately able to conclude on the issue of discriminatory pricing without having to adjudicate upon any of RTÉ/RTÉNL's purported justifications, i.e. the worst case price scenario differentials are considered.

Whether there is Competitive Harm

160 Deloitte then considered the whether the price differentials identified were likely to give rise to competitive harm¹⁵³ thereby impacting TV3's commercial decision making and ability to compete effectively. In Section 6.2.5. of the Deloitte Report, Deloitte examines a number of factors as indicators of competitive harm including foreclosure, exclusion, impact on ability to generate returns and grow market share.

161 Deloitte finds there is no evidence of foreclosure or exclusion of TV3 from the downstream/related broadcast markets. Deloitte note that TV3 remained in the market throughout the Period of Investigation and remain in the market today.

162 Deloitte then examines TV3's ability to generate returns, examines TV3's EBIT¹⁵⁴ and Net Profit Margins¹⁵⁵ in the period 2001 to 2011 (see Figure 3 above) and notes that TV3 continued to earn a positive return up to 2007/8. Deloitte note that the dip in TV3's margins from 2008 (with this also being the period when TV3 entered into the 2008 Contract with RTÉNL, whereupon its ATTTD charges were reduced) is likely to be largely due to a dip in the Irish advertising market as it was affected by the global financial crisis/economic downturn, and the resulting impact on TV3's revenue earnings. This view that the fall in revenue was associated with the economic decline is also supported in information provided by TV3 and reviewed by Deloitte.¹⁵⁶

¹⁵² Section 6.2.5 of the Deloitte Report.

¹⁵³ Deloitte note that "...when referring to 'competitive harm' in the context of this report, this is referring to an assessment of whether or not there is evidence to suggest that the pricing practices undertaken by RTÉ/RTÉNL during the period under review, placed TV3 at a competitive disadvantage." (page 74 of the Deloitte Report).

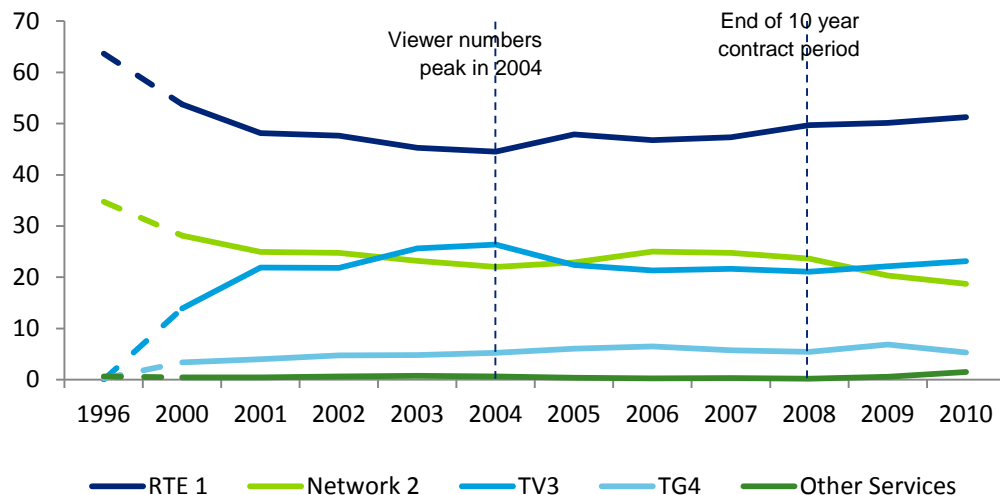
¹⁵⁴ In the period 2001 to 2007 (data not available prior to 2001) TV3's EBIT ranged from -3% to 33%. Thereafter it fell from 16% to as low as 4% before recovering to 7% in 2011.

¹⁵⁵ In the period 2001 to 2007 (data not available prior to 2001) TV3's Net Profit Margin ranged from negative 13% to +28%. Thereafter it fell from 14% to as low as 4% before recovering to 7% in 2011.

¹⁵⁶ Source: 'Budget Presentation 2009.ppt' provided by TV3 to ComReg in response to a February 2013 RFI.

163 Deloitte also find that TV3 managed to successfully capture market share during the Period of Investigation. This is evidenced in the Deloitte Report¹⁵⁷ (replicated below) which shows TV3's viewer numbers increased to a level almost on par with RTÉ2 (TV3's likely primary competitor in the ATT market) by 2001. From 2001 TV3's viewer numbers remain close to those of RTÉ2.

Figure 5: ATT viewer numbers 1996, 2000 to 2010



Source: Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland (BAI), Athene Media, August 2010

164 Deloitte note that TV3 was likely to be incentivised to maximise profits and that any investment decisions on additional programming content were likely to be made on the basis of the anticipated returns, unless there was evidence of funding constraints due to bad performance. Deloitte note this does not appear to be the case from an examination of TV3's EBIT and Net Profit Margins¹⁵⁸.

165 Deloitte also estimates the total potential notional savings to TV3, had it been charged a rate of return that RTÉ/RTÉNL generated from supplying ATTTD services to RTÉ1, RTÉ2 (and TG4). The results¹⁵⁹ replicated below in Figure 6 and Figure 7, suggest low levels of cost savings relative to TV3's overall costs had it notionally been charged on the same basis as was applied to RTÉ1, RTÉ2 and TG4 during the period 2003-2008 and 2003-2011¹⁶⁰.

¹⁵⁷ Figure 20 of the Deloitte Report.

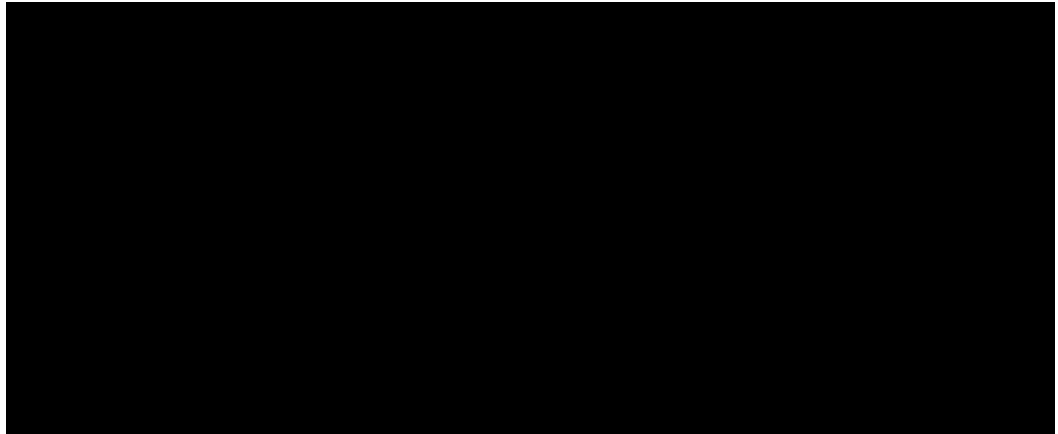
¹⁵⁸ Figure 3 above.

¹⁵⁹ Figures 21 and 22 of the Deloitte Report.

¹⁶⁰ In order to calculate these values, the TV3 charge was adjusted downward by Deloitte, to the point at which RTÉNL would have generated an equivalent return from TV3 to that which it earned from RTE1, RTE2 (and TG4).

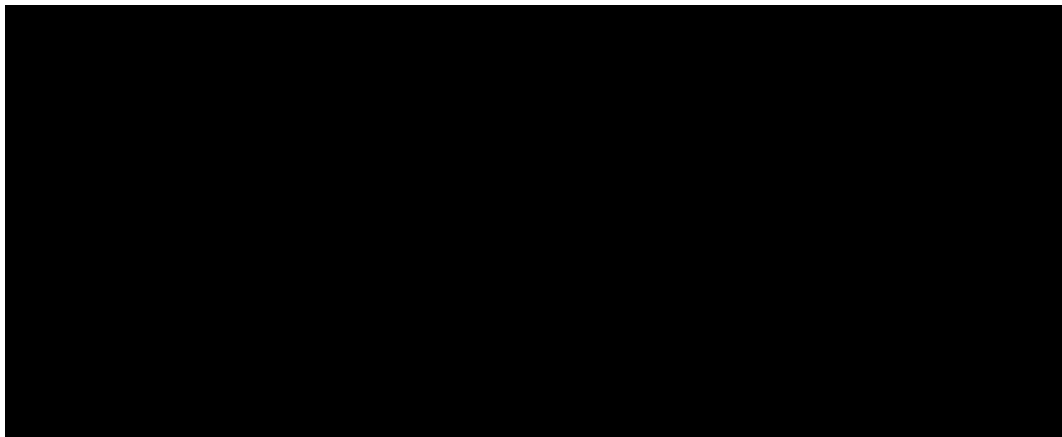
166 Note that the blue areas in Figure 6 and Figure 7 below are Deloitte's estimates of what TV3's remaining operating expenses would have been once the potential savings have been deducted.

Figure 6: TV3 total annual costs, less potential notional savings (2003 to 2008)
[Redacted ✕]



Source: TV3 annual financial statements, Deloitte analysis

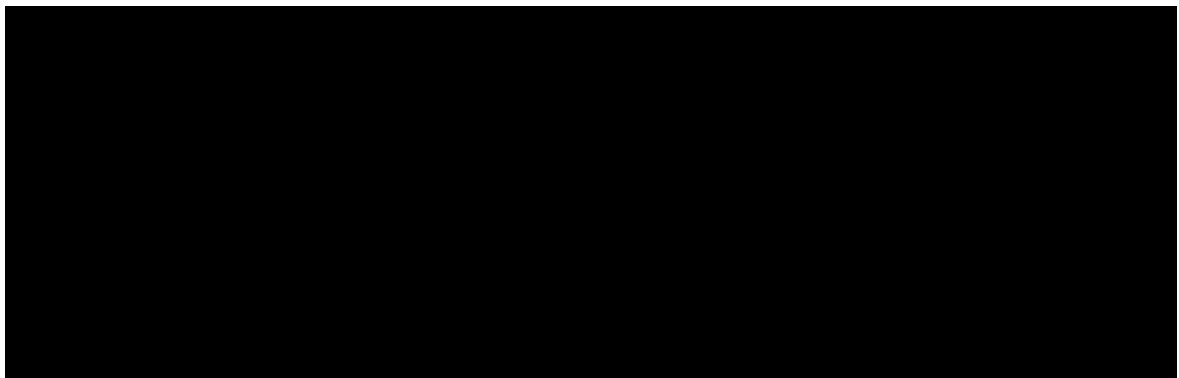
Figure 7: TV3 total annual costs, less potential notional savings (2003 to 2011)
[Redacted ✕]



Source: TV3 annual financial statements, Deloitte analysis

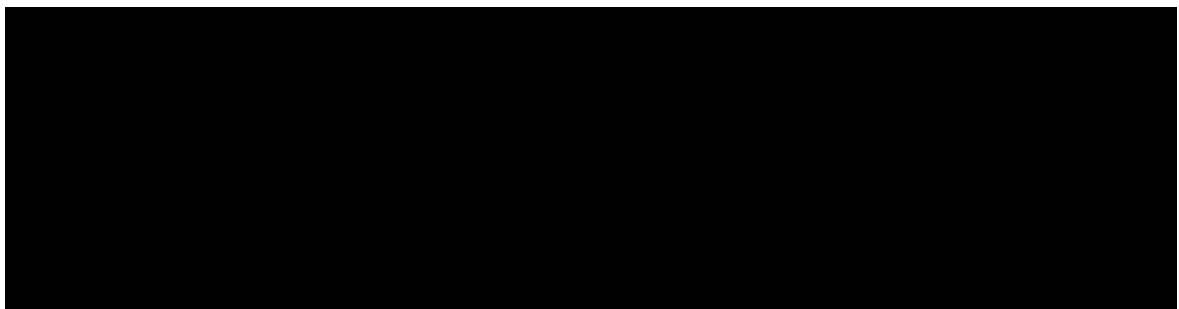
167 Deloitte then calculates the impact of the potential notional cost savings identified in Figure 6 and Figure 7 above on TV3's profit margins (both Net Profit Margin and EBIT Margin) in each of the years 2003-2011¹⁶¹, replicated below in **Error! Not a valid bookmark self-reference.** and Figure 9. Deloitte shows that TV3's adjusted Net Profit Margin would have been improved by between¹⁶² [X] and [X] percentage points over the Period of Investigation, with its adjusted EBIT Margin also improving by between¹⁶³ [X] and [X] percentage points.

Figure 8: TV3's notionally adjusted profit margins to include notional savings for the period 2003 to 2008 if TV3 had been priced on the basis of RTÉ1, RTÉ2 and TG4 [Redacted X]



Source: TV3TNL financial statements, RTÉ financial statements, Deloitte analysis Note: Adjustments were only calculated for 2003-2008, therefore 2001, 2002 and 2009-2011 do not have any adjustments included

Figure 9: TV3's notionally adjusted profit margins to include potential notional savings for the period 2003 to 2011 if TV3 had been priced on the basis of RTÉ1, RTÉ2 and TG4 [Redacted X]



Source: TV3TNL financial statements, RTÉ financial statements, Deloitte analysis. Note: Adjustments were only calculated for 2003-2011, therefore 2001, 2002 do not have any adjustments included

¹⁶¹ Figures 23 and 24 of the Deloitte Report.

¹⁶² While the following specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 3 percentage points.

¹⁶³ While the following specific figures have been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes that they are less than 4 percentage points.

168 Deloitte notes that at these levels of potential notional savings/extra profit margins, TV3's investment decisions were unlikely to have been materially impacted as TV3 was already generating significant and increasing returns up to 2008. While noting that TV3 may have generated additional income from these savings, in terms of any impact on TV3's investment decisions, Deloitte state:

"The results in Figure 23 and Figure 24 show that while TV3 may have generated additional income from these savings, it is unlikely that this additional income would have affected TV3's investment decisions¹⁶⁴, nor to have threatened TV3's ability to raise capital, during the period of primary concern, 2003-2008. This is due to the fact that TV3 appears to have been generating sufficiently high returns during this period, to be able to undertake additional investment without requiring these savings. Given the overall profit maximising incentive of TV3, these investment decisions are only likely to have been avoided if they were not considered likely to generate sufficient returns."¹⁶⁵

Deloitte's Overall Conclusions on Discriminatory Pricing

169 Deloitte concludes its analysis of the alleged discriminatory pricing abuses¹⁶⁶ by stating the following:

"There is no evidence of material harm to the competitive process. This is evidenced by TV3's ability to generate significant and increasing positive returns between 2003 and 2008, as well as its ability to capture market share equivalent to that of RTÉ2 by 2004. In addition to this TV3 was not in any apparent risk of foreclosure throughout this period."

and

"Overall there does not appear to be sufficient evidence that the differential pricing imposed on TV3 harmed its ability to compete against other broadcasters in the ATT market during the period under review. As such these findings are not considered sufficient to support a case for discriminatory pricing under the relevant competition law provisions. However, ComReg will still need to consider the merits of this case from a legal perspective".

¹⁶⁴ This is on the basis that TV3 was already able to generate significant and increasing returns until 2008.

¹⁶⁵ Page 78 of the Deloitte Report.

¹⁶⁶ Page 82 of the Deloitte Report

170 Following a request for clarification by ComReg in relation to Deloitte's findings in relation to competitive harm¹⁶⁷, Deloitte further confirmed to ComReg that:

"I can confirmon its analysis of the information made available to it, that Deloitte found no evidence of any harm to the competitive process as a result of the observed pricing differentials".

5.3.2 ComReg Analysis

171 ComReg considers the analysis of discriminatory pricing contained in the Deloitte Report to be robust and justified, and can be relied upon to inform ComReg's assessment of the TV3 Complaint.

172 In addition to the analysis contained in the Deloitte Report, ComReg has also assessed the impact of the differential pricing on TV3's ability to compete in downstream markets. In this regard, ComReg has examined the size and scale of the potential impact on TV3, having regard to TV3's response to the January 2014 RFI (in which TV3 was asked to provide its views on competitive harm.

173 Noting the above, in the following sections, ComReg sets out its views on the impact of the differential pricing on TV3 by reference to:

- (a) TV3's Revenue and Expenditure;
- (b) Viewers, Content and Advertising;
- (c) Competition between TV3 and RTE;
- (d) TV3's ability to invest in content and raise capital; and
- (e) The strength of the FTA Platform and TV3's ability to launch new channels.

¹⁶⁷ At various points in the Deloitte Report concerning the assessment of discriminatory pricing, references are made to competitive harm. The Deloitte Report concludes in a number of places that, notwithstanding price differentials, that "...there was no apparent economic evidence of competitive harm..." (page 14) and "There is no apparent evidence of harm to the competitive process..." (page 17). However, in some other sections of the Deloitte Report references are made which suggest there has been no "material" harm to the competitive process or that there was not "sufficient evidence" of competitive harm. ComReg's understanding was that Deloitte, on the basis of the evidence made available to it, concluded that there was no economic evidence of competitive harm at all, and that the references to 'material harm' or insufficient evidence of competitive harm were to be interpreted in this context. ComReg's sought clarification from Deloitte on 24 January 2014, with Deloitte confirming ComReg's understanding on 29 January 2013.

TV3's Revenue and Expenditure

- 174 Whether there was competitive harm in view of the differential pricing might be also be considered in the context of an examination of the likely impact on TV3's revenues, operating expenses and net profit. Table 8 below compares, for 2003 to 2011, TV3's revenues, overall costs, advertising and net profit to the "**Estimated Price Differentials**" identified in the Deloitte Report¹⁶⁸. In order to derive these Estimate Price Differentials, Deloitte carried out an assessment of what the likely impact would be if TV3 had generated a similarly low return as RTÉ/RTÉNL generated from RTÉ1, RTÉ2 and TG4. In order to calculate this value, the TV3 charge was adjusted downwards to the point at which RTÉNL would have generated an equivalent return on TV3 to that earned from the other channels. While this analysis was performed by Deloitte for both the 2003 to 2008 period and the 2003 to 2011 period, ComReg's analysis covers the longer period as this more accurately covers the Period of Investigation. It should be noted that the figures presented below are for TV3's business as a whole and are not specific to FTA TV services.
- 175 ComReg notes that the Estimated Price Differential is a worst case scenario, and does not take into account the potential justifications provided by RTÉ as discussed earlier in this Information Notice¹⁶⁹. As evidenced from Table 8 below, notwithstanding the price differentials ComReg observes that, TV3's turnover, operating expenses and net profit increased on an annual basis up to 2008, before then declining, with this being likely to be due to the onset of the Irish recession and its associated impact on, for example, advertising revenues.

¹⁶⁸ Figure 22 of the Deloitte Report replicated in Figure 7 of this Information Notice.

¹⁶⁹ See paragraph 116 and 158.

Table 8: TV3's Turnover, EBIT and Net Profit [Partially Redacted ✕]

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
	€k	€k	€k	€k	€k	€k	€k	€k	€k	€k
Estimated Price Differential	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]
Turnover	41,376	43,003	48,499	53,605	62,416	61,550	51,781	53,410	54,428	470,068
Operating expenses	34,332	34,352	36,633	38,136	42,020	51,635	48,638	50,610	51,323	387,679
EBIT	7,044	8,651	11,866	15,469	20,396	9,915	2,212	2,027	3,678	81,258
Budgeted EBITDA	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]	[✕]
Net profit	4,584	7,710	11,640	12,664	17,679	8,537	1,920	1,699	3,556	69,989
Remaining Margin as a % of:										Average¹⁷⁰
Turnover	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]
Operating expenses	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]
EBIT	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]
Budgeted EBITDA	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]
Net profit	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]	[✕ %]

Source: Deloitte Report and material provided to ComReg by TV3 (in response to February 2013 RFI). Also based on publicly available information contained in TV3's annual report and accounts.

¹⁷⁰ Average Figure here is derived from the total figures over the period (as opposed to an average of the annual percentages).

- 176 Between 2003 and 2011, the Estimated Price Differential identified by Deloitte, when represented as a percentage of TV3's operating expenses, amounts to on average, [X█%]¹⁷¹ annually. Furthermore, over the same period, the Estimated Price Differential amounts to, on average, [X█%]¹⁷² of TV3's annual turnover.
- 177 Overall, regardless of whether the Estimated Price Differential is treated as potentially lowering TV3's overall costs or increasing its annual turnover, the potential impact of the price differential on TV3's ability to compete would, given the above, not appear to ComReg to be such that it would be likely to give rise to competitive harm.

Viewers, Content and Advertising

- 178 To assess the impact of the price differential on TV3's ability to compete in the relevant downstream markets, ComReg sought information from TV3¹⁷³ for the period 1998 to 2012 relating to its:
- (a) level of programming spend over the period;
 - (b) viewership numbers; and
 - (c) advertising revenue generated per programme/category of programmes.
- 179 To further support the above analysis, ComReg requested TV3 to provide it with business plans and board documents, as well as details of TV3's ownership structure and changes to such over period.
- 180 In seeking this information, ComReg was seeking to establish the extent of any impact the RTÉ/RTÉNL ATTTD charging differential might have had on TV3's ability to acquire programme content and viewership (ComReg considers these to be reasonable indicators of TV3's ability to compete in the downstream broadcasting and advertising markets). ComReg also sought this information to establish if the charges levied on TV3 by RTÉ/RTÉNL had a material impact on TV3's programming decisions (and potentially ultimately consumer welfare)¹⁷⁴.

¹⁷¹ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 2%.

¹⁷² While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 2%.

¹⁷³ RFIs dated 6 February and 15 February 2013.

¹⁷⁴ Since TV3 is provided on a FTA basis, viewers using this platform as their means of television viewing are not charged for it. It is potentially open for consideration whether consumer harm could be assessed by reference to consumers having access to a lower or more inferior level of content than would otherwise be the case were TV3 charged on the same basis as other broadcasters and been able to acquire content. However, this would involve a degree of subjectivity regarding viewing tastes and ComReg does not, therefore, place any weight on this in its assessment.

- 181 ComReg has assessed below the extent of any impact of charging differentials on TV3's ability to purchase content and raise revenue from advertising.
- 182 In March 2013¹⁷⁵, TV3 provided ComReg with details of TV3's annual channel/programme viewership data over the period 2001-2012 (sourced from Nielsen). TV3 also provided information on programme spend levels over the same period. This is summarised in Table 9¹⁷⁶ and Table 10 below.
- 183 As is evident from Table 9, TV3 successfully captured total viewership market share (across all TV platforms¹⁷⁷) following its launch in 1998 up to 2007, notably during the years within which the charging differentials identified were greatest. TV3 subsequently experienced a drop in viewership in 2008/2009, before recovering over the next two years, such that by 2011 its viewership market share was broadly comparable to its pre-2008 levels. During the period 2003 to 2011 TV3's average viewership figures and share of viewers across all platforms have, therefore, remained relatively static. Despite the increased competition for viewership from other channels available to Irish consumers (through ATT, satellite or cable¹⁷⁸), during the Period of Investigation, TV3 managed to initially grow and then retain its share of Irish viewers.

Table 9: TV3's Viewer Figures [Redacted X]

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011
Average Viewership	[X [Redacted]]	[X [Redacted]]	[X [Redacted]]	[X [Redacted]]	[X [Redacted]]	[X [Redacted]]	[X [Redacted]]	[X [Redacted]]	[X [Redacted]]
Share of viewer figures % (Nielsen)	[X [Redacted] %]	[X [Redacted] %]	[X [Redacted] %]	[X [Redacted] %]	[X [Redacted] %]	[X [Redacted] %]	[X 12.48%]	[X [Redacted] %]	[X [Redacted] %]

Source: Material provided to ComReg by TV3 based on Nielsen data (February 2013 RFI)

- 184 TV3 noted in its response¹⁷⁹ to the 6 February 2013 RFI that:

[X [Redacted]
 [Redacted]
 [Redacted]
 [Redacted]
 [Redacted].]

¹⁷⁵ In a letter to ComReg, dated 5 March 2013, TV3 provided detailed information requested by ComReg on 6 February 2013.

¹⁷⁶ See also Figure 5 above.

¹⁷⁷ These figures from Nielsen cover all platforms Irish viewers use to watch TV channels and not just the FTA platform.

¹⁷⁸ Satellite and Cable pay TV customers are likely to fall within separate retail markets to the FTA ATT customers.

¹⁷⁹ TV3's response to RFI dated 5 March 2013.

- 185 The above statement suggests that TV3's investment decisions had regard to the level of the charges then being imposed upon them by RTÉ/RTÉNL.
- 186 ComReg has considered the impact on TV3's investment decisions in programming if the charges imposed by RTÉ/RTÉNL on TV3 had been applied on the same basis as was levied by RTÉ/RTÉNL on other downstream broadcasters. Table 10 below sets out the Estimated Price Differential (outlined previously in Table 8) and TV3's annual expenditure on programming content and revenues generated from advertising. These revenues and expenditure figures refer to all platforms and not specifically to TV3's FTA platform. Noting that TV3 was also carried on pay-TV platforms during this period, TV3 was unable to provide ComReg with a breakdown of revenues generated specifically through the FTA platform.

Table 10:TV3’s Programming and Revenues [Redacted X] ¹⁸⁰

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
	€k	€k	€k	€k	€k	€k	€k	€k	€k	€k
Estimated Price Differential	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Spend on Irish Programming	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Spend on Total Programming	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Spot Advt. Revenues	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total Advertising Revenues	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Estimated Price Differential as % of										Average ¹⁸¹
Spend on Irish Programming	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %
Spend on Total Programming	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %
Spot Advt. Revenues	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %
Total Advertising Revenues	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %	[X] %

Source: Deloitte Report and ComReg analysis based on material provided to ComReg by TV3 (February 2013 Request for Information).

¹⁸⁰ These revenues and expenditure figures refer to all platforms and not specifically free-to-air. TV3 was also carried on pay-TV platforms during this period.

¹⁸¹ Average Figure here is derived from the total figures over the period (as opposed to an average of the annual percentages).

- 187 Between 2003 and 2011 the potential price differential (represented by the Estimated Price Differential) in each year amounts to, on average, [redacted]¹⁸² of the total annual spend by TV3 on 'Irish Programming' content. When represented in terms of spend on 'Total Programming' over the same period, this figure is, on average, [redacted]¹⁸³.
- 188 In terms of revenues, between 2003 and 2011 the Estimated Price Differential in each year amounts to, on average, [redacted]¹⁸⁴ of the total annual 'Spot (advertising) Revenues' and [redacted]¹⁸⁵ of 'Total Revenues' generated by TV3.
- 189 ComReg also notes that TV3 managed to increase its Total Programming Spend during the period 2003-2011, suggesting the price differentials did not have a material impact on TV3's ability to acquire content. The decrease in Spot Advertising Revenues in the period post 2007 would appear to be most likely associated with the impact of the onset of the recessionary period (also noting that this period was also one within which the Estimated Price Differential was at its lowest).
- 190 ComReg notes that, overall, the size and scale of the price differentials are small relative to TV3's spend on programme content or its advertising revenues. The evidence outlined above does not suggest that the differential pricing is likely to have harmed TV3's ability to compete for programming content or advertising revenues.

Competition between TV3 and RTÉ

- 191 In its response to the February 2014 RFI, TV3 stated that it:

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

¹⁸² While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5%.

¹⁸³ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5%.

¹⁸⁴ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5%.

¹⁸⁵ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5%.

- 192 In light of TV3's view above, ComReg has sought to examine what, if any, competitive advantage RTÉ/RTÉNL might have gained in terms of having access to additional content (by virtue of additional monies arising from the alleged discriminatory pricing abuse). ComReg considers that if TV3 was likely to be harmed in this way in the context of likely foreclosure/exclusionary effects, there would be some evidence of an actual or probable impact on TV3's ability to compete with RTÉ (and potentially TG4). ComReg's assessment of this is out in the paragraphs below.
- 193 ComReg notes that RTÉ's annual spend on programming content from 2003 to 2011 ranged from €189m to €286m¹⁸⁶. ComReg notes that the average annual Estimated Price Differential for TV3¹⁸⁷ (as estimated by Deloitte) amounts to [X€████████] ¹⁸⁸ per annum during period 2003-2011. This figure amounts to approximately [X██████%]¹⁸⁹ of RTE's lowest annual spend on programming (in the period 2003 to 2011). ComReg considers that the size of the TV3 Estimated Price Differential is such that it was unlikely to have had a material impact on RTE's decisions or spending on content acquisition (assuming the related monies had been used by RTÉ to purchase content). Even so, ComReg considers that it is not likely to be at a level such that it would confer any competitive advantage on RTÉ relative to TV3 in downstream broadcasting or advertising markets.
- 194 ComReg notes that both TV3¹⁹⁰ and RTE¹⁹¹ were implementing cost cutting plans from 2009 onwards. Notwithstanding the implementation of its plan, TV3 increased (see Table 11 below) its spending on content and programming acquisition year-on-year between 2003 and 2011. RTE Television's spend on content and programme acquisition increased year-on-year until 2008 (see Table 11 below), before declining (with this likely to be due to the impact of the economic recession and implementation of a cost cutting plan).

¹⁸⁶ Figures extracted from RTÉ's publicly available annual reports. Spend on Programming combines the spend by the Television and News and Current Affairs sections (Integrated Business Divisions) of RTÉ.

¹⁸⁷ Deloitte estimates the total potential notional savings to TV3, had it been charged based on a rate of return that RTÉNL generated from RTÉ1, RTÉ2 (and TG4). See Figure 7 above.

¹⁸⁸ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5% of TV3's annual spend on Total Programming.

¹⁸⁹ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5%.

¹⁹⁰ As noted in the TV3 Board documents provided to ComReg pursuant to RFIs.

¹⁹¹ RTE's 2009 Annual Report.

Table 11:TV3's and RTE's spend on content and programme acquisition

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011
	€	€	€	€	€	€	€	€	€
TV3 Spend on Irish Programming	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
TV3 Spend on Total Programming ¹⁹²	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
RTE Spend on Irish Programming ¹⁹³	122,127	135,590	158,103	168,515	182,072	199,616	160,171	156,012	144,699
RTE Spend on Total Programming ¹⁹⁴	145,232	159,180	180,236	192,708	206,123	224,402	185,537	180,511	169,785
Combined Irish Content (RTE + TV3)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Combined Total Content (RTE + TV3)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
TV3 % Share of Combined Irish Content	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %
TV3 % Share of Combined Total Content	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %	[redacted] %

Source: Various RTE Annual Reports and TV3's response to March 2013 RFI. Note: RTE spend figures are based on spending by the Television and News and Current Affairs Integrated Business Divisions of RTE.

¹⁹² These figures refer to TV3's total spend on programming content, and not specifically spend on FTA services.

¹⁹³ Figures refer to RTE Television only. Figures are taken from RTE annual reports, 2003-2011.

¹⁹⁴ *Ibid.*

195 It should be noted that the revenue and expenditure figures above refer to all TV broadcasting platforms and not specifically the FTA platform. TV3, RTE and TG4 were also carried on pay-TV platforms during this period.

196 ComReg also notes that TV3 was successful in obtaining funding from the BAI through the BAI's Broadcasting Funding Scheme (Sound & Vision Schemes) for the development of TV content. Both RTE and TG4 saw a marked decline in the level funding obtained from the BAI in recent funding rounds under the Sound & Vision II scheme. In contrast, TV3 managed to increase its share of the total funds awarded from the BAI. This suggests that TV3 had the ability and necessary resources to obtain funding from the BAI for content development, notwithstanding any impact of the price differentials.

Table 12: Funding from Broadcasting Authority of Ireland¹⁹⁵

	Rounds 1-8 (2006-09)		Rounds 9-15 (2010-2012)	
	€	%	€	%
RTE	€20,035,294	36.5%	€11,059,700	33.2%
TG4	€19,836,074	36.1%	€11,709,042	35.1%
TV3	€6,446,000	11.7%	€5,336,000	16%

Source: BAI Website – Statutory Review of the Sound and Vision 2 scheme, by Crowe Horwath

197 In its response to the February 2014 RFI, TV3 sought to quantify the “*direct impact of RTE overcharging*” between 1998 and 2012 (replicated below in Table 13). i.e. the notional consequential impact of revenues forgone on the assumption that the ‘overcharge’¹⁹⁶ could have been used by TV3 to acquire additional content, and the resulting viewership market share and advertising revenue that is derived from this.

198 TV3 expressed its view that the “*minimum estimated overcharge*” was [X€] per annum¹⁹⁷ and that the direct impact of the overcharge was approximately [X€] between 1998 and 2008. For the period 2003 to 2008 this figure is [X€] and for the period 2003 to 2011 it is [X€].

¹⁹⁵ Figures sourced from the Statutory Review of the Sound and Vision 2 scheme, by Crowe Horwath, accessible here - http://www.bai.ie/wordpress/wp-content/uploads/20130701_CroweHorwathRprtReSnV2.pdf

¹⁹⁶ While TV3 used the term ‘overcharge’, ComReg interprets this as also referring to price differentials.

¹⁹⁷ TV3 previously stated in letters to ComReg dating from 2009 and 2011 that [X€]
[X€]

- 199 In arriving at these figures, TV3 used its revenue to programming content ratio as a multiplier to determine the return it would have achieved in each year had it not been 'overcharged'. i.e. the TV3 estimated annual overcharge amount has a level of return applied to it, with this level of return calculated from the revenue to programming content ratio.

Table 13: TV3 Estimate by year of direct impact of RTÉ overcharging [Partially Redacted X]

Estimated Direct impact on TV3 Group	01/09/98	01/09/99	01/09/00	01/09/01	01/09/02	01/09/03	01/09/04	01/09/05	01/09/06	01/09/07	01/09/08	01/09/09	01/09/10	01/09/11
	31/08/99	31/08/00	31/08/01	31/08/02	31/08/03	31/08/04	31/08/05	31/08/06	31/08/07	31/08/08	31/08/09	31/08/10	31/08/11	31/08/12
Revenue to Programming ratio (return on content investment)	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
TV3 estimated 'Overcharge' €m ¹⁹⁸	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total Annual Effect €m	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total Overall Effect 2003-2008 [X€m]							Total Effect (1998 to 2012) [X€m]							

Table 14: ComReg's estimate by year of direct impact of RTÉ pricing differential based on Deloitte figures and TV3 methodology [Redacted X]¹⁹⁹

ComReg Estimate	2003	2004	2005	2006	2007	2008	2009	2010	2011
Revenue to Programming ratio (return on content investment)	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Deloitte Estimated Price Differential €000	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total Annual Effect €m	[Xm]	[Xm]	[Xm]	[Xm]	[Xm]	[Xm]	[Xm]	[Xm]	[Xm]
Total Overall Effect 2003-2008 [X€m]					Total Effect (2003-2011) [X€m]				

Note: These revenues and expenditure figures refer to all platforms and not specifically free-to-air. TV3 was also carried on pay-TV platforms during this period.

¹⁹⁸ Information based on TV3's response to the January 2014 RFI.

¹⁹⁹ The Revenue to Programming multiplier is different in ComReg's estimate as these are based on calendar years and not TV3's accounting year.

- 200 ComReg notes that no meaningful analysis or detailed workings for the [X€] per annum overcharge figure cited by TV3 were provided during the course of the Investigation²⁰⁰. In addition, the “Revenue to Programming ratio” adopted by TV3 relates to revenues and programme spending levels across all platforms (FTA and pay TV). ComReg considers that it is unlikely that content acquisition by TV3 was driven by viewership on the analogue FTA platform alone. In addition, ComReg considers it likely that any additional spend on content and the associated revenues from advertising might also displace existing content spend to one degree or another (i.e., replacing one programme with another) as well as advertising revenues (a new programme may have different target audience and thus a different potential for advertising).
- 201 In Table 14 below, ComReg has sought to replicate the TV3 methodology for estimating the “*direct impact of RTE overcharging*” but using the price differential as estimated by Deloitte in the Deloitte Report (and applying this to revenue to programming content ratios²⁰¹ derived from data in TV3’s annual reports). Based on such analysis, ComReg estimates the total potential derived consequential impact of the differential charging on TV3 to be [X€] for the period 2003 to 2011 (and [X€] over the period 2003 to 2008).
- 202 These estimates (both TV3’s and ComReg own analysis) assume that all additional money TV3 would have had (if charged on the same basis as RTÉ) would have been spent on content acquisition. This is unlikely to be entirely the case as it is at least probable that some such money would have been diverted towards TV3’s other operating expenses. In addition, it is unlikely that a linear relationship exists between content spend and advertising revenues. Furthermore, the revenue and expenditure figures used are associated with all TV platforms and not specifically FTA (noting that TV3 was also carried on pay-TV platforms during this period also), the effect of which is to overestimate impacts.
- 203 ComReg notes that, over the period 2003 to 2011²⁰², the [X€] represents:
- [X%]²⁰³ of TV3’s Total Revenue;

²⁰⁰ Information based on TV3’s response to the January 2014 RFI.

²⁰¹ In doing so, we do not comment on whether or not TV3’s approach of using a revenue to programming content ratio to derive impacts is valid. It is, however, illustrative of what the impact might be taking TV3’s own approach.

²⁰² Given the figure for the period 2003 to 2011 gives rise to the figure larger than the period 2003-2008, we only show the former period.

²⁰³ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5% of TV3’s Total Revenue over this period.

- [redacted%]²⁰⁴ of TV3’s Total Programming Spend; and
- [redacted%]²⁰⁵ of TV3’s Total Opex;

204 When considered alongside the analysis elsewhere in this Information Notice, relative to the Total Revenue, Programming Spend and Opex of TV3 over the period 2003-2011, the relative differential is not suggestive that it would be likely to give rise to exclusionary effects.

TV3’s ability to invest in content and raise capital

205 ComReg considers that if TV3 was likely to be harmed by any alleged price discrimination there would be some evidence of the impact of such on TV3’s ability to invest in content and/or gain access to capital. Below, ComReg examines the extent of any impact of price differentials on TV3’s ability raise capital and/or invest in content.

206 In its response to the February 2014 RFI, TV3 stated that the RTÉ ‘overcharge’²⁰⁶ resulted in TV3 being able to invest less in content acquisition. As examples of its inability to invest in content acquisition as a result of the overcharge, TV3 listed²⁰⁷ a number of programmes that it failed to secure the rights to.

207 ComReg notes that no supporting documentary evidence was provided by TV3 to show it was unable to invest in programmes or critical content as a consequence of the price differentials. In the February 2013 RFI, ComReg sought specific details relating to any cost/benefit analysis undertaken by TV3 when making decisions regarding programme acquisition. In response, TV3 stated that

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

208 In the February 2013 RFI, ComReg also sought copies of TV3’s fiscal plans and Board documentation. In response, TV3 provided ComReg with, amongst other things, a copy of its 2003 fiscal plan which states:

²⁰⁴ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 6% of TV3’s spend on Total Programming Spend over this period.

²⁰⁵ While the specific figure has been redacted for reasons of commercial sensitivity and confidentiality, ComReg notes it is less than 5% of TV3’s Total Opex over this period.

²⁰⁶ As described by TV3, page 1 of its response to the January 2014 RFI.

²⁰⁷ TV3 listed the names of programmes by year, but did not quantify the amount bid by TV3 for each programme or how much the winning bid was (where known).

[REDACTED]

- 209 ComReg considers that the above statements are suggestive that the alleged 'overcharge' does not appear to have significantly impeded TV3's ability to invest in content acquisition.
- 210 As evidenced in Table 11 above, ComReg also notes that TV3's annual investment in content acquisition remained stable up to 2005 before then increasing in subsequent periods²⁰⁸. ComReg considers that TV3's ability to acquire content through investment and its increasing advertising revenues (and net profit) during the period 2003 to 2011 is suggestive that TV3's access to capital to invest in critical programming content was not impeded.
- 211 ComReg also considers that the differential charges levied by RTÉ/RTÉNL are also unlikely to cause harm directly to consumers (whether advertisers or viewers). As evidenced from Table 11, in every year from 2003-2011 TV3 increased its spending on Irish produced content and total overall programming content (self-commissioned and acquired externally). Furthermore, TV3's ability to generate increasing returns from advertising revenues between 1999 and 2006 (prior to the recessionary period) suggests advertisers were satisfied that TV3 programming content and its associated viewership were of a sufficient quality to warrant their acquisition of advertising slots on the TV3 channel. In addition, TV3's relatively stable viewership figures and overall share of Irish viewers (as set out in Table 9) suggests TV3's viewers were also satisfied with the content offered by TV3.
- 212 ComReg has also sought to determine whether the Estimated Price Differential resulted in TV3 not being able to acquire or invest further in programming during the Period of Investigation, including as a consequence of not having access to financing facilities that it could use to do so. In carrying out such an assessment it was necessary to have regard to TV3's financial position, including TV3's decisions as to how it financed its operations.

²⁰⁸ TV3's total programme spend increased from [REDACTED] in 2003 to [REDACTED] in 2011.

213 In this respect, it was necessary to clarify with TV3 the nature of its debt structure as explained by TV3 in its response to the February 2013 RFI. Deloitte had identified that TV3 chose to finance itself using [X [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

214 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

215 ComReg considers that TV3's stated ability to be in a position to [X [REDACTED]
[REDACTED]] as being suggestive that it had the capacity to invest in programming content if such content, in the view of TV3, would increase TV3's market share or viewer figures (and it was profitable to do so).

216 ComReg has also considered TV3's business and fiscal plans from 2003 to 2011 which suggest that TV3 was able to compete and grow its business. For example, in 2003 to 2008 TV3 showed [X [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- 217 ComReg considers it to be likely that, notwithstanding any price differentials with respect to charging for access to ATTTD services, TV3's ability to invest in content during the Period of Investigation was not likely to have been harmed and it had the means to raise capital to do so, if needed. TV3's positive return on content investment (outlined above in Table 13) suggests TV3 made reasonable (and up to 2007/8 increasing) returns from its investments in programming content. ComReg is of the view that if TV3 had plans to invest in what was deemed to be critical programme content, it could, notwithstanding any impact of ATTTD service price differentials, have been likely to have been able to obtain the necessary funding to do so, in particular, given the identified potential return on content investment when expressed in revenue terms.
- 218 Overall, the impact of price differentials does not appear to have harmed TV3's ability raise capital and/or invest in content.

Weaker FTA Platform and TV3's ability to launch new channels

- 219 In its response to the February 2014 RFI TV3 stated that the alleged overcharge resulted in a weaker FTA platform and that more customers were reliant on pay platforms as a result. Furthermore it noted that:

[X [REDACTED]
[REDACTED]
[REDACTED].]

- 220 ComReg notes that a similar trend of viewers moving from analogue FTA TV platforms towards paid TV platforms has been observed in other countries during the same time period. This has likely to have been driven by demand for a variety of content services (including premium content) and increasing prevalence of the bundling of TV and telephony and other communications services.
- 221 ComReg also notes that paragraph 3.16 of ComReg's most recent *ex ante* 2013 Broadcasting Market Analysis Decision²⁰⁹ states:

"...that although pay TV services have gained popularity over time (increasing by 6 percentage points between 2003 and 2012) the overall proportion of existing FTA TV homes had remained somewhat stable over the latter portion of that time period (ranging from 29% to 33% between 2008 and 2012). This implies that existing FTA TV homes have shown an unwillingness to take up pay TV services."

²⁰⁹ See footnote 125.

- 222 In paragraphs 5.12 to 5.27 of the BTS Consultation²¹⁰ ComReg also set out its view that Pay TV and FTA services are not direct demand-side substitutes, with ComReg ultimately considering that these services are likely to fall into separate markets. The BAI agreed with ComReg's view, stating that there are clear differences between such services in terms of their cost, choice of programme services available, features, and substitution and consumer migration across them²¹¹. TV3 also agreed with ComReg's view that households with access to Irish terrestrial programme services on a FTA basis are in a separate retail market to pay TV and highlighted that pay TV, at an EU level, has long been seen as a separate market²¹². ComReg's conclusion in the 2013 Broadcasting Market Analysis Decision is that pay TV services and FTA services are not effective substitutes and are not in the same retail market.
- 223 RTÉ1, RTÉ2 and TG4 were also carried on the FTA platform during the Period of Investigation. ComReg is of the view that a weaker FTA was not likely to be in the interests of RTE, as its own downstream channels also depend on the platform. However, ComReg recognises that RTÉ/RTÉNL may also face incentives to weaken a competitor.
- 224 The TV3 response to the February 2014 RFI stated that the alleged 'overcharging' had an
[redacted]
[redacted].]
- 225 TV3 did not provide evidence to support the above statement, to the effect that the price differentials prevented TV3 from expanding in the market.
- 226 ComReg notes that, based on its review of TV3 provided information, TV3 appeared to have had an ongoing interest in developing [redacted]. Furthermore, ComReg notes that TV3 purchased Channel 6 in 2008, with Channel 6 later being integrated into the TV3 Group and rebranded as 3e.
- 227 ComReg's review of TV3's fiscal plans and board documents are not suggestive of TV3 being impeded in launching a new TV channel or obtaining [redacted]. TV3's continued desire to [redacted] suggest it was not materially constrained by the pricing differentials and had the financial resources or means necessary to fund such projects.

²¹⁰ Broadcasting Transmission Services in Ireland. Consultation Document. ComReg Document 12/77 13 July 2012 ('BTS Consultation').

²¹¹ See paragraph 3.57 of the 2013 Broadcasting Market Analysis Decision.

²¹² See paragraph 3.58 of the 2013 Broadcasting Market Analysis Decision.

228 Overall, ComReg does not consider the evidence presented and available as being suggestive that differential pricing of ATTTD services is likely to have harmed TV3 in terms of its ability to launch new channels during the Period of Investigation.

5.3.3 ComReg's Overall Conclusions on Discriminatory Pricing

229 Notwithstanding the difficulties regarding the availability of information prior to 2003, ComReg considers that the analysis of discriminatory pricing contained in the Deloitte Report to be robust. It can, therefore, be relied upon to inform ComReg's assessment of the discriminatory pricing allegations set out in the TV3 Complaint. Deloitte has indicated to ComReg that based on its analysis of the information made available to it:

"Deloitte found no evidence of any harm to the competitive process as a result of the observed pricing differentials".

230 ComReg notes that, when compared on a like-for-like basis, RTÉ/RTÉNL charged TV3 a different price for ATTTD services than it charged RTÉ1, RTÉ2 and TG4. ComReg further notes that there is some objective justification for the elements of the price differentials as analysed in Annex E of the Deloitte Report such as the Balance of Credit and Accelerated capital payments. Further, ComReg notes that although TV3 was charged a different price it does not appear to have produced an actual or likely exclusionary effect to the detriment of competition and thereby of consumers' interests.

231 In this respect, TV3 was able to successfully compete in the downstream market, capture and hold onto market share and increase revenues. TV3 was also able to increase its expenditure on programme content and does not appear to have been impacted through an inability to gain access to finance for content acquisition. ComReg considers this to be evidence that TV3 was not placed at a competitive disadvantage as a result of the price differentials.

232 ComReg therefore concludes that there are insufficient grounds to support TV3's claim that, contrary to Section 5 of the Competition Act 2002 and/or Article 102 of TFEU, RTÉ/RTÉNL is likely to have engaged in discriminatory pricing with respect to its provision of ATTTD services to TV3 over the Period of Investigation.

6 Overall Conclusions on TV3 Complaint

233 Following its Investigation, having regard to the above, ComReg has decided to close the TV3 Complaint on the basis that there are insufficient grounds for action with respect to each of the alleged excessive and discriminatory pricing abuses.