



Commission for
Communications Regulation

Consultation Paper

Market Analysis – Wholesale Broadcasting Transmission Services

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All responses to this consultation should be clearly marked:-
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and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5.30pm, 3rd
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1 Executive Summary

- 1.1 The new EU communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Regulations*. In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.
- 1.2 The *Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes place as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets (“the *Relevant Markets Recommendation*”) by the Commission.¹ In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Market Recommendation* and the Commission Guidelines on Market Analysis and Significant Market Power (“*The SMP Guidelines*”²).
- 1.3 The services under examination in this review are those for television and radio wholesale broadcasting transmission services. As such, this review will consider whether, and the extent to which, the various television and radio wholesale broadcasting transmission services currently supplied and acquired in Ireland fall within the same relevant market(s). In this respect, it considers television and radio broadcasting transmission services provided over terrestrial, satellite, cable and MMDS and deflector networks, using analogue and/or digital technology. Television and radio broadcasting transmission services are provided by the respective platform operators to broadcasters.
- 1.4 The European Commission recommends, in its *Relevant Markets Recommendation*, that National Regulatory Authorities (NRAs) should analyse the relevant wholesale market for “**broadcasting transmission services, to deliver broadcast content to end-users**”. The Commission has based its conclusion on several factors,³ including:
 - whether services broadcast over different transmission systems can be considered to constitute effective demand substitutes in terms of price and product for a significant number of end-users;
 - the coverage or availability of the different transmission networks;
 - the existence of demand and supply substitution conditions that enable end-users (or a significant portion of them) to switch between broadcasting or transmission platforms; and
 - the existence and coverage of digitally capable broadcasting transmission platforms.
- 1.5 ComReg has carried taken utmost account of the *Relevant Markets Recommendation* in the assessment of markets in accordance with the principles of competition law and

¹ Regulations 26 and 27.

² Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3, (“the *SMP Guidelines*”).

³ Explanatory Memorandum to the *Relevant Markets Recommendation*.

has taken the utmost account of the *SMP Guidelines*. The wholesale broadcasting transmission market contained in the *Relevant Markets Recommendation* comprises a number of different types of transmission services. As per the *SMP Guidelines*, it is appropriate to assess whether each type falls within the same market definition by starting with the smallest possible transmission market and then focusing on whether the closest possible substitute is in the same market. ComReg has therefore started with a number of narrow sets of products and assessed whether other products are substitutable for them, in order to determine the candidate markets in this sector.

1.6 ComReg has carefully considered the market for “**broadcasting transmission services, to deliver broadcast content to end-users**”, however, ComReg has decided to define markets appropriate to national circumstances that differ from the *Relevant Markets Recommendation*. The wholesale transmission markets which ComReg has defined are as follows:

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

1.7 The *Relevant Markets Recommendation* obliges ComReg in circumstances where national markets differ from the market recommended to apply three cumulative criteria prior to establishing whether such national markets are subject to ex-ante regulatory intervention. Following this exercise two markets have failed the criteria and are not subject, during this review, to further market analysis.

1.8 The **local/regional analogue terrestrial radio transmission market** is characterised by low barriers to entry where the majority of undertakings have ownership over their own transmission networks. New entrants also have the option of purchasing transmission services from the national transmission network operator, RTE Transmission Network Limited (RTNL) or existing mobile network operators. ComReg thus deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in this transmission market.

1.9 Although the **cable and satellite broadcasting transmission market** is characterised by high barriers to entry, it displays some characteristics such that it will tend over time towards effective competition. The Freesat model gives broadcasters additional options with respect to choice of platforms and cable operators are now free to compete in other areas as exclusivity has now been removed. ComReg thus deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in this transmission market, although ComReg reserves the right to reassess the competitive conditions in this market in the future if required.

1.10 ComReg has identified two relevant wholesale transmission markets on which to conduct an analysis of whether or not the market is effectively competitive by

reference to whether any given undertaking or undertakings are deemed to hold significant market power (SMP) in that market :

- the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks
- the wholesale market for television broadcasting transmission services on analogue terrestrial networks

- 1.11 ComReg has conducted an extensive market analysis on the relevant markets defined to assess whether an undertaking has Significant Market Power (SMP). ComReg has used a wide range of criteria including market share, countervailing buying power and barriers to entry and has also conducted a prospective analysis of the relevant markets
- 1.12 ComReg has reached the preliminary conclusion that RTNL should be designated as having SMP in the relevant market for the provision of wholesale analogue national terrestrial broadcasting transmission services for the provision of radio content to Irish end-users. In the short to medium term, considering foreseeable technological developments and anticipated customer behaviour, there is nothing to suggest to ComReg that the SMP enjoyed by RTNL will be diluted in any meaningful way in the absence of appropriate and proportionate *ex ante* regulatory measures. There is nothing to indicate that there exists sufficient countervailing market power to exert competitive pressure on RTNL
- 1.13 ComReg has reached the preliminary conclusion that RTNL should be designated as having SMP in the proposed relevant market for the provision of wholesale analogue terrestrial broadcasting transmission services for the provision of TV content to Irish end-users. There is nothing to indicate that there exists any countervailing market power such as to exert any competitive pressure on RTNL.
- 1.14 In light of ComReg's identification of the relevant markets and its subsequent market analysis, ComReg takes the view that the most appropriate remedy to apply to RTNL, in accordance with the principles set forth in the *Framework and Access Directives* and the *Framework and Access Regulations*, is based on the principles of transparency and non-discrimination for charges and other conditions for the provision of wholesale analogue terrestrial TV broadcasting transmission services. ComReg also reserves the right to impose an accounting separation remedy to ensure the efficacy of the above obligations⁴.
- 1.15 This document is a consultation document. ComReg would welcome comments from all interested parties on the questions posed in this market review and will accept written comments on or before 3rd December 2003. As required by Regulation 20 of the Framework Regulations, the draft measure will then be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking a final decision.

⁴ ComReg is aware that RTNL is obliged under the Broadcasting Charter to produce accounting separation in the near future. ComReg will assess the sufficiency of this existing obligation in ensuring the efficacy of the above obligations.

2 Introduction

Objectives under the Communications Regulations Act 2002

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

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

2.2 This review is in line with the objectives set out in the Communications Regulation Act 2002, which also form part of the EU directives and Irish regulations.

The Regulatory Framework

2.3 Four sets of Regulations,⁵ which transpose into Irish law four European Community directives on electronic communications and services,⁶ entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the *Privacy and Electronic Communications Directive*, must be transposed into Irish law by 31 October 2003. The Minister for Communications, Marine and Natural Resources has consulted on the draft regulations⁷.

2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure

⁵ Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the *Framework Regulations*"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the *Authorisation Regulations*"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the *Access Regulations*"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the *Universal Service Regulations*").

⁶ The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the *Framework Directive*"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the *Specific Directives*"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the *Authorisation Directive*"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the *Access Directive*"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the *Universal Service Directive*"), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the *Privacy and Electronic Communications Directive*"), OJ 2002 L 201/37.

⁷ ComReg Doc No. 03/99 outlines ComReg's response to the original draft regulations.

outlined in the *Framework Regulations*.⁸ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.⁹ Where it concludes that the relevant market is not effectively competitive (*i.e.*, where there are one or more undertakings with significant market power (“SMP”)), the *Framework Regulations* provide that it must identify the undertakings with SMP on that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.¹⁰ Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Regulations* oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market, and withdraw any such obligations it may have imposed at an earlier stage.¹¹

2.5 In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Market Recommendation* and the *SMP Guidelines*. These may be revised from time to time by the Commission, and the market analysis process is to be repeated when this happens.

Consultation

- 2.6 All comments to this Public Consultation are welcome. However, it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.
- 2.7 The consultation period will run from 22nd October to 3rd December 2003 during which the Commission welcomes written comments on any of the issues raised in this paper.
- 2.8 As required by Regulation 20 of the Framework Regulations, the draft measure will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking a final decision.

Process to Date

- 2.9 It is important that market definition and analysis is rooted in the market realities of each Member State. ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services (“ECNSs”), and from consumer surveys commissioned by ComReg, in order to carry out as thoroughly as possible its market definition and market analysis based on established economic and legal principles, and taking the utmost account of the *Relevant Markets Recommendation* and the *SMP Guidelines*.
- 2.10 ComReg published an information notice on the market analysis process on December 19th, 2002. The first of the industry workshops held by ComReg took place on January 23rd, 2003 and questionnaires were sent to all broadcasting operators on February 18th. Following representations made by operators at ComReg’s first workshop, the industry was given until the 15th April to respond to the questionnaire. ComReg held its second workshop on the 25th February to discuss the questionnaire.

⁸Regulation 26.

⁹Regulation 27.

¹⁰Regulation 27(4).

¹¹Regulation 27(3).

2.11 Further market data was obtained from consumer surveys carried out on ComReg's behalf and publicly available sources.

Liaison with Competition Authority

2.12 There is a requirement on NRAs to co-operate with National Competition Authorities (NCAs) throughout the process of market definition and analysis. In December 2002 ComReg signed a co-operation agreement with the Competition Authority for a period of three years¹². To facilitate market review decision making, a Steering Group including a representative from the Competition Authority was set up by ComReg. Through this forum the Competition Authority was informed and involved throughout the market review decision making process.

2.13 Markets defined by ComReg for sector-specific regulatory purposes will always be without prejudice to the relevant markets defined by national competition authorities or the Commission, as the case may be, in competition cases, as the concept of the relevant market is closely related to the objectives pursued.

2.14 The remainder of this consultation document is structured as follows:

- section 3 introduces the background to the market definition process;
- section 4 discusses what services fall within the relevant wholesale broadcasting transmission market in Ireland;
- section 5 presents ComReg's conclusions on the definition of the wholesale broadcasting transmission market in Ireland;
- section 6 presents ComReg's market analysis of the wholesale broadcasting transmission market and presents the view on whether this market is effectively competitive;
- section 7 presents ComReg's view on those undertakings with significant market power;
- section 8 outlines a range of possible, as well as our likely proposed remedies, under the new regulatory framework;
- section 9 outlines the nature of the regulatory impact assessment that needs to be conducted in relation to any proposed regulatory intervention;
- section 10 provides details with regard to the submission of comments on this consultation document; and

¹² ComReg Document No. 03/06

Wholesale Broadcasting Transmission Services Consultation

- Finally, Annexes A & B provide a description of the different radio and television market players in the Irish broadcasting transmission market while Annexes C & D provide a description of the services offered at the retail level.

3 Background to Market Definition

- 3.1 The *Framework Regulations* require ComReg to define relevant markets appropriate to national circumstances, in particular the relevant geographic markets within Ireland, in accordance with the market definition procedure outlined in the *Framework Regulations*. This obligation applies to both the relevant markets identified in the *Relevant Markets Recommendation* and to additional relevant markets that ComReg may consider to merit investigation (*i.e.*, so-called “Article 7” markets). In accordance with the *Framework Regulations*, the market definition exercise must be carried out in accordance with the principles of competition law and must take “utmost account” of the *Relevant Markets Recommendation*, as well as the *SMP Guidelines*.¹³
- 3.2 The purpose of the market definition procedure is to identify in a systematic way the competitive constraints that providers of ECNSs encounter, thereby also facilitating the subsequent market analysis procedure. According to the European Court of Justice,¹⁴ a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable with its products, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question.
- 3.3 As regards demand-side substitution, ComReg will take account of the SSNIP test wherever practicable. Under that test, a particular service or set of services constitutes a separate relevant product market if a hypothetical monopoly supplier could impose a Small but Significant,¹⁵ Non-transitory Increase in Price above the competitive level without losing sales to the extent that such a rise in prices would not prove to be unprofitable (the ‘SSNIP test’)¹⁶. Applying the SSNIP one tries to ‘ascertain whether customers purchasing a particular product or service would switch to readily available substitutes or to suppliers located elsewhere if a hypothetical monopoly supplier were to impose a small (in the range of 5% to 10%) but significant, non-transitory price increase above the competitive level, thereby rendering such a rise in prices as being unprofitable (the ‘SSNIP test’). Supply-side substitution is said to occur when, in response to a rise in the price of a particular product or service, suppliers of other products or services switch, without the need for significant new investments, to supplying the product or service whose price has risen within a reasonable timeframe, thereby rendering the price increase unprofitable. The market definition exercise is concerned with the likely competitive response of a marginal body of customers (and

¹³ Regulation 27. Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3, (“the SMP Guidelines”).

¹⁴ See, for example, Case 322/81, *Michelin v. Commission* [1983] ECR 3461, as well as the Commission Notice on the definition of relevant markets for the purposes of Community competition law (“the Commission Notice on Market Definition”), OJ 1997 C 372/3, and the SMP Guidelines.

¹⁵ Usually calculated at between 5% and 10%, depending on the particular product and the market circumstances.

¹⁶ See the Commission Notice on Market Definition, the SMP Guidelines and ComReg’s Market Data Information Notice for additional guidance.

not necessarily the majority of customers).¹⁷ In some cases it may not be appropriate to apply the SSNIP test due to other influencing factors.

- 3.4 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

¹⁷ See, for example, Case 85/76, *Hoffman-La Roche & Co. A. G. v. Commission*, [1979] ECR 461, as well as Case 66/ 86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, [1989] ECR 803.

4 The Relevant Market

- 4.1 According to the *Relevant Markets Recommendation* there are in the electronic communications sector at least two main types of relevant markets to consider: markets for services or products provided to end users (retail markets), and markets for the inputs which are necessary for operators to provide services and products to end users (wholesale markets). Within these two types of markets, further market distinctions may be made depending on demand and supply side characteristics.
- 4.2 The Commission recommends, in its *Relevant Markets Recommendation*, that NRAs should analyse the relevant wholesale market for “**broadcasting transmission services, to deliver broadcast content to end-users**”. The Commission has based its conclusion on several factors,¹⁸ including:
- whether services broadcast over different transmission systems can be considered to constitute effective demand substitutes in terms of price and product for a significant number of end-users;
 - the coverage or availability of the different transmission networks;
 - the existence of demand and supply substitution conditions that enable end-users (or a significant portion of them) to switch between broadcasting or transmission platforms; and
 - the existence and coverage of digitally capable broadcasting transmission platforms.

Background to the Irish Broadcasting Sector

- 4.3 When compared to the other Member States, Ireland has a relatively small and highly concentrated broadcasting sector, with 1.3 million TV homes¹⁹ and two-thirds of all TV households subscribing to pay television services (Pay TV). The dynamics of the Irish broadcasting sector are outlined below and the broadcasting supply chain is presented in Figure 4.1. The main players in the broadcasting sector are (further details are contained in Annexes A & B):
- ntl Incorporated
 - Chorus Communications Ltd
 - BSkyB Ltd
 - EUTELSAT
 - SES ASTRA
 - RTÉ
 - TG4
 - TV3
 - Casey Cablevision.

¹⁸ Explanatory Memorandum to the *Relevant Markets Recommendation*.

¹⁹ Figure is based on 2002 CSO estimate of approximately 1.3 million households with a TV

- 4.4 There are four platforms which provide broadcasting transmission services in Ireland, namely, **satellite**, **cable**, **deflector** and **analogue terrestrial**. At the retail level, channel distribution is provided by the platform operator to the end user via an aerial (in the case of analogue terrestrial transmission, MMDS and deflectors), a cable connection, a satellite-dish (in the case of DTH satellite) and/or via a set top box (for MMDS, digital cable and DTH satellite reception).
- 4.5 SES Astra and Eutelsat both operate **satellites**, whose footprint includes Ireland, for the delivery of TV and radio services.
- 4.6 BSkyB is both a producer and provider of programme services distributed to end users via satellite (Direct to Home) and cable. It leases transponder capacity from SES/Astra and Eutelsat to broadcast its services to end users. BSkyB's own programme services are uplinked to the Astra and Eutelsat satellites from the UK. However, BSkyB²⁰ also subleases transponder capacity to RTÉ, TG4 and TV3 which are uplinked in Ireland.
- 4.7 Also available on the satellite platform are unencrypted programme services (a type of service known as "Freesat"), which now includes the BBC programme services.
- 4.8 Cable, terrestrial analogue and deflector network operators operate their own platforms for delivery of services to end users.
- 4.9 ntl, Chorus Communications, Casey cable and a number of small independent cable providers operate localised and at present non-competing (at the retail level) **cable/MMDS** (hereafter cable) networks, all of which have analogue and some of which digital capabilities.
- 4.10 There are twenty seven **deflector** operators which deliver services to rural parts of Ireland (using UHF frequencies). Fourteen deflector systems operate in Donegal, one in Cork, two in Waterford, five in Mayo, one in Sligo, one in Louth, one in Tipperary, one in Offaly and one in Galway. Currently, there are over 21,000 deflector subscribers, however such networks are fragmented, many of the systems are small (with less than 1,000 subscribers) and the transmitters are low powered and thus have low coverage capacity.
- 4.11 Deflector operators are restricted to providing only four television services which are usually UK programme services (BBC1, BBC2, ITV and Channel 4). Such services are generally considered to be a complement to the national analogue terrestrial network. New entrants may consider providing MMDS-type services in the 12 GHz frequency band, which would offer increased capacity and thus in the longer term could be regarded as a substitute for services available on cable and satellite platforms. Because of their small scale and limited geographical reach, deflectors as they currently operate will not be considered further in this review. The possibility of deflector operators or others entering the market via MMDS services at 12GHz will be considered in the appropriate sections of this document.
- 4.12 Free to air services in Ireland are provided by RTÉ and by independent broadcasters who have entered into contractual arrangements with the Broadcasting Commission of Ireland (BCI). The spectrum used by RTÉ is licensed by ComReg to the RTÉ Authority in accordance with the Broadcasting Act, 1960²¹ while that used by the

²⁰ For the purposes of this review, ComReg is differentiating between Sky's transmission providing arm and its programme providing 'broadcaster' arm.

²¹ <http://www.comreg.ie/sector>

independent sector is licensed to the BCI in accordance with the Radio and Television Act, 1988²². The BCI licenses and regulates independent broadcasting content services including the national television programme service (TV3), a national radio service (Today FM) and local/regional radio services. National analogue terrestrial transmission services are provided by RTÉ to TV3 and Today FM.

- 4.13 RTÉ, the Public Service Broadcaster operates the **national analogue terrestrial transmission** platform through its network division, RTÉ Transmission Networks Limited (RTNL).
- 4.14 There are twenty-seven independent **local and regional radio stations** operating in specified franchise areas. Most local/regional radio stations own part or all of their transmission networks. Some lease transmission services from RTNL to ensure coverage of all of their franchise area. Mobile network operators and cable operators also provide some local radio programme service providers with access to sites for analogue terrestrial transmission services.

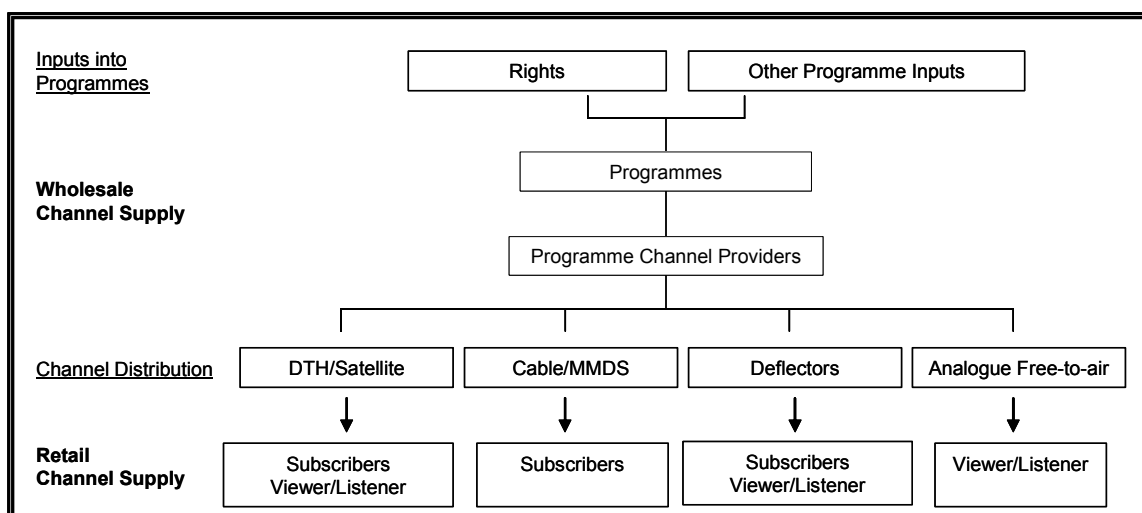


Figure 4.1: Broadcasting Supply Chain

Transmission Payments Flows

- 4.15 The payment flows for broadcasting transmission services are outlined in Figure 4.2 below.
- 4.16 **National Terrestrial Analogue Transmission:** In the Irish market unlike other member states, RTÉ the state owned public service broadcaster, wholly owns the national TV and Radio analogue terrestrial transmission networks. RTÉ provides transmission services to TV3 and Today FM. Irish radio and television programme services can be accessed via analogue terrestrial transmission on a free to air basis. RTÉ’s radio and TV programme services are principally funded from advertising, sponsorship and a TV licence fee while TV3’s and Today FM’s income to date is dependent on advertising and sponsorship and has not been supplemented by the licence fee.

²² <http://www.comreg.ie/sector>

- 4.17 **Local Transmission:** The majority of local radio stations provide their own transmission (60%) with the remaining (40%) leasing transmission from third parties such as RTÉ, ntl, Chorus and mobile operators in exchange for payment. Of those which lease transmission, one operator is fully supplied and approximately 20% are partially supplied by RTNL. Local and regional radio stations provide local radio broadcasting services with their income mainly derived from advertising and sponsorship
- 4.18 At the retail level revenue is earned by cable, satellite and deflector operators from end users via installation fees, payment for programme packages and pay per view charges (PPV is not available via deflectors).
- 4.19 **Deflectors** are fairly unique to the Irish market. Deflectors pay the UK BBC, ITV and Channel 4 for the rights to re-transmit their services. Revenue is earned from end users (in some cases on a voluntary basis) by means of an annual subscription fee.
- 4.20 **Cable and MMDS** (unlike several other Member States) pay programmers generally a fee per subscriber for the rights to carry their channels. Cable and MMDS operators have obligations under the Broadcasting Act 2001 to transmit the ‘must carry’ programme channels provided by RTÉ, TV3 and Today FM, (programme service contractors) and no money is paid or received for carriage. Under the Broadcasting Act 2001 the “must carries” could be extended to include community/local TV channels who enter into a new contract regime with the BCI.
- 4.21 Programme service providers normally pay **satellite** operators directly (Eutelsat or SES Astra) for transponder capacity (e.g. BBC) or indirectly via a third party such as BSkyB. A ‘barter’ like arrangement exists between RTÉ, TV3 and BSkyB, under which no charges are paid by either party for the transmission of the RTÉ programme services and TV3 on the satellite platform. Satellite operators are not subject to the “must carry” obligations of the Broadcasting Act 2001.

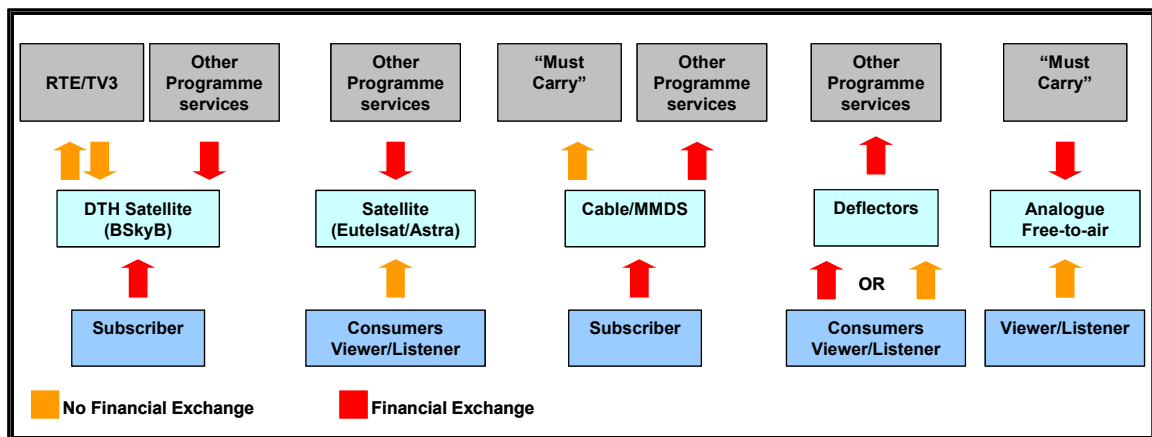


Figure 4.2: Broadcasting Transmission Payment Flows

Alternative Delivery Platforms

xDSL

- 4.22 Under the new Framework Regulation, which has been transposed by the Minister for Communications Marine and Natural Resources, operators providing services (not

using spectrum) no longer require a licence to provide broadcasting transmission services. This presents an opportunity for operators to provide programme services via technologies such as xDSL.

- 4.23 Radio listeners can acquire access to radio streamed over the Internet over both dial-up and always-on connections. Also, the very recent introduction of flat rate charging has increased the incentives at the retail level for listeners to listen to radio in this manner.
- 4.24 However, the use of xDSL to provide programme services in another Member State has not yet proven to be a successful business model. There are capacity constraints on the use of radio over the internet as it is limited by the number of simultaneous streams a server can support. Further, fixed streamed services will not support mobile and portable reception. Internet streamed radio services are most appropriate for static reception. ComReg considers that it is unlikely that Internet streamed radio services will be widely accessed by mobile listeners during the timeframe of this review. Currently, less than 1% of adult radio listeners listen to the radio via the internet²³. As a result, radio broadcasters are not likely to regard fixed stream services (over xDSL) as a viable substitute for analogue terrestrial transmission and will thus not be considered further in this review.

12 GHz Frequency Band

- 4.25 Regulations have been submitted by ComReg for approval to the Department of Communications Marine and Natural Resources which would make spectrum at 12 GHz band available for MMDS programme service distribution. Such a service could be comparable to that currently available via cable or satellite.
- 4.26 However, it is not expected that new radio and TV broadcasting services will become significant players within the timeframe of this review. If significant players do enter the market and exert competitive force within the timeframe of this review ComReg will revisit the situation.

DTT

- 4.27 One possible source of competition in the terrestrial transmission sector at a national level is digital terrestrial television (DTT). Presently, DTT does not exist in Ireland and it is not expected that such a platform will become an established player within the timeframe of the review.

Mobile

- 4.28 In Ireland, TV programme services are not available on the mobile platform. Radio services are provided on the VHF band. Current capacity constraints and technical limitations on the GPRS network do not support the delivery of TV broadcasting services at a marketable quality. However with the advancement of mobile capabilities and the introduction of 3G technology these issues may be reduced. In Japan,

²³ MRBI Joint National Listenership Research (JNLR) - June 2003

terrestrial digital TV broadcasting received via 3G will commence from December 2003 in major metropolitan areas of Tokyo, Nagoya and Osaka districts. However it is not clear that such services will be introduced and become established in Ireland within the timeframe of this review.

Scope of this Review

- 4.29 The services under examination in this review are those for television and radio wholesale broadcasting transmission services. As such, this review will consider whether, and the extent to which, the various television and radio wholesale broadcasting transmission services currently supplied and acquired in Ireland fall within the same relevant market(s). In this respect, it considers television and radio broadcasting transmission services provided over terrestrial, satellite, cable and MMDS and deflector networks, using analogue and/or digital technology. Television and radio broadcasting transmission services are provided by the respective platform operators to broadcasters.
- 4.30 Member States have discretion with respect to the analysis of the market for Conditional Access Systems to digital television and radio services broadcast in accordance with Article 6(3) of the Access Directive. Under the new framework all service operators who provide conditional access services to digital TV and radio broadcasters must offer these services on a fair, reasonable and non-discriminatory basis (FRND). This FRND obligation has been carried over from Directive 95/47/EC where it was introduced to ensure that a wide variety of programming and services was available in the nascent digital television industry. The obligation applies to any current provider of conditional access services to broadcasters in Ireland, and to any undertaking wishing to do so in the future. If a Member State sees this obligation as inappropriate and wishes to amend or withdraw this obligation, then Article 6(3) of the Access Directive²⁴ provides that Member States may permit their NRAs to review the market for conditional access systems to digital television and radio services broadcast, irrespective of the means of transmission. ComReg considers that the existing FRND requirements on all providers of conditional access systems in Ireland continues to be appropriate and proportionate and that it is unnecessary to undertake a review of this obligation.
- 4.31 While this review only covers the wholesale distribution of broadcasting transmission services, ComReg reserves the right to revisit other broadcasting markets in the future to conduct market definition and analysis where it feels it is necessary to do so.

Wholesale Broadcasting Transmission Services

- 4.32 Currently, end users, depending on their particular circumstance, may receive radio and television broadcasting via terrestrial, cable or satellite transmission networks. This is reflected in figure 4.3 below which provides an overview of the various broadcasting transmission services in Ireland that make up the **wholesale market for broadcasting transmission services to deliver content to end users**:

²⁴ Regulations 7(7) and 7(8) of the European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003 give ComReg the discretion in relation to the conduct of market analysis in relation to the market for conditional access to digital television and radio services broadcast to viewer and listeners in the European Community.

- i. analogue terrestrial radio transmission networks²⁵
- ii. analogue terrestrial television transmission network
- iii. cable television and radio transmission networks
- iv. satellite television and radio transmission networks.

4.33 In section 5 the level of substitutability between the various types of transmission services listed above is analysed (beginning with analogue terrestrial radio) to assess the boundaries of the relevant broadcasting transmission market in Ireland.

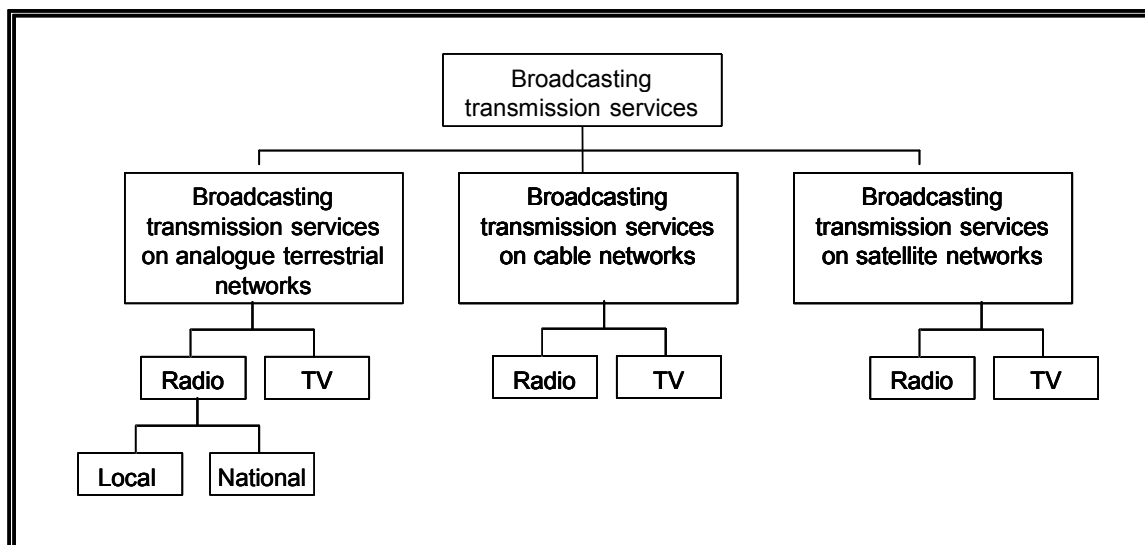


Figure 4.3: Wholesale Broadcasting Transmission Services

²⁵ Characterised by one national network and 27 local radio stations that are supplied with transmission services in various different ways

5 Market Definition

- 5.1 ComReg has carried out the following market definition exercise in accordance with the principles of competition law and has taken the utmost account of the *Relevant Markets Recommendation*, as well as the *SMP Guidelines*.
- 5.2 As indicated in the Scope of this Review, for Ireland, the wholesale broadcasting transmission market that is included in the *Relevant Markets Recommendation* comprises a number of different types of transmission services. As per the *SMP Guidelines*, it is appropriate to assess whether each type falls within the same market definition by starting with the smallest possible transmission market and then focusing on whether the closest possible substitute is in the same market. Figure 5.1 below sets out the structure of the approach taken in this section when assessing the boundaries of the relevant broadcasting transmission market in Ireland.

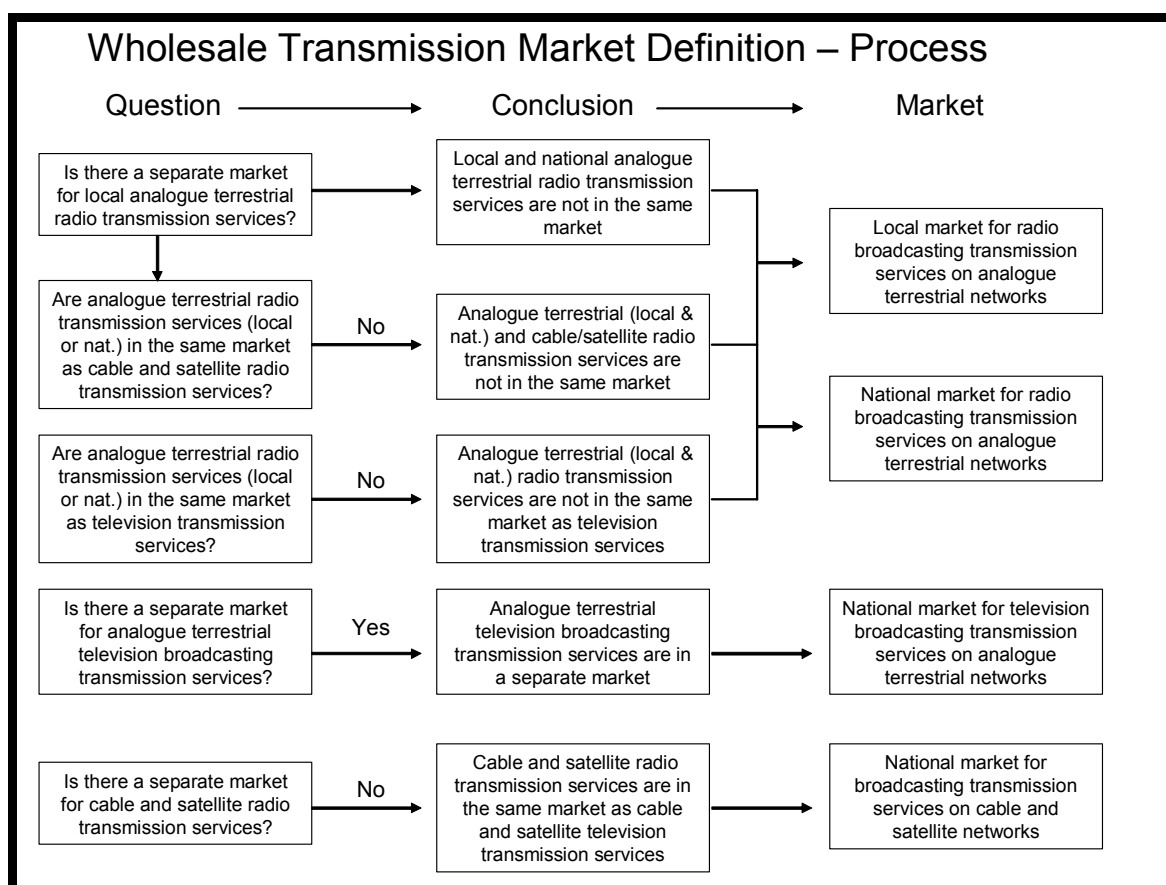


Figure 5.1: Market Definition – Process

- 5.3 As a starting point for assessing the boundaries of the relevant broadcasting transmission market, we will first focus on analogue terrestrial radio transmission services, which comprise both local/regional (hereafter local) and national transmission networks.

Question 1: Local and National Analogue Terrestrial Radio

Is there a separate market for local analogue terrestrial radio transmission services?

Demand-side substitutability

- 5.4 Local radio at the retail level is a principal source of local news whereas national radio is often regarded as a major source of national and international news. JNLR data indicates that local radio programme services, which have a regulatory obligation to carry local content, have over 45% market share of Irish radio listenership. This would indicate that there clear demand for local content.
- 5.5 Capacity on the analogue terrestrial network is limited, due to the inherent limitation resulting from the finite amount of available spectrum in the frequency bands allocated to radio broadcasting. Currently, all available analogue national radio terrestrial frequencies, representing 50% of the available spectrum in the FM band are assigned to RTÉ or Today FM. The remaining 50% of the available spectrum in the FM band is assigned to other broadcasters. In rural areas, where there is generally only one local radio station, 25% of the available FM spectrum is unassigned. In Dublin, local services and a number of community and special interest services currently occupy most of the spectrum allocated for non-national services. When the reorganisation of community and adjacent county local services which the BCI has underway is complete, approximately 10% of the available 20.5 MHz capacity in the FM band will be available for additional services in the Dublin area. There is a significant difference in the availability of capacity at the local level compared to that which is available for national transmission.
- 5.6 Frequencies for local radio transmission are assigned by ComReg to the Broadcasting Commission of Ireland. Individual broadcasters enter into a contract with the BCI for the supply of defined local radio services over a particular frequency within a certain coverage area. A local radio station is not entitled to broadcast nationally or indeed outside its own franchise area. Although a few local radio stations do purchase some local transmission services from RTNL, the demand for local analogue terrestrial radio transmission services arises from local radio stations set up specifically for that purpose, and distinct from national services. Thus regulatory constraints mean that a local radio station will only purchase local transmission, and a national radio station (e.g. Today FM) will only purchase national transmission. From a demand point of view, the two markets are distinct.

Supply-side substitutability

- 5.7 National analogue terrestrial radio transmission services supplied by RTNL provide coverage for over 95% of the population to all five national broadcasters. Local analogue terrestrial network operators might be able to collectively provide transmission services to achieve national coverage, in theory. However, due to the differences between local and national transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters co-located at sites), there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could provide a substitutable service. Consequently, it is very unlikely that the local analogue terrestrial network operators would be able to

act collectively and exert competitive pressure on the national terrestrial network operator.

Conclusion

- 5.8 At a retail level the demand for content differs as national and local networks do not provide the same service. At the wholesale level, local and national networks do not provide coverage on homogeneous conditions: local radio stations will purchase local transmission, national radio stations will purchase national transmission and the two are not substitutable. As a result, ComReg does not believe that the local analogue terrestrial networks and national analogue terrestrial network providing radio broadcast transmission services fall within the same relevant market.
- 5.9 However, when assessing the level of wholesale substitutability with other forms of transmission (e.g. cable), the arguments are relevant for both local and national analogue terrestrial radio networks and thus the following analysis focuses on substitutability with ‘analogue terrestrial radio transmission services’.

Question 2: Analogue terrestrial radio and cable and satellite radio

Are analogue terrestrial radio transmission services in the same market as cable and satellite radio transmission services?

Demand side substitution

- 5.10 As few as 2% of Irish radio listeners listen to radio via cable or satellite platforms on a daily basis²⁶. ComReg believes that it is very likely this derives from the importance placed on the mobility and portability afforded by analogue terrestrial transmission systems to radio end users, as discussed below.
- 5.11 There is a significant difference in retail pricing for analogue terrestrial and cable satellite radio services. Radio content broadcast over the analogue terrestrial radio networks is broadcast free to listeners. However, on the cable and satellite platforms, subscription services do not separate charges for TV and radio service (see Annex D). Also everyone with a TV set in Ireland is obliged to pay a licence fee, regardless of whether they watch free-to-air or subscription based TV.
- 5.12 Given the various different types of relationships and revenue flows in the broadcasting sector, and the range of factors other than price that impact on the attractiveness of a transmission platform, it is difficult to isolate the impact of a rise in price by a hypothetical monopolist on the behaviour of broadcasters. In particular, transmission services on the national analogue terrestrial network provide access to virtually all listeners, unlike such services on all other platforms (whether as a result of network coverage or mobility and/or portability limitations). The following analysis considers the complementarity of, the access characteristics of, and technical differences between particular networks on the behaviour of particular types of broadcasters currently operating in Ireland:

²⁶ TNSmrb Phonebus Survey September 2003. Sample size 1000, representative of the adult population (15+)

- radio broadcasters dependent on advertising revenues (e.g. Today FM) – if a hypothetical monopolist transmission services provider were to increase transmission charges, such a broadcaster would consider the impact of the increase relative to any change in coverage and audience share and advertising revenues that would result from switching platforms
- radio broadcasters funded (in whole or in part) through a government grant or the licence fee (e.g. 2FM) – if a hypothetical monopolist transmission services provider were to increase transmission charges, such a broadcaster would consider the impact of such an increase relative to the coverage of alternative platforms (bearing in mind the public service obligations that attend funding mechanisms of these types) and the potential for increases in grants or licence fees to off-set the transmission charge increase.

- 5.13 In light of these relationships, this demand side analysis will consider the significant relevant demand side factors at the wholesale level and, in view of their impact on the wholesale level, at the retail level, as a surrogate for the SSNIP test.
- 5.14 Identifying the functional coverage of each platform, i.e. the extent to which an end-user can receive transmissions on the platform, is an important consideration for a radio broadcaster's choice of provider. For example, transmissions on local, regional and national analogue radio platforms can be received by end-users with nothing more than an antenna (which may be integrated into the radio set). Transmission on analogue cable platforms can be received on most audio system radio receivers, but not on mobile or portable receivers. In contrast, transmissions on digital satellite platforms can only be received with a dish and a set-top-box (with or without conditional access). Similarly, transmissions on digital cable platforms require a set-top-box to be received. ComReg has sought to identify the listeners who are currently able to receive radio broadcasts on particular platforms.
- 5.15 Analogue terrestrial platforms (both national and local/ regional) allow listeners to listen while mobile and on portable radios. If a digital terrestrial platform is introduced, it will also allow mobile reception and reception on portable sets. Transmissions over both cable and satellite cannot be received by mobile listeners. In addition, cable transmissions and encrypted satellite transmissions cannot be received on portable sets. JNLR data indicates that 17% of radio listeners listen to the radio in cars (at drive time on week days). These listeners can only be listening to signals transmitted by an analogue terrestrial radio network.
- 5.16 As outlined above, broadcasters' revenue is earned from advertising, subscription or government grants. In Ireland both local and national radio stations use audience research as a basis for planning and selling advertising time. Additionally, broadcasters funded by the government aim to provide universal services. Therefore radio broadcasters' revenue is directly related to audience share set against the cost of being carried on that platform (although there are no costs involved in being carried on the cable platforms). As mentioned above, few Irish radio listeners listen to radio via cable or satellite platforms on a daily basis.
- 5.17 Radio broadcasters wishing to reach the widest radio audience would take these factors into account when deciding on the most appropriate platforms to be carried. Leaving the analogue terrestrial transmission network for cable and satellite would thus not appear to be an option for these broadcasters.

Supply side substitution

- 5.18 ComReg takes the view that there are no operators operating in Ireland that do not currently provide transmission services for the supply of radio broadcasting content and who could provide effective and immediate supply-side substitution at the wholesale level.
- 5.19 Wholesale supply-side substitution could come most easily from existing networks that are currently used to supply other services. In this respect, ComReg notes that, unlike analogue terrestrial networks, providers of cable and satellite broadcasting transmission services can both use unused capacity for the transmission of radio content and switch supply between capacity used to provide transmission services for deliver of television content to the delivery of radio content (subject to contractual restrictions on doing so and subject to demand and the commercial business case for pursuing such a switch).
- 5.20 However, as noted above, cable/satellite radio services will not support mobile and portable reception. From this analysis ComReg would suggest that analogue terrestrial radio is not a substitute for cable and satellite radio at the retail level which suggests that there are separate markets at the wholesale level.

Conclusion

- 5.21 ComReg does not believe that the provision of wholesale broadcasting radio services on analogue terrestrial transmission platforms on the one hand and on cable and satellite transmission platforms on the other fall within the same market.

Question 3: Analogue Terrestrial Radio and Television Transmission

Are analogue terrestrial radio transmission services in the same market as television transmission services?

General

- 5.22 End-users are unlikely to consider radio and television as adequate demand side substitutes but rather as complements. Television provides both visual and audio-stimulation and communication while radio is audio only. The production values, costs and subsequent content are often significantly different resulting in very different consumer uses and experiences. Radio, for example is generally regarded as a principal source of music where as television is often regarded as a major source of popular drama. Sports and Movies, which often involve a great deal of action and visual based activity, are regarded as key drivers of pay TV while radio is generally more speech or music based. As radio is audio only, users may listen to the radio whilst taking part in other activities such as jogging or driving a car. For these reasons it can be argued that the needs of radio-listeners would not be met by television and vice versa. Radio broadcasters wishing to reach the widest radio audience would take this into account when deciding on the most appropriate platforms to be carried.

a) analogue terrestrial television transmission services:

Demand side substitution

- 5.23 Along with limited substitutability at the retail level, there are technical barriers to radio broadcasters switching from an analogue terrestrial radio transmission system to an analogue terrestrial television transmission system (set out below) which would further limit the level of demand side substitutability at the wholesale level.

Supply side substitution

- 5.24 Providers of national analogue terrestrial television transmission services cannot switch to the provision of analogue terrestrial radio transmissions without incurring considerable switching costs. Analogue terrestrial TV platforms are designed for transmission on particular spectrum bands, these bands differ from those used for analogue radio. Accordingly, new transmitters and antenna systems would need to be fitted to provide analogue radio transmission services. Analogue radio services are not transmitted in spectrum bands allocated for television services, as the equipment for analogue radio reception and transmission has been designed for different radio-only frequency bands. While Digital Audio Broadcasting (DAB) is allocated spectrum in VHF Band III which is also used for TV in many countries in Europe, new DAB transmitters would be required and DAB has not launched in Ireland. Consequently, ComReg does not believe that wholesale supply-side substitutability for terrestrial analogue radio services could come from existing analogue terrestrial television networks.

b) Cable and satellite television transmission services:

Demand side substitution

- 5.25 The same demand side arguments regarding audience shares and mobility applied in question 2 above are relevant here. Radio broadcasters wishing to reach the widest radio audience would take this into account when deciding on the most appropriate platforms to be carried. Leaving the analogue terrestrial radio transmission network to be carried purely on cable and/or satellite transmission services would thus not appear to be an option for these broadcasters.

Supply side substitution

- 5.26 Wholesale supply-side substitution could come most easily from existing networks that are currently used to supply other services. In this respect, ComReg notes that providers of cable and satellite broadcasting transmission services can both use unused capacity for the transmission of radio content and switch supply between capacity used to provide transmission services for delivery of television content to the delivery of radio content (subject to contractual restrictions on doing so). However, providers of cable and satellite transmission would not constitute a viable alternative to an analogue terrestrial transmission network due to the absence of mobility and portability afforded to end users.

Conclusion

- 5.27 Due to the lack of demand and supply side substitutability at both the retail and wholesale level, local and national analogue terrestrial radio transmission services are not in the same market as television transmission services.

The relevant geographic market for analogue terrestrial radio transmission

- 5.28 ComReg considers that the relevant geographic market for the national analogue radio transmission network is national in scope. The network has national coverage and radio broadcasters seeking and acquiring broadcasting transmission services on the network are seeking or acquiring national reach, under a single arrangement. For this reason, ComReg does not believe that the local and/ or regional analogue networks providing radio broadcast transmission services fall within the same geographic market. They do not provide coverage on homogenous conditions. The relevant geographic market for local radio is defined by the fact that each franchise is local. Entities seeking transmission services on local networks do so based on the terms or conditions of their contracts with the Broadcasting Commission of Ireland (BCI), that differ for each franchise and the transmission services sought cannot transcend these local borders.

Conclusion

There are thus two distinct wholesale analogue terrestrial radio broadcasting transmission markets in Ireland:

- national radio broadcasting transmission services on analogue terrestrial networks
- local/regional radio broadcasting transmission services on analogue terrestrial networks.

Question 4: Analogue Terrestrial Television Transmission

Is there a separate market for analogue terrestrial television broadcasting transmission services?

Demand side substitution

- 5.29 As discussed in question 2 above, the various different types of wholesale relationships and revenue flows in the broadcasting sector, and the range of factors other than price that impact on the attractiveness of a transmission platform, make it difficult to isolate the impact of a rise in price by a hypothetical monopolist on the behaviour of broadcasters. It is also likely that broadcasters seeking access to the largest available number of viewers will treat platforms as complements, while simultaneously selecting the platform(s) on which to seek a presence.
- 5.30 For television broadcasters dependent on advertising revenues (e.g. TV3), if a hypothetical monopolist transmission services provider were to increase transmission charges, such a broadcaster would consider the impact of the increase relative to any change in coverage and audience share and advertising revenues that would result from switching platforms. Such broadcasters would also consider the balance between

the value that is attributed to their rights and the value attributed to transmission services. These relative values might net out in favour of either the broadcaster or the platform operator or be zero sum. The broadcaster will assess any change to this balance that results from an increase in transmission charges.²⁷

- 5.31 For television broadcasters funded in part through a government grant or the licence fee (e.g. Network 2), if a hypothetical monopolist transmission services provider were to increase transmission charges, such a broadcaster would consider the impact of such an increase relative to the coverage of alternative platforms (bearing in mind the public service obligations that attend funding mechanisms of these types) and the potential for increases in grants or licence fees to off-set the transmission charge increase.
- 5.32 In light of these relationships, the following analysis will consider the significant relevant demand side factors at the wholesale level and, in view of their impact on the wholesale level, at the retail level, as a surrogate for the SSNIP test.
- 5.33 A broadcaster wishing to deliver broadcast content to end-users in Ireland using television broadcasting transmission services can acquire such services from a number of providers over a number of platforms (*i.e.*, terrestrial, cable and satellite). The choice of provider is based on a number of factors, including:
- coverage and penetration;
 - technical aspects, including degree of digitisation;
 - capacity availability and limitations;
 - legal and regulatory requirements/barriers; and
 - cost differentials and impact on revenues of acquiring transmission on particular platforms.
- 5.34 Broadcasters are generally carried on multiple platforms. The decision whether or not a particular broadcaster is carried on a particular platform may be dictated by must-carry rules. Where it is not, broadcasters may decide whether or not they wish to be carried on an additional platform based on the incremental number of consumers it reaches, set against any associated cost or revenue generated from being carried on that platform and/or the incremental advertising revenues from the extra consumers reached.

(a) Coverage and Penetration

- 5.35 There are currently some differences between the coverage of the TV broadcasting transmission services available for delivery of broadcasting content to end-users. The coverage of each platform is approximately as follows:

²⁷ Some broadcasters using this business model also generate advertising revenues. Accordingly, their 'assessment' of the impact of an increase in transmission charges entails the factors listed in both this point and the preceding point.

- terrestrial analogue TV transmission: percentage of population – 92%, 98% and 99% for TV3, TG4 and RTÉ (RTÉ1 and NET 2), respectively; percentage of territory – in excess of 90%;
- digital satellite TV transmission: between 95 and 99% for both population and territorial coverage; and
- cable and MMDS TV transmission: 85% of homes are passed by the analogue platforms and 55% are passed by the digital platforms.

5.36 The other factor that must be considered, in addition to coverage, in identifying the functional coverage of each platform, is the extent to which an end-user can receive transmissions on the platform. For example, end-users must have access to an antenna to receive analogue terrestrial broadcasts, or to a dish and a set-top-box (with or without conditional access), to be able to receive digital satellite broadcasts and to a set-top-box to receive digital cable broadcasts.

5.37 At the end of June 2003, approximately 55% of Irish TV households were passed by digital cable platforms, and 85% of Irish TV households were passed by analogue cable platforms. Approximately 43% of all TV households subscribed to analogue cable services, slightly below the 48% reported in 2001. Approximately 6.5% of all TV households had subscribed to digital cable services, an increase from 3% over the previous 12 months. Digital cable subscriptions are expected to continue rising for at least the short term.

5.38 At the end of June 2003, 22% of TV households subscribed to digital satellite services. This percentage has increased from 12% in March 2001. However, the rate of new customer acquisition for retail satellite transmission appears to have slowed in the twelve months between June 2002 and June 2003.

5.39 Over the same period, the number of end-users receiving only analogue terrestrial TV transmissions decreased from 36% to 35%. However, all TV households remain able to receive analogue terrestrial TV transmissions, even if they also acquire satellite and cable transmissions.

5.40 A broadcaster seeking to assess the current reach of the alternative platforms would, therefore, consider TV household coverage and penetration rates of:²⁸

- terrestrial analogue – only means of reception in 34% of TV households and available (as either the only or a secondary means of reception) in up to 99% of TV households;
- digital cable – penetration of 6.5% of TV households, 55% of TV households passed;
- analogue cable – penetration of 43% of TV households, 85% of TV households passed; and
- digital satellite – penetration of 22% of TV households, coverage of between 95 and 99% of TV households.

5.41 As such, a broadcaster considering each platform will lose penetration of approximately 85% of TV households if it acquires transmission services only on the digital cable platforms and is not carried on the terrestrial analogue platform. Similarly, such a broadcaster will lose penetration of over 75% of TV households if it

²⁸ These figures reflect the position as at June 2003.

acquires transmission services only on a digital satellite platform and is not carried on the terrestrial analogue platform.

(b) Technical Aspects including Degree of Digitisation

Digitisation

5.42 Satellites broadcasting TV content into Ireland are digitised. Approximately 55% of TV households are passed by digitised cable platforms providing broadcasting transmission services in Ireland. The national terrestrial television broadcasting network is analogue, and it is not clear that it will be digitised during the timeframe of this review²⁹.

Bi-direction Functionality

5.43 The RTE analogue terrestrial platform has no return path or 'interactive' capability. As such, the platform cannot support the provision of 'interactive' or 'enhanced' TV content³⁰ and would be technically unsuitable for broadcasters seeking a platform able to deliver such services to end-users. Both the cable and satellite platforms are capable of providing some level of interactive services.

Technical Requirements to Switch Platforms

5.44 There are few technical impediments to consumers switching, at the retail level to acquire transmission services solely on the analogue terrestrial network. Virtually all TV households can receive such transmissions incurring minimal, if any, equipment-related switching costs. However, from the point of view of broadcasters, there are capacity constraints on the analogue terrestrial network which limit switching capability. These are discussed in the next section.

5.45 The digital cable platforms are currently operated as closed systems. As such, although these are pay-TV services, broadcasters do not enter into direct retail relationships with end-users. Cable subscribers pay a monthly rental charge for the set top box although the ownership of the set-top-box remains with the cable operators. The monthly rental charged to end-users combines programming, transmission and set-top-box price components that are not itemised. As a result, it is difficult to get an understanding of the level of subsidy costs incurred (if any) by the cable operators. There is no direct relationship between the provision of such set-top-boxes and the broadcasters. However, a broadcaster entering into a transmission arrangement with a digital cable platform operator must consider the likely effect of the need for their end-users to have access to such a set-top-box and the costs of re-authoring any

²⁹ A process to introduce digital terrestrial television ("DTT") on a commercial basis was launched and halted in 1999. A separate process for the award of a DTT licence (and the part sale of RTE's transmission network) was advertised in 2001. However, the single bidder withdrew its application in October 2002. While other avenues to ensure the introduction of DTT are currently being explored, it appears unlikely that a functioning DTT network could be providing commercial services within the next two years.

³⁰ The scope of the 'broadcast content' services contemplated in the Recommendation is not defined. However, services that constitute television programmes intended for reception by the public that do not amount to the provision of items of information or other messages on individual demand are defined as television broadcasting by the Television Without Frontiers Directive. As such, ComReg's analysis of transmission services acquired to deliver broadcast content is focussed on television programmes, enhanced TV services and, where they are not provided on demand, interactive TV services.

interactive services before entering into any such transmission arrangement with a cable platform operator.

- 5.46 There are a number of satellites on which broadcasters could acquire TV broadcasting transmission services. There are three SES ASTRA satellites and one Eutelsat satellite in the 28.5 degrees east orbital slot. As such, broadcasters could switch between acquiring transponder capacity on any of these satellites, without requiring end-users to acquire new dishes or to reposition their dishes significantly. Broadcasters that become part of the programme bouquet of an entity with established relationships with end-users do not need to ensure that their end-users acquire set-top-boxes. However, such broadcasters lose control of the subscriber relationship with the end-user (if they are subscription broadcasters), and the end-users effectively pay for their set-top-boxes over time (as part of their subscription charges). Broadcasters who maintain direct relationships with end-users and whose end-users have already acquired set-top-boxes that are compatible with their systems do not need to rely on end-users acquiring new set-top-boxes. However, those whose end-users have not acquired such set-top-boxes must acquire one to follow a broadcaster who moves to a satellite platform.

(c) Capacity Availability and Limitations

- 5.47 Capacity in the terrestrial TV broadcasting bands is constrained, due to the inherent limitations resulting from the available spectrum. There are currently four national TV programme services on the analogue terrestrial network. In order to ensure interference free national coverage for national TV programme services, a national service providing coverage on one frequency channel in an area renders unusable in that area the three other frequency channels typically available. As a result, the four national TV programme services effectively account, at any single location, for 16 frequency channels out of the 45 available. A further 24 frequency channels at any location are effectively reserved for future DTT channels (six national multiplexes). This would then leave scope for only one or possibly two further TV signals (either analogue or digital) at any single location.
- 5.48 It is understood that both SES Astra and Eutelsat have unused transponder capacity with a footprint that extends over Ireland. BSkyB lease transponder capacity directly from SES Astra and currently sub-lease some of this capacity on to third party broadcasters broadcasting into either or both of the Republic of Ireland or the United Kingdom.
- 5.49 There is little unused capacity on the cable platforms for TV programme services. Currently, cable operators are sharing capacity between their digital and analogue services. To increase the number of digital services beyond what is now available, they would have to remove analogue programme services. In this context, a single 8 MHz frequency channel can carry one analogue programme service or five to eight digital programme services. The addition of a new analogue programme service would also require the removal of existing programme services (e.g., either one analogue programme service or five to eight digital programme services). It appears unlikely with the growth of digital services that cable platforms would readily consider offering an additional analogue service unless required to so by regulatory obligation.

5.50 In the case of MMDS, which currently only operates in the 2.5 GHz band, there are alternative uses for this frequency band. CEPT has designated the 2500 – 2690 MHz as the main expansion band for UMTS/IMT-2000 services (also known as 3G). At this point in time it is unclear how much of this spectrum would be required by Irish mobile telecom operators to provide additional capacity in urban (hotspot) areas for UMTS/IMT-2000. The band can also be used for the provision of Fixed Wireless Access services. In a recent response to consultation³¹ ComReg stated that it proposed to review the feasibility of (Fixed Wireless Access) FWA being provided within the MMDS spectrum in the context of encouraging broadband roll-out and spectrum efficiency. Since the frequency plans for 3G services in the 2.5 GHz band are scheduled to be completed by the end of 2004, ComReg also intends to carry out a more detailed consultation based on the proposal to divide the 2500 – 2690MHz band between UMTS/IMT-2000 and MMDS. MMDS operators are requested to present a case to ComReg by 30 June 2004 detailing the extent of their requirements for continuing use of the 2.5 GHz band.

(d) Regulatory Barriers and Restrictions

5.51 The *Broadcasting Act 2001* sets out the existing Irish ‘must carry’ obligations (see Background). In addition, RTÉ is required to endeavour that, insofar as it is reasonably practical to do so, its services are available to the whole community in Ireland.³² However, RTÉ is not expressly required to use its affiliated network to do so, to the extent that another platform provides it with the means to reach ‘the whole community’.

5.52 It is difficult to foresee any circumstances in which RTÉ, TG4 and TV3 would leave the national analogue transmission network. At least 34% of TV households would have to incur considerable installation costs in order to receive those programme services. In addition, existing pay TV subscribers would incur additional costs if they sought to receive these programme services on multiple TV sets. It is unlikely that this would be a viable option during the timeframe of this review.

5.53 ComReg has taken into account the impact of these regulatory requirements on the commercial behaviour of the affected providers of wholesale TV broadcasting transmission services in its analysis.

(e) Cost Differentials and Impact of Acquiring Transmission on Different Platforms

Costs

5.54 As noted above, it is difficult to quantify the exact costs of acquiring transmission capacity on the various platforms available to a broadcaster seeking to provide broadcast content to Irish end-users because of the different financial models and the existence of “barter” agreements. There is a range of agreements in place for such acquisition, varying on both an inter-platform and an intra-platform basis. In addition to the effect of statutory and other regulatory obligations, it is important to note that the nature of the transmission arrangements in large part reflect the business models of

³¹ ComReg Document No 03/105: Use and Development of Radiocommunications Services in the 2500 – 2690 MHz Bands - Responses to Consultation Document 03/70

³² Section 5(5).

the entities. Where the broadcaster's content becomes part of the 'programme bouquet' offered to subscribers by the platform operator, there is effectively an exchange of value (*i.e.*, a license of the intellectual property rights held by the broadcaster in exchange for transmission and access to the platform operator's installed base of end-users).

- 5.55 Such an exchange of value may lead to a 'barter' arrangement, under which no charges are paid by either party, to an arrangement under which the transmission platform operator pays a net charge for the content or to an arrangement under which the transmission platform operator is paid for transmission services. Barter can also include conditional access, API licence and EPG placement costs. Where the broadcaster broadcasts in its own right and maintains its own relationships with end-users, there is no 'exchange of value' with the platform operator, in that the broadcaster does not license its intellectual property rights.
- 5.56 The analogue terrestrial network has historically charged TV3 and TG4 for the supply of transmission services. The platform operator was not structurally separated from its related broadcasters (*i.e.*, RTÉ 1 and NET 2). Accordingly, it did not charge or record accounting value for the transmission services provided to these entities.
- 5.57 It is anticipated that the accounting separation of the transmission and broadcasting arms of RTÉ will be complete and implemented within the timeframe of the current review. Accounting values will be given to the supply of transmission services to RTÉ 1 and NET 2.
- 5.58 Cable operators do not currently receive payment for carriage of RTÉ 1, NET 2, TG4 or TV3.³³ In addition, cable operators pay for the right to provide other TV programme services to their subscribers.
- 5.59 There are a number of different ways in which a broadcaster can acquire TV transmission services on a satellite. A broadcaster could lease transponder capacity on an SES ASTRA satellite or a EUTELSAT satellite directly from either operator or could sub-lease capacity from another entity with unused capacity on such a transponder. A transponder has an average digital capacity of approximately 38 Mbps, carrying approximately 8 to 10 digital programme services, using Statistical Multiplexing. As such, there is a minimum economic scale for an entity leasing a transponder in its own right (either in relation to its own programme services or programme services of other entities).
- 5.60 It is not usually financially viable for a broadcaster seeking satellite transmission capacity for a single programme service to lease capacity (and acquire the necessary multiplexing and other equipment). Such broadcasters generally either sub-lease capacity from an existing transponder lessee or must lease capacity (and acquire the necessary equipment) with a view to providing a multi-channel service including programme services from other broadcasters.
- 5.61 Pricing for transmission provided by satellite operators is in the region of €1 to €6 million per annum for a transponder capable of transmitting into Ireland, depending on a range of factors, including individual satellite type, orbital position, inclination of the orbit, footprint of the transponder and the services carried on other transponders on

³³ See discussion of statutory obligations in section (d), above.

the same satellite. Some entities with unused leased transponder capacity sub-lease such capacity to broadcasters.

Impact on Revenue of Selecting or Switching Platforms

5.62 The impact on revenues of the selection of, or a change in platform on broadcasters will differ, depending on a range of factors including the extent to which:

- they depend on advertising and sponsorship and, as result, must retain control over the insertion and placement of advertising into their programmes;
- their revenues (whether from advertising, subscription, public or other sources) are dependent on the number of end-users that can be reached on each particular platform;
- they must maintain a direct relationship with end-users to ensure revenues from non-programme sources; and
- the relationship between costs and revenues.

5.63 For example, a commercial, advertising funded, broadcaster such as TV3 would need to consider, if choosing or switching between the analogue terrestrial and a digital satellite or cable platform, factors including whether:

- a sufficient margin of its viewers would view it on, or follow it to the new platform, to maintain the ‘access to eyeballs’ that underpins advertising revenue;
- it would be able to establish or maintain the relationship with advertisers or would have to allow the platform operator to insert or place advertisements;
- the relative costs of transmission capacity on the platform, compared to the other possible platforms;
- it will be required to acquire equipment (*e.g.*, uplink/ encoding/ multiplexing facility) to be able to provide service in a manner that enables it to maintain existing revenue streams or acquire new streams;
- it might adopt risks that might have the effect of increasing its cost of capital; and
- the platform operator might pay for the rights to broadcast the broadcaster’s content, or off-set transmission charges against the perceived value of such rights.

5.64 As part of its investigation of the boundaries of competition in relation to the acquisition of wholesale broadcasting transmission services, to deliver broadcast content to end-users, ComReg has explored various aspects of customer behaviour at the retail level. While the focal point of the analysis is clearly at the wholesale level, since the demand for transmission at the wholesale level is a derived demand, customer demand at the retail level has a material impact at the wholesale level. It appears from ComReg’s investigations that demand at the retail level supports the identification of two markets at the wholesale level, wholesale transmission services on the analogue TV terrestrial platform on the one hand and wholesale transmission

services on the satellite and cable platforms on the other hand. This conclusion is based on the factors outlined below.

(f) Retail Market Considerations

- 5.65 The number of TV programme services end users receive by analogue terrestrial TV transmission is currently limited to four national programme services³⁴. In contrast, there are many more channels available on cable and satellite than those carried by analogue terrestrial TV transmission, including some devoted to specialist programmes, exclusive live coverage of many sporting events and films shown considerably earlier than they are on analogue terrestrial TV transmission.
- 5.66 The four national programme services on the analogue terrestrial transmission platform are free-to-air. Analogue terrestrial pay-TV services are not available. Cable and satellite services are normally available through subscription (with the exception of Freesat) in addition to the TV licence fee (a feature also referred to in the EC Decision on Bertelsmann/Kirch/Premiere, Case No IV/M.993, OJ (1999) L53/1). In addition ComReg has noted that digital cable and satellite have similar retail pricing. See Annex D for information on pricing of cable and satellite packages. In relation to multi-room viewing, additional costs can be incurred by the cable and satellite end user when seeking to acquire access to subscription services in more than one room.
- 5.67 ComReg also notes (a feature also referred to in the UK by the Competition Commission "*NTL Incorporated and Cable & Wireless Communications plc: A report on the proposed acquisition*", Cm4666, 2000) that the normal concept of substitutability is not applicable, since before consumers subscribe to cable or satellite they must purchase TV sets and licences, which automatically allow access to analogue terrestrial TV programme services. It seems likely that if consumers choose to acquire satellite or cable it is because they want a service that is different from and additional to analogue terrestrial TV rather than a substitute.
- 5.68 It therefore seems unlikely that a monopoly supplier of all cable and satellite services would be prevented from sustaining prices 5 to 10 per cent above competitive levels by the existence of analogue terrestrial TV.
- 5.69 Consumer surveys conducted on behalf of ComReg indicate that the amount and type of content available on cable and satellite platforms is a highly relevant factor for end-users in deciding whether to acquire only broadcasting services delivered over cable or satellite networks. For example, 41% of respondents state that they have never subscribed to cable or satellite services because they are happy with the range of Irish and/ or British programme services that are available to them without subscription. This would indicate that analogue terrestrial television is not in the same market as cable and satellite television.

³⁴ RTÉ 1, Network 2, TG4 and TV3

Supply-side substitutability

- 5.70 ComReg is of the view that there are no operators operating in Ireland that do not currently provide broadcasting transmission services for the supply of broadcasting content that could provide effective and immediate wholesale supply-side substitutes to analogue terrestrial television broadcasting services..
- 5.71 Supply-side substitution is said to occur when, in response to a rise in the price of a particular product or service, suppliers of other products or services switch, without the need for significant new investments, to supplying the product whose price has risen within a reasonable timeframe (thereby rendering the price increase unprofitable). ComReg is adopting the one year timeframe that is generally considered to be appropriate under competition law. Consideration therefore, has been given to whether there are means by which supply-side substitution can occur. ComReg has considered whether a competing supplier would in fact be forthcoming (mere hypothetical supply-side substitution will not be sufficient) but has concluded that this is an unlikely scenario in the absence of other forms of regulatory intervention.
- 5.72 Wholesale supply-side substitution could come most easily from existing networks that are currently used to supply other services. In this respect, ComReg notes the recent launch of unencrypted BBC programme services on satellite (a type of service known as “Freesat”), using transmission capacity on an SES ASTRA satellite. It appears possible that other broadcasters might also decide to provide unencrypted services on satellite (using the Freesat model), either using capacity leased directly from SES Astra or Eutelsat or sub-leased capacity, during the timeframe of the current review.³⁵ Due to the characteristics of the national analogue terrestrial transmission network, with sunk costs and network effects, it is highly unlikely that it could be economically replicated.
- 5.73 In addition, ComReg is aware of the possibility of potential competition through TV broadcasting transmission services on xDSL networks and at 12GHz. However, it is unclear that such services will be effectively and immediately available.
- 5.74 Finally, as noted previously, it is uncertain that national digital terrestrial TV transmission services will be introduced in Ireland during the timeframe that is the subject of this review. It appears that there is a separate product market for wholesale analogue terrestrial television broadcasting transmission services, for the following lines:
- the analogue terrestrial television broadcasting platform provides different coverage and penetration to cable and satellite platforms
 - the service provided to broadcasters via the analogue terrestrial network is different to that provided by cable and satellite platforms, in terms of the degree of digitisation and bi-directional functionality. At the retail level, there would be switching costs for consumers in moving from terrestrial TV to cable or satellite reception (though these switching costs would not arise if consumers moved in the other direction);

³⁵ ComReg is aware of the potential for copyright-derived issues that prevent the broadcasters of particular channels from showing programmes for which the right to broadcast in Ireland is already held by another entity and from availing themselves of this platform.

- at the wholesale level, there are capacity constraints on the analogue terrestrial network which limit switching capability.
- RTÉ is obliged to make its services available to the whole community, and to provide transmission to TV3;
- broadcasters currently carried on the analogue terrestrial transmission network are unlikely to move away from it, as they would lose access 44% of consumers who do not have pay-TV;
- as analogue terrestrial television is free-to-air and requires only the payment of a TV licence fee, it does not act as a constraint on the pricing of cable and satellite television services;
- there are no operators or platforms not currently providing analogue terrestrial television services which are likely to do so within a reasonable timeframe (in this case, a year or so).

The relevant geographic market

5.75 A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.³⁶ In Ireland TV broadcasters acquire wholesale analogue terrestrial transmission services on a national basis. ComReg thus takes the view that the relevant geographical market for wholesale broadcasting services on analogue terrestrial platforms in Ireland is national in scope.

Conclusion

5.76 It appears that there is a separate national market for wholesale analogue terrestrial television broadcasting transmission services in Ireland.

Question 5: Cable and Satellite Radio Transmission

Is there a separate market for cable and satellite radio transmission services?

5.77 As outlined in the previous section, for a broadcaster wishing to deliver broadcast content to end users in Ireland using television broadcasting transmission services, cable and satellite platforms are seen as substitutable when the factors below are examined:

- coverage and penetration;
- technical aspects, including degree of digitisation;
- capacity availability and limitations;

³⁶ See the Commission Notice on Market Definition, SMP Guidelines, ComReg's Market Data Information Notice (ComReg Document No. 02/117) and *United Brands v. Commission*, [1978] ECR 207, for additional guidance.

- legal and regulatory barriers; and
- cost differentials and impact on revenues of acquiring transmission on particular platforms.

5.78 Further, as outlined under Question 2 above, for a broadcaster wishing to deliver broadcast content to end users in Ireland using radio broadcasting transmission services, cable and satellite platforms are seen as substitutable when the following factors are examined:

- mobility/portability;
- retail pricing
- functional coverage and penetration
- capacity

5.79 Consideration is now made as to whether cable and satellite radio services are in the same market as cable and satellite television transmission services.

5.80 At the retail level virtually all pricing for cable and satellite subscription services does not separate charges for TV and radio services. Close to all packages available to end users include both radio and TV services (see Annex C).

5.81 Coverage and household penetration of TV and radio broadcasting transmission services available for delivery of broadcasting content to end-users on cable and satellite platforms are comparable, as outlined above. The coverage on both platforms is the same for the transmission of radio and TV services.

5.82 Satellite platforms broadcasting TV and radio content into Ireland are digitised. Approximately 55% of TV households are passed by digitised cable platforms broadcasting both TV and radio transmission services in Ireland.

5.83 Radio and TV broadcasters are funded in similar ways i.e. advertising revenues, subscription, a government grant or the licence fee, or for a licence to the broadcasters' intellectual property rights. As outlined above, the impact on revenue of selecting or switching between cable and satellite platforms would be significant for both radio and TV broadcasters.

5.84 As discussed above, currently both cable and satellite platform operators are sharing capacity between their radio and TV (digital) services and TV (analogue) services. Analogue radio programme services on cable are provided in the VHF-FM radio band. However, due to the small amount of capacity currently used to deliver radio services via analogue cable plus the fact that TV services in Western Europe are not distributed in the VHF-FM band, ComReg does not consider that this will have an effective impact on the cable and satellite broadcasting transmission services market in Ireland within the timeframe of this review.

5.85 However, in a recent survey commissioned by ComReg, of the 1000 adults sampled, only 2% claimed to listen to radio via satellite or cable on a daily basis. Due to this low take up, it is unlikely that radio broadcasters see much benefit in the purchase of cable and/or satellite transmission services. This is supported by the fact that radio broadcasters in Ireland do not purchase transmission services from cable or satellite

platforms. It may be that these programmes services are carried to make the cable and satellite retail packages more attractive to end users by merely adding to the volume of programme services offered.

5.86 In conclusion, ComReg considers that there is no separate market for cable and satellite radio transmission services. TV and radio services are sold as a bundled package on cable and satellite platforms. Without going into the question of whether the retail products themselves are complements or substitutes, ComReg considers that there is a single product market for radio and television transmission services over cable and satellite.

Relevant Geographic Market

5.87 A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.³⁷

5.88 On the basis of this definition, ComReg takes the view that the relevant geographical market for wholesale broadcasting services on cable and satellite platforms in Ireland is national in scope. This view is based primarily on the following factors:

- The footprint of satellite transponders with coverage of the Republic of Ireland is national. Transponder capacity is not leased to specific regions within the possible footprint of the relevant transponder. As such, capacity is acquired nationally;
- While none of the cable platforms are national in scope, they acquire rights to UK radio programme services from UK rights holders seeking to reach as broad a subscription base as possible across Ireland. In this respect, the cable platform operators compete with satellite platform operators in providing transmission capacity to such broadcasters; and
- The retail prices for Sky's packages are uniform across the Republic. The cable broadcasters are competing with these packages, irrespective of regional or local variations in their own charges.

Conclusion

5.89 ComReg is of the view that cable and satellite radio transmission services are in the same market as cable and satellite television transmission services and that this market is national in scope.

Conclusions of Market Definition

5.90 ComReg has carried out the above market definition exercise in accordance with the principles of competition law and has taken the utmost account of the Relevant Markets Recommendation, as well as the SMP Guidelines.

³⁷ See the Commission Notice on Market Definition, SMP Guidelines, ComReg's Market Data Information Notice (ComReg Document No. 02/117) and *United Brands v. Commission*, [1978] ECR 207, for additional guidance.

5.91 ComReg has carefully considered the market for “**broadcasting transmission services, to deliver broadcast content to end-users**”, however, ComReg has decided to define wholesale transmission markets appropriate to national circumstances that differ from the *Relevant Markets Recommendation* and, following national consultation in accordance with Regulation 19 of the *Framework Regulations and Article 6 of the Framework Directive*, ComReg intends to submit this proposal to the Commission and the national regulatory authorities of other Member States as a draft measure in accordance with Regulation 20 of the *Framework Regulations and Article 7 of the Framework Directive*.

5.92 The wholesale transmission markets which ComReg has defined are as follows:

- the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks
- the wholesale market for radio broadcasting transmission services on local analogue terrestrial networks
- the wholesale market for television broadcasting transmission services on analogue terrestrial networks
- the wholesale market for broadcasting transmission services on cable and satellite networks

Threshold for ex-ante regulatory intervention

5.93 When defining these markets ComReg has taken utmost account of the *Relevant Markets Recommendation* and, accordingly, ComReg:

- has based the identification of the relevant markets on the competition principles developed in the Commission Notice on the definition of relevant markets for the purposes of Community competition law,
- was consistent with the *SMP Guidelines*, and
- assesses below whether the following three criteria are satisfied:
 - i. the presence of high and non-transitory entry barriers whether of structural, legal or regulatory nature;
 - ii. the market must be a market the structure of which does not tend towards effective competition within the relevant time horizon; and
 - iii. the application of competition law alone would not adequately address the market failure(s) concerned.

5.94 Paragraph 16 of the *Relevant Markets Recommendation* indicates that when identifying electronic communications markets as justifying possible *ex ante* regulation, the above three criteria should be applied cumulatively, so that failing any one means that the market should not be identified as justifying possible *ex ante* regulation. ComReg below assesses the four wholesale broadcasting transmission markets that have been identified against these criteria, as the threshold for determining whether market analysis is appropriate.

- 5.95 The **local/regional analogue terrestrial radio transmission market** is characterised by low barriers to entry where up to 60% of undertakings have ownership over their own transmission networks, with a further 20% providing at least part of their own transmission requirements. It appears that it is relatively easy for new entrants to self-supply in this market. New entrants also have the option of purchasing part or all of their local transmission requirements from RTNL or existing mobile and cable network operators. ComReg thus deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in this transmission market.
- 5.96 Although the **cable and satellite broadcasting transmission market** is characterised by high barriers to entry it displays some characteristics such that it will tend over time towards effective competition. The Freesat model gives broadcasters additional options with respect to choice of platforms and cable/MMDS operators are now free to compete in other areas as exclusivity has now been removed. While the investment required to duplicate existing cable networks may not be commercially viable, the same does not necessarily apply to MMDS. While the BBC does not currently sub-lease capacity to TV broadcasters, there is the potential for broadcasters other than BSkyB, such as the BBC or Turner Broadcasting Systems Europe Ltd, to become an alternative source of transmission capacity, potentially through sub-leasing capacity from satellite operators such as SES Astra or Eutelsat, during the timeframe of the current review. Further, ComReg is aware that there is interest in supplying services in the 12 GHz band, and has been preparing Regulations to permit potential entrants or existing MMDS or Deflector operators to use frequencies in this band to provide the transmission services necessary to provide retail broadcasting services to end users. Thus, the dynamics of this market are such that ComReg deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in this transmission market, although ComReg reserves the right to reassess the competitive conditions in this market in the future if required.
- 5.97 Both the **national analogue terrestrial radio and television broadcasting transmission markets** are characterised by high and non-transitory entry barriers. These barriers have persisted for some time and both markets display characteristics such that they will not tend over time towards effective competition. There are currently no alternatives to RTNL's national analogue terrestrial transmission network. There has never been an alternative national terrestrial transmission network and it would not appear financially viable for an existing operator to construct an alternative network within the review timeframe.
- 5.98 Further, it appears that competition rules are insufficient of themselves (absent *ex ante* regulation) to address the lack of effective competition in the relevant market for national analogue terrestrial TV or national analogue terrestrial radio transmission services. As a general rule, competition rules find it difficult to address the competitive harm which can occur in wholesale market relationships in the context of a network industry. Where such competition law-based investigations have taken place, they have tended to be subject to lengthy delays. Accordingly, ComReg consider that *ex ante* regulation is best positioned to address the competitive failures arising from provision of national analogue terrestrial transmission services, and should at the very least be considered to be an appropriate complement to competition law in the short to medium-term.

Conclusion

5.99 ComReg thus deems it unnecessary (under this review time frame) to undertake an assessment of effective competition in the following transmission markets, although ComReg reserves the right to reassess the competitive conditions in these markets in the future if required:

- the wholesale market for radio broadcasting transmission services on local analogue terrestrial networks
- the wholesale market for broadcasting transmission services on cable and satellite networks

5.100 ComReg deems it appropriate to undertake market analyses to assess the level of effective competition in the following wholesale markets:

- the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks
- the wholesale market for television broadcasting transmission services on analogue terrestrial networks

This is addressed in the following section.

Consultation Questions for Market Definition

Question 5.1. Do you agree with the above conclusions regarding the market definition exercise? Please provide a reasoned response.

Question 5.2. Do you agree with the suggestion that it is unnecessary to undertake an assessment of effective competition in the cable and satellite broadcasting transmission market?

Question 5.3. Do you agree that it is appropriate to undertake market analyses to assess the level of effective competition in the national analogue terrestrial radio and television broadcasting transmission markets? Please elaborate in your response and provide economic evidence in support.

6 Market Analysis

Background

- 6.1 Having first identified a relevant market, ComReg is required to conduct an analysis of whether or not the market is effectively competitive by reference to whether any given undertaking or undertakings are deemed to hold significant market power (SMP) in that market. Recital 27 of the Framework Directive states that a relevant market will not be effectively competitive “where there are one or more undertakings with significant market power”. Regulation 25 (1) of the Framework Regulations states that:
- 6.2 *“A reference in these Regulations ... to an undertaking with significant market power is to an ... undertaking (whether individually or jointly with others) [that] enjoys a position which is equivalent to dominance of that market, that is to say a position of economic strength affording it the power to behave to an appreciable extent, independently of competitors, customers, and, ultimately, consumers”.*
- 6.3 Accordingly, the Framework Regulations align the concept of SMP with the concept of dominance under EC competition rules.³⁸ An undertaking may be deemed to have SMP either individually or jointly with other undertakings in a relevant market. In addition, where an undertaking has SMP on a relevant market, it may also be deemed to have SMP on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking

Procedure for Market Analysis

- 6.4 A dominant position is found by reference to a number of criteria and its assessment is based, on a forward looking market analysis based on existing market conditions.
- 6.5 Market share is often used as a proxy for market power. Although a high market share alone is not sufficient to establish possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market will be in a dominant position.
- 6.6 EC case-law provides guidance in relation to the extent to which market shares of between 40 and 50% are indicative of market power. More particularly, such shares do not permit an automatic conclusion that market power exists. Market power must

³⁸ Recital 25 of the Framework Directive states that the new SMP definition “is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities”. Paragraph 70 of the SMP Guidelines notes that, as a consequence of this alignment, NRAs will have to ensure that their decisions are in accordance with the Commission’s practice and the relevant jurisprudence of the European Courts on dominance. In *Hoffmann-La Roche v. Commission*, a case concerning Article 82 EC, the ECJ stated that a dominant position: “relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers” (at paragraph 38). Case 85/76, *Hoffman-La Roche & Co. AG v. Commission*, [1979] ECR 461.

be determined having regard to the strength and number of competitors, including their relative market shares.³⁹

- 6.7 According to established EC case-law,⁴⁰ very large market shares - in excess of 50% - of themselves, save in exceptional circumstances, provide strong evidence of the existence of a dominant position.
- 6.8 The criteria to be used to measure market share of the undertaking(s) concerned will depend on the characteristics of the relevant market.
- 6.9 According to the SMP Guidelines,⁴¹ the existence of a dominant position cannot be established on the sole basis of large market shares. A range of additional criteria are traditionally used to determine the existence of dominance.⁴² However, because these criteria mostly relate to the scale or behaviour of the undertaking relative to other undertakings active in the market (of which there are none in the two markets being considered for the existence of SMP in this review), only the following criteria would be relevant for the purposes of this analysis.
- 6.10 Potential competition or the threat of market entry, either on a long-term or “hit and run” basis, is amongst the main competitive constraints on incumbent firms in a relevant market, where such entry can be shown to be highly probable, timely and appreciable. The threat of market entry will be diminished by the presence of barriers to entry.
- 6.11 Countervailing buyer power exists where customers have the ability within a reasonable timeframe to resort to credible alternatives (*e.g.*, not to purchase or to retaliate) if the supplier decides to increase prices or to undermine the conditions of delivery.
- 6.12 Evidence of market behaviour such as the ability to adopt anti-competitive practices can be indicative of competitive harm. Many economists take the view that dominance, or SMP, can best be identified through an entity’s ability to engage successfully in anti-competitive behaviour which cannot be restrained by the independent actions of competitors, customers or consumers. Community case-law supports such a view.⁴³ Such practices could entail a number of different elements,

³⁹United Brands v. Commission op cit. at paras 109 – 110.

⁴⁰Case C-62/86, *AKZO Chemie BV v. Commission*, [1991] ECR I-3359.

⁴¹Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

⁴²These other criteria include:

- overall size of the undertaking;
- economies of scale;
- economies of scope;
- technological advantages or superiority;
- product/services diversification;
- vertical integration;
- a highly developed distribution and sales network;
- easy or privileged access to capital markets and financial resources;
- barriers to expansion; and
- active competition on non-price factors.

⁴³United Brands v. Commission op cit. at paras 2, 65 and 66.

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including excessive pricing, discrimination in relation to pricing or other terms and conditions.

Assessment of Market Power

- 6.13 ComReg will consider the existence of SMP in each of the proposed Article 7 markets identified, starting with the proposed market for wholesale national analogue terrestrial radio transmission services and then the proposed market for wholesale national analogue terrestrial TV transmission services.

Wholesale National Analogue Terrestrial Radio Broadcasting Transmission Market

Market Share

- 6.14 There is only one supplier of wholesale national analogue radio terrestrial transmission to supply retail radio broadcasting services to end-users in Ireland. Accordingly, it has 100% share of the relevant market.
- 6.15 Although a significant market share is a precondition for establishing dominance, it does not of itself imply that a firm must necessarily hold a dominant position in the relevant market. However a firm with 100% share of the relevant market would only be found non dominant in exceptional circumstances. Additional relevant factors are examined below.

Barriers to Entry

- 6.16 The proposed national market for the supply of wholesale broadcasting services on the analogue terrestrial platform to supply retail radio broadcasting services to end-users in Ireland is characterised by high and non-transitory entry barriers.
- 6.17 There are substantial financial costs involved in the establishment of a national terrestrial radio transmission network and the current public resistance to the construction of masts for radio communications either in centres of population or in scenic rural areas together with the costs would make the proposition unattractive to potential new entrants. As RTNL is a national provider and well established in the market it would be difficult for a new entrant to offer a sufficiently differentiated service that would attract radio broadcasters away from RTNL
- 6.18 Capacity on the analogue terrestrial network is limited, due to the inherent limitation resulting from the finite amount of available spectrum in the frequency bands allocated to radio broadcasting. Currently, all available analogue national radio terrestrial frequencies, representing 50% of the available spectrum in the FM band are assigned to RTÉ or Today FM. The remaining 50% of the available spectrum in the FM band is assigned to other broadcasters.

Countervailing bargaining power

- 6.19 ComReg is of the preliminary view that there is limited countervailing buyer power, at the wholesale level, as regards the proposed relevant wholesale market for analogue terrestrial national radio transmission services for the provision of radio content to end-users in Ireland.
- 6.20 ComReg, has noted that “barter like” negotiations occur between broadcasters and platform operators at the wholesale level in relation to the carriage of and rights to

broadcast, programme services. However this relationship does not appear to exist in the national analogue terrestrial radio transmission market.

- 6.21 RTÉ's transmission company, RTNL, is obliged under the Broadcasting Acts 1960 to 2001 to transmit, by analogue means, sound broadcasting services on behalf of the Authority.
- 6.22 Today FM, the only national radio programme service contractor, has no alternative national analogue transmission network it can use, and RTÉ does not purchase services from it. Accordingly, it cannot credibly threaten not to purchase from RTÉ, or to retaliate against it. ComReg is of the view, therefore, that countervailing buyer power does not exist such as to render RTÉ non-dominant in this market.

Potential Competition

- 6.23 There is and has only been one player active in the national analogue terrestrial radio transmission market and no new parties have entered the market. Capacity in the terrestrial radio broadcasting bands is finite. There are currently five national radio programme services on the analogue terrestrial network
- 6.24 All VHF-FM frequencies allocated for national radio programme services are currently assigned to either RTÉ or Today FM. It is a matter for the BCI to decide whether the allocation of frequencies for additional national radio programme services in the VHF-FM band should be planned. If it were to do so, ComReg would endeavour to co-ordinate such planned allocation with the relevant UK authorities.
- 6.25 Local analogue terrestrial network operators might be able to collectively provide transmission services to achieve national coverage. However, due to the differences between local and national transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters co-located at sites), there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could provide a substitutable service. Consequently, it is very unlikely that the local analogue terrestrial network operators would be able to put the current single national terrestrial network operator under competitive pressure.
- 6.26 In addition, as noted in the background section of this document, ComReg believes that the supply of radio broadcasting transmission services over xDSL platforms (whether as streamed and audio or otherwise) provides an alternative transmission service for the provision of radio content to listeners. However, as noted, radio content cannot be received by mobile listeners or on portable sets using this means of transmission.
- 6.27 Additionally, ComReg does not believe that broadcasting transmission services over cable and satellite platforms provides a viable alternative for the provision of radio content to listeners as it does not offer mobility to end users.
- 6.28 Finally, it is uncertain that a digital terrestrial platform capable of providing substitutable transmission services for radio content will be established within the timeframe of this review.

Evidence of market behaviour

- 6.29 Identifying evidence of market behaviour or anti competitive behaviour in relation to the market under examination requires consideration of the impact of the particular dynamics of the ‘value’ exchanged between the provider(s) of transmission services and those acquiring such services.
- 6.30 For example, the identification of unfairly high prices requires the application of a test of ‘unfairness’ based on the relationship between the price and the “economic value” of the services provided.⁴⁴ Economic value is to be assessed by reference to the costs of the relevant services supplied or by reference to prices for comparable services.
- 6.31 At present, RTÉ does not have separate accounting systems for its broadcasting (RTÉ) and transmission (RTNL) divisions. It is therefore difficult to understand the operating costs of managing the network and to match costs with the price charged for transmission to third parties. For example it is possible that the price of leasing transmission services can rise substantially, and still be non discriminatory due to a proportionate increase to the operating cost. This lack of transparency makes it difficult to assess whether transmission services are charged on a fair, reasonable and non-discriminatory basis.
- 6.32 In the future, as and when prices and costs become more transparent (*e.g.* .in accordance with the new structural separation and accounting publication in relation to the national terrestrial analogue radio transmission network), it may be possible to conduct assessments of the fairness of prices.
- 6.33 In essence, price discrimination consists of not treating like cases alike or of treating different cases in the same manner. However, there are many factors that can lead to the payment of different prices for the same or similar services. In addition, it is important to ensure that ‘like’ is being compared to ‘like’.

Conclusion

- 6.34 RTNL should be designated as having SMP in the relevant market for the provision of wholesale analogue national terrestrial broadcasting transmission services for the provision of radio content to Irish end-users.
- 6.35 In the short to medium term, considering foreseeable technological developments and anticipated customer behaviour, there is nothing to suggest to ComReg that the SMP enjoyed by RTNL will be diluted in any meaningful way in the absence of appropriate and proportionate *ex ante* regulatory measures.
- 6.36 There is nothing to indicate that there exists sufficient countervailing market power to exert competitive pressure on RTNL.

⁴⁴Case 26/ 75 General Motors v. Commission [1975] ECR 1367.

Wholesale National Analogue Terrestrial Television Broadcasting Transmission Market

Market Share

- 6.37 There is only one supplier of wholesale national analogue terrestrial TV transmission services in Ireland. Accordingly, it has 100% share of the proposed relevant market which strongly suggests that RTNL has SMP in that market.
- 6.38 As mentioned above, although a significant market share is a precondition for establishing dominance, it does not of itself imply that a firm must necessarily hold a dominant position in the relevant market. For this same reason, additional relevant factors are examined below.

Barriers to Entry

- 6.39 The proposed wholesale market for the supply of wholesale broadcasting services on the analogue terrestrial platform to supply TV broadcasting services to end-users in Ireland is characterised by high and non-transitory entry barriers.
- 6.40 There are substantial financial costs involved in the establishment of a national terrestrial TV transmission network and the current attitudes to masts together with the costs would make the proposition unattractive to potential new entrants. As RTNL is a national provider and well established in the market it would be difficult for a new entrant to offer a sufficiently differentiated service that would attract broadcasters away from RTNL
- 6.41 Capacity in the terrestrial TV broadcasting bands is finite. There are currently four national TV programme services on the analogue terrestrial TV network. As a result of the requirement to provide interference-free national coverage, ComReg considers that a national service providing coverage on one frequency channel in an area renders unusable, in that area, the three other frequency channels which typically provide coverage in adjacent areas. As a result, four national TV programme services effectively account, at any single location, for 16 frequency channels out of the 45 available. If, in accordance with the current DTT proposals, six digital multiplexes were transmitted nationally, they would effectively account, at any single location, for a further 24 frequency channels. This would leave scope for one, possibly two, further TV signals (analogue or digital) at any single location. However, if fewer DTT multiplexes were transmitted nationally, more local or regional TV signals could be accommodated using the available spectrum

Countervailing Bargaining Power

- 6.42 ComReg is of the preliminary view that there is limited countervailing buyer power, at the wholesale level, as regards the proposed relevant wholesale market for analogue terrestrial national radio transmission services for the provision of radio content to end-users in Ireland.
- 6.43 ComReg, has noted that “barter like” negotiations occur between broadcasters and platform operators at the wholesale level in relation to the carriage of and rights to broadcast, programme services. However this relationship does not appear to exist in the national analogue terrestrial television transmission market.

- 6.44 The Transmission Company is obliged under the Broadcasting Acts 1960 to 2001 to transmit, by analogue means, the television programme contractor services on behalf of the Authority.
- 6.45 TV3, the only national television programme service contractor, has no alternative national analogue transmission network it can use, and RTÉ does not purchase services from it. Accordingly, it cannot credibly threaten not to purchase from RTÉ, or to retaliate against it. ComReg is of the view, therefore, that countervailing buyer power does not exist such as to render RTÉ non-dominant in this market.

Potential Competition

- 6.46 There is and has only been one national player active in the analogue terrestrial TV transmission market and ComReg is not aware of any new party planning to enter the market at a national level. As already stated, capacity in the terrestrial TV broadcasting bands is finite, due to the inherent limitations resulting from the available spectrum.
- 6.47 If, in accordance with the current DTT proposals, six digital multiplexes were transmitted nationally, they would effectively account, at any single location, for a further 24 frequency channels. This would leave scope for one, possibly two, further TV signals (analogue or digital) at any single location. ComReg considers that it is unlikely that a DTT platform capable of provided substitutable transmission services for TV content will be established within the timeframe of this review.
- 6.48 If fewer (or no) DTT multiplexes were transmitted nationally, more local or regional TV signals could be accommodated using the available spectrum.
- 6.49 ComReg considers that it is unlikely that the potential for supply of TV broadcasting transmission services over xDSL platforms (as streamed video and audio or otherwise) provides a viable alternative transmission service for the provision of television content to end-users.

Evidence of Market Behaviour

- 6.50 The nature of the transactions involving the acquisition of broadcasting transmission capacity to provide TV content to end users is similar in nature to the radio broadcasting transmission market which is discussed in section 5 above. Lack of transparency, makes it impossible to accurately breakdown and compare the prices charged for such transmission services and therefore ComReg cannot ascertain whether or not those charges are fair, reasonable and non-discriminatory.
- 6.51 When prices and costs become more transparent (*e.g.*, in accordance with the new structural separation and accounting publication obligations), it may be possible to conduct more quantified assessments of the fairness of prices.

Conclusions

- 6.52 RTNL should be designated as having SMP in the proposed relevant market for the provision of wholesale analogue terrestrial broadcasting transmission services for the provision of TV content to Irish end-users.
- 6.53 There is nothing to indicate that there exists any countervailing market power such as to exert any competitive pressure on RTNL.

Forward Look

- 6.54 In the short to medium term, considering foreseeable technological developments and anticipated customer behaviour, there is nothing to suggest to ComReg that the SMP enjoyed by RTNL will be diluted in any meaningful way in the absence of appropriate and proportionate *ex ante* regulatory measures.
- 6.55 ComReg intends to monitor market developments of the providers of wholesale broadcasting transmission services for the provision of content to Irish end-users to ensure the ongoing validity of this conclusion during the term of the period under review.

Consultation Questions for Market Analysis

Question 6.1. Do you agree with the above conclusions regarding the market analysis exercise? Please provide a reasoned response.

7 Designation Of Undertakings With Significant Market Power

7.1 Having regard to the sections above, particularly sections 5 and 6, ComReg is of the view that, in accordance with the Framework Regulations:

- RTNL should be designated as having SMP on the wholesale national market for provision of wholesale national analogue terrestrial broadcasting transmission services for the provision of radio content to Irish end-users, and
- RTNL should be designated as having SMP on the wholesale market for provision of wholesale national analogue terrestrial broadcasting transmission services for the provision of TV content to Irish end-users.

Consultation Questions for Designation of Undertakings with SMP

Question 7.1. Do you agree that RTNL should be designated as having SMP on the wholesale markets for provision of wholesale national analogue terrestrial broadcasting transmission services for the provision of radio and TV content to Irish end-users? Please elaborate in your response and provide economic evidence in support.

8 Proposed Market Remedies

Wholesale national analogue terrestrial radio broadcasting transmission services

- 8.1 In light of ComReg's identification of the relevant market and its subsequent market analysis, ComReg takes the view that the most appropriate remedy to apply to the undertaking listed in Section 7 of this Consultation, in accordance with the principles set forth in the *Framework* and *Access Directives* and the *Framework* and *Access Regulations*, is based on the principles of transparency and non-discrimination for charges and other conditions for the provision of wholesale analogue terrestrial radio broadcasting transmission services. ComReg will consider whether it is appropriate and proportionate to impose an accounting separation obligation in addition to the obligations that it already intends to impose on RTNL, in order to ensure the efficacy of the transparency and non-discrimination obligations. ComReg is aware that under its Broadcasting Charter, RTNL will be obliged to produce some level of accounting separation. ComReg will assess whether this is sufficient for the purposes set out above and reserves the right to impose such an obligation in accordance with the principles set forth in the *Framework* and *Access Directives* and the *Framework* and *Access Regulations*.
- 8.2 In proposing transparency and non-discrimination for charges for such services, ComReg will take into account the following factors:⁴⁵
1. The transparency requirement will apply to all of the conditions for the provision of such services, not only price, providing a means to simplify and accelerate negotiation, reduce disputes and give confidence that such conditions are not discriminatory.
 2. The transparency requirements will specify the manner in which the various conditions are to be made available, the identity of the entities to which such conditions must be made available and the form in which such conditions are provided, taking into account the nature and purpose of the various conditions.
 3. ComReg will structure the non-discrimination obligation to ensure that RTNL does not distort the competitive dynamics at either the wholesale or retail level through the conditions of supply of wholesale analogue terrestrial radio broadcasting transmission services. ComReg will be particularly concerned to ensure that the obligation makes provision for ensuring that competition between entities affiliated to RTNL and entities that are not affiliated to RTNL is not distorted at the retail level.

ComReg intends to consult fully on these remedy proposals in a subsequent Consultation.

⁴⁵ Regulation 9(5) of Access Directive allows, where in exceptional circumstances ComReg intends to impose on operators with SMP obligations for access or interconnection other than those set out in Regulations 10 to 14, ComReg shall submit to the European Commission a request for permission, to impose such other obligations.

Wholesale national analogue terrestrial television broadcasting transmission services

- 8.3 In light of ComReg's identification of the relevant market and its subsequent market analysis, ComReg takes the view that the most appropriate remedy to apply to the undertaking listed in Section 7 of this Consultation, in accordance with the principles set forth in the *Framework and Access Directives* and the *Framework and Access Regulations*, is based on the principles of transparency and non-discrimination for charges and other conditions for the provision of wholesale analogue terrestrial TV broadcasting transmission services. ComReg will consider whether it is appropriate and proportionate to impose an accounting separation obligation in addition to the obligations that it already intends to impose on RTNL, in order to ensure the efficacy of the transparency and non-discrimination obligations. ComReg is aware that under its Broadcasting Charter, RTNL will be obliged to produce some level of accounting separation. ComReg will assess whether this is sufficient for the purposes set out above and reserves the right to impose such an obligation in accordance with the principles set forth in the *Framework and Access Directives* and the *Framework and Access Regulations*.
- 8.4 In proposing transparency and non-discrimination for charges for such services, ComReg will take into account the following factors:
1. The transparency requirement will apply to all of the conditions for the provision of such services, not only price, providing a means to simplify and accelerate negotiation, reduce disputes and give confidence that such conditions are not discriminatory.
 2. The transparency requirements will specify the manner in which the various conditions are to be made available, the identity of the entities to which such conditions must be made available and the form in which such conditions are provided, taking into account the nature and purpose of the various conditions.
 3. ComReg will structure the non-discrimination obligation to ensure that RTNL does not distort the competitive dynamics at either the wholesale or retail level through the conditions of supply of wholesale analogue terrestrial TV broadcasting transmission services. ComReg will be particularly concerned to ensure that the obligation makes provision for ensuring that competition between entities affiliated to RTNL and entities that are not affiliated to RTNL is not distorted at the retail level.

ComReg intends to consult fully on these remedy proposals in a subsequent Consultation.

Consultation Questions for Proposed Market Remedies

Question 8.1. Do you agree with the proposed market remedies outlined above? Please elaborate in your response.

9 Regulatory Impact Assessment

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

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

- 9.2 ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with significant market power⁴⁶. ComReg is obliged further to impose obligations listed in Regulation 10 to 14 of the Access Regulations⁴⁷ which are as follows:

- obligation of transparency
- obligation of non-discrimination
- obligation of accounting separation
- obligation of access to, and use of, specific network facilities
- price control and cost accounting obligations.

- 9.3 ComReg is obliged under Regulation 9(6) of the Access Regulations to impose obligations ‘based on the nature of problem identified, proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations’

- 9.4 ComReg will conduct a Regulatory Impact Assessment which will form part of the decision making process and would invite comments on the proportionality of the remedies list in section 8 of this consultation and the justification of the remedies listed.

⁴⁶ Regulation 27(4) states ‘Where the regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate’

⁴⁷ Regulation 9(1) of Access Regulations

Consultation Questions for Regulatory Impact Assessment

Question 9.1 Respondents are asked to provide views on whether the remedies in section 8 are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impacts of these remedies on end-users, competition, the internal single market and technological neutrality.

10 Submitting Comments

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

The consultation period will run from 22nd October to 3rd December 2003 during which the ComReg welcomes written comments on any of the issues raised in this paper.

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

Having analysed and considered the comments received, ComReg will review the wholesale broadcasting transmission market review and publish a report on the consultation which will inter alia summarise the responses to the consultation.

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

Annex A Background of the provision of wholesale television broadcasting transmission services in Ireland

When compared to the other Member States, Ireland has a relatively small and highly concentrated broadcasting sector, with 1.3 million TV homes⁴⁸ and two-thirds of all TV households subscribing to pay television services (Pay TV). The main in the broadcasting sector are:

- ntl Incorporated
- Chorus Communications Ltd
- Casey Cablevision Ltd
- BSkyB Ltd
- EUTELSAT
- SES ASTRA
- RTÉ
- TG4 and
- TV3.

ntl Incorporated is a NASDAQ listed cable and telecommunications company. ntl entered the Irish market in 1999, when it acquired Cablelink Ltd, Ireland's largest cable and MMDS operator from RTÉ and Telecom Eireann (the state owned predecessor to Eircom). ntl:Ireland, a subsidiary of ntl Incorporated, offers analogue and digital TV services to homes in the areas of Dublin, Waterford and Galway. MMDS technology is also used for approximately 5% of the network. ntl:Ireland also offers business telecommunication services including voice, data and internet products.

Chorus Communication Limited, previously known as Princes Holdings Limited, was formed between 1990 and 2000, through a process of consolidation of a number of privately owned cable operators in Ireland (Irish Multichannel, Suir Nore Relays, and CMI Cable), and adopted its current branding on 2nd October 2000. It is a venture between Independent News and Media plc, Liberty Media Corporation and BCI International Investments, LLC. BCI International Investments, is owned by Bill Bresnan who has over forty years experience in the US cable industry. Independent News & Media PLC's core businesses are newspaper publishing, electronic media (principally radio broadcasting) and outdoor advertising. Liberty Media Corporation holds interests in a number of entertainment networks such as Discovery Channel, USA Interactive, QVC, Encore, and STARZ! Liberty's assets also include interests in international video distribution businesses; international telephony and domestic wireless telephony; plant and equipment manufacturers; and other businesses related to broadband services. Chorus offers TV and radio programme services (both analogue and digital) over its Multi-point Microwave Distribution Systems (MMDS) in the rural areas of Ireland and over its cable

⁴⁸Figure is based on 2002 CSO estimate of approximately 1.3 million households with a TV

networks in urban areas including Cork, Limerick, Sligo, Ennis, Naas, Newbridge and Kilkenny. Other activities include the provision of voice telephony, cablenet broadband and business communication services.

Casey Cablevision Ltd. is a privately owned company, which operates in the Dungarvan area of County Waterford. It offers analogue broadcasting services via a fibre network. Casey also provides “Cablesurf”, the company’s high-speed cable modem offering, which provides two-way cable Internet service.

British Sky Broadcasting Group Plc (BSkyB) is a subsidiary of the News Corporation Group, whose activities include, films entertainment, cable TV programming, television operations, newspapers, publishing and, supply of conditional access and subscriber management systems and the creation and distribution of on-line programming. BSKyB has a public and institutional shareholder ownership (approximately 65%). BSKyB Group Plc is made up of the wholly owned subsidiaries, such as BSKyB Ltd which provides broadcasting transmission services, Sky, the programme service provider, and SSSL, providing conditional access and subscriber management services.

BSkyB Ltd is the operator of the UK’s largest digital television platform, Sky digital. BSKyB is also the main Direct-to-Home (DTH) supplier in Ireland. The service became Ireland’s first digital TV service on December 18th 1998. BSKyB switched off the analogue service in 2001.

BSkyB Plc wholly owns and operates a number of programme services, including Sky One, Sky News, Sky Travel, the Sky Sports services and the Sky Movies services. Currently, BSKyB is the only service provider which offers interactive services and applications in Ireland. Sky Active, BSKyB’s interactive service became available on the Irish market in November 2002. Sky also earns wholesale revenue from the sale of programme content, Sky’s basic and premium programme services, to cable/MMDS operators. Sky also earns advertising revenue from the sale of airtime slots on its own and other third party programme services.

Sky Subscribers Services Ltd (SSSL), a fully owned subsidiary of BSKyB, provides conditional access services to Sky Active and to BSKyB for its Sky Sports Extra access services on the digital satellite platform.

SES ASTRA, a company registered in Luxembourg, is the operator of ASTRA, a European broadcast satellite system. SES ASTRA is wholly owned by SES GLOBAL, which is active in Europe, USA, the Americas, Asia and Asia-Pacific and also owns SES AMERICOM and has holdings in AsiaSat, NSAB, STAR ONE and Nahuelsat. 13 ASTRA satellites provide capacity for the transmission of TV, radio and IP-based content within Europe. SES ASTRA currently transmits more than 1000 digital and analogue radio and television programme services over 176 transponders to approximately 92 million TV households within its footprint. Services are made available in Ireland using the 19.2 and 28 degrees east orbital slots.

Eutelsat is incorporated under French law and headquartered in Paris. It operates subsidiaries in the USA, Brazil and Italy. Its satellites have coverage of Europe, the Middle East, Africa, Asia, eastern North America and South America. Its core

business is the provision of transponder capacity for the transmission of video broadcasting, business network solutions, broadband internet access, multicast file delivery and streaming solutions, mobile communications and positioning. Broadcasters who use Eutelsat include BBS, Sky Italia, France Television, Deutsche Welle, TF1, CNN, BSkyB and TPS. Its satellites use orbital slots from 15 degrees west to 76 degrees east. Services are made available in Ireland using transponders on the satellite in the 13 and 28.5 degrees east orbital slots.

Radio Telefís Éireann (RTÉ) is the Irish national public service broadcaster. A statutory corporation, it provides a range of radio (since 1926) and television services (since 1961), and a large range of ancillary services. Under the *Broadcasting Act 1960* and subsequent legislation, RTÉ is under the control of the RTÉ Authority, appointed by the Government. As the national public service broadcaster, RTÉ is subject to a number of regulatory obligations:-

- RTÉ TV/radio broadcasting services must be available nationally
- RTÉ Transmission Network Limited's ("RTNL's")⁴⁹ transmission network has no must-carry obligations but transmission services must be available nationally
- RTNL has no must-carry obligations as defined for Cable/MMDS however it fulfils RTÉ's obligations under the Broadcasting Legislation to provide Radio and Television services.

The national television and sound broadcasting services required to be maintained by RTÉ must have the character of a public service, continue to be a free-to-air service and be made available, insofar as it is reasonably practicable, to the whole Irish community.

RTÉ is required, by the *Broadcasting Act 2001*, to endeavour to ensure, insofar as it is reasonably practicable to do so, that the services that it provides are available to the whole community. RTÉ terrestrial network makes the TV and radio services that it broadcasts "universally available", on a "free-to-air" basis. It also provides network facilities for other content providers, under the *Radio and Television Act 1988*. Historically, RTÉ treated its transmission network as a budgeted activity within the group. In 1997, in preparation for the attempted launch of DTT, RTÉ began to restructure the organisation to reflect its present separation of a transmission (RTNL) and broadcasting (RTÉ Broadcasting) arm. This was driven by the perception that separate transmission and broadcasting functions would better suit future demands of the organisation. RTÉ's new structure requires its radio, television and the network divisions to operate as separate business divisions. RTÉ receives payment from TV3 for the provision of up-links to third parties to feed programme services to satellite transponders. RTÉ provides up-linking services from its headquarters in Donnybrook. RTÉ does not lease transponder capacity from SES ASTRA.

In 1994, **Teilifís na Gaeilge (TG4)** was established as a fully owned subsidiary of RTÉ. TG4 is a Government initiative for public service broadcasting and is funded

⁴⁹ RTNL is RTE's transmission operation providing analogue terrestrial transmission services to TV and radio broadcasters in Ireland.

by the Exchequer. In 2002 the annual funding to TG4 from the Exchequer was €21.8m.

TV3, Ireland's first National, commercially-funded, independent television network, launched in September 1998 and is a joint venture between CanWest Global Communications Corp. and Granada Media .

The *Broadcasting Act 2001* sets out the existing Irish 'must carry' obligations. In particular, it requires:

- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, an analogue cable system, must retransmit specified analogue free-to-air services, which currently include RTÉ1, NET 2, TG4 and TV3, on request;⁵⁰
- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, a digital cable system, must retransmit specified digital free-to-air services, which currently include RTÉ 1, NET 2, TG4 and TV3, on request;⁵¹
- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, an analogue MMD system, must retransmit specified analogue free-to-air services, currently TV3, on request;⁵² and
- holders of licences authorising the retransmission of programme material by means of a system that is, in whole or in part, a digital MMD system, must retransmit specified digital free-to-air services, currently TV3, on request.⁵³

In addition, RTÉ is required to endeavour that, insofar as it is reasonably practical to do so, its services are available to the whole community in the Republic of Ireland.⁵⁴

⁵⁰ Section 37(5)(a).

⁵¹ Section 37(5)(b).

⁵² Section 37(6)(a).

⁵³ Section 37(6)(b).

⁵⁴ Section 5(5).

Annex B: Background of the provision of wholesale radio broadcasting transmission services in Ireland

Radio broadcasting services have been provided in Ireland since 1926. All Irish radio stations are available to listeners via analogue terrestrial transmission networks and all national and some local/regional radio stations are available on cable/MMDS platforms. In addition, RTÉ's radio programme services are transmitted using satellite transponder capacity. Some radio stations, both national and local, are also streamed over the Internet.

There are currently five national radio stations:⁵⁵

- RTÉ Radio 1 (news, current affairs, chat shows, some music),
- 2FM (popular music),
- Lyric FM (classical),
- Radio na Gaeltachta (Irish language service) and
- Today FM.

Four of these radio stations are run by RTÉ. The fifth station, Today FM, is Ireland's only national independent radio station.

Radio Telefís Éireann (RTÉ) is the Irish national public service broadcaster. A statutory corporation, it provides a range of radio (since 1926) and television services (since 1961), and a large range of ancillary services. Under the *Broadcasting Act 1960* and subsequent legislation, RTÉ is under the control of the RTÉ Authority, appointed by the Government. As the national public service broadcaster, RTÉ is subject to a number of regulatory obligations:-

- RTÉ TV/radio broadcasting services must be available nationally
- RTÉ Transmission Network Limited's ("RTNL's")⁵⁶ transmission network has no must-carry obligations but transmission services must be available nationally
- RTNL has no must-carry obligations as defined for Cable/MMDS however it fulfils RTÉ's obligations under the Broadcasting Legislation to provide Radio and Television services.

The national television and sound broadcasting services required to be maintained by RTÉ must have the character of a public service, continue to be a free-to-air service and be made available, insofar as it is reasonably practicable, to the whole Irish community.

⁵⁵ Joint National Listenership Research (JNLR) figures – December 2002

⁵⁶ RTNL is RTÉ's transmission operation providing analogue terrestrial transmission services to TV and radio broadcasters in Ireland.

RTÉ's income is derived principally from advertising and the licence fee. Both FM and AM are used to distribute RTÉ Radio 1 and 2FM services. All RTÉ's national radio services can be accessed via its analogue terrestrial radio transmission network, a subscription to the major cable/MMDS and satellite digital broadcasting platforms or over the Internet.

RTÉ Transmission Network Limited (RTNL) runs the only national analogue terrestrial transmission network for radio. RTÉ is obliged to ensure, in so far as it is reasonably practicable to do so, that the services provided by it are free-to-air and available to the whole community in the State⁵⁷. It meets this obligation broadcasting over its own transmission network. RTÉ also provides network facilities for other radio broadcasters (*i.e.*, independent commercial broadcasters), under the *Radio and Television Act 1988*. Historically, RTÉ treated its transmission network as a budgeted activity within group operations. However, under its new corporate structure, radio, television and network divisions now operate as separate business divisions. RTNL provides national analogue terrestrial radio transmission services to each of its radio stations and to the independent radio broadcaster Today FM. Through its relationship with RTÉ, Today FM achieves approximately 96% population coverage. RTÉ is contracted to provide Today FM with national transmission services up to 2007. RTÉ also provides transmission services to a number of local/regional radio operators throughout the State.

Today FM, operating since 1997, has contractual agreement with the Broadcasting Commission of Ireland (BCI). Today FM can be accessed nationally via RTÉ's analogue terrestrial radio transmission network, over the major cable/MMDS platforms (to subscribers) or streamed over the Internet.

There are currently twenty-seven independent **local/regional** radio stations operating in specified franchise areas, including six in Dublin. These independent stations are operated by commercial companies which provide local radio broadcasting services with their income derived from advertising and sponsorship. Although each independent radio station has a designated franchise area, they collectively cover the whole State. All local/regional radio stations can be accessed over an analogue receiver, some as part of cable/ MMDS packages, and some are streamed over the Internet.

UK stations, community stations, other foreign stations and unlicensed stations make up the balance of radio listenership in the State.

The major **cable/ MMDS** and **satellite** platform operators (*i.e.*, ntl, Chorus and BSkyB) carry some or all of the national radio stations in their analogue and digital packages. In addition, Chorus and ntl include some local/ regional stations in their digital packages. Cable/ MMDS operators provide transmission services directly to each station, but RTÉ national radio stations sub-lease SES-ASTRA satellite transponder capacity from BSkyB. No payments are made by radio operators for transmission on cable/ MMDS networks and ComReg has not been informed of payments made by national radio stations for satellite transmission. RTÉ also provides satellite up-linking services to each of the national radio stations.

⁵⁷ Broadcasting Act 2001-Part II 5(5)

Most **local/regional** radio stations own part or all of their transmission networks. Some lease transmission services from RTNL to ensure coverage of all of their franchise area. The mobile network operators also provide some local radio programme service providers with access to sites for analogue terrestrial transmission services.

Annex C: Programme offerings available on the cable and satellite platforms 2003

Satellite	
Television	<p>BSkyB – more than 250 programme services (including those broadcast at staggered times and 45 box office services), including RTÉ 1, NET 2, TG4 and TV3, in a range of packages including:</p> <ul style="list-style-type: none"> • basic packages with over 65 TV programme services, • premium packages, adding approximately 60 movie or 10 sports programme services; and • 8 stand-alone services (including adult services);
Radio	<p>Sky – 60 radio programme services, including RTÉ Radio 1, RTÉ Radio 2 FM and Radio na Gaeltachta, in a range of packages including for example:</p> <ul style="list-style-type: none"> • BBC radio programme services, Virgin radio, RTÉ 1, 2 FM, Lyric FM, RNaG.

Cable	
Television Analogue	<p>Analogue cable – between 13 and over 20 programme services (varying by network) available in basic and premium packages:</p> <ul style="list-style-type: none"> ○ basic packages of between 13 and 15 programme services (including RTÉ 1, NET 2, TG4 and TV3) and 15 radio programme channels; and ○ premium packages adding 4 or 5 sports or movie

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	services, respectively
Television Digital	Digital cable – between 33 and 58 programme services in addition to those in the basic analogue package, ⁵⁸ made available as: <ul style="list-style-type: none"> ○ 25 to 38 additional basic services; ○ 3 additional sports services; ○ 4 to 15 additional movie services; and ○ up to 8 additional adult, movie or individual subscription services.
Radio Analogue	Between 6 and 17 radio programme services ⁵⁹ (including RTÉ Radio 1, 2 FM, Lyric FM and Radio na Gaeltachta, and BBC radio services)
Radio Digital	Between 8 and 11 radio programme services ⁶⁰ in addition to those in the basic analogue package, ⁶¹

⁵⁸ The channels in the basic analogue package are also supplied, digitised, as part of the basic digital package.

⁵⁹ NTL offers 17 radio channels in Dublin and Waterford (including 2 and 1 local station(s) respectively) and 16 in Galway (including 2 local stations). Chorus only offers radio channels in the digital package while Casey offers 6 radio channels on its analogue network.

⁶⁰ Chorus offers 11 digital radio channels in Cork (including 1 local radio station) and 8 digital channels in Limerick.

⁶¹ The channels in the basic analogue package are also supplied, digitised, as part of the basic digital package.

Annex D: Subscription packages prices in 2003

Analogue subscription packages in 2003 are priced as follows:

ntl cable	Cost (monthly)	€17	€50	
	Programme Services	Basic	Basic + Sky sports and movies	
ntl MMDS	Cost (monthly)	€19	€51	
	Programme Services	Basic	Basic + Sky sports and movies	
Chorus cable	Cost (Limerick and Cork)	€25	€47	€71.5
	Programme Services	Basic	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies
	Cost Swords/ Malahide	€23	€45	€69.5
	Programme Services	Basic	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies
Chorus MMDS	Cost	€23.5	€45.5	€62.5
	Programme Services	Basic	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies
Casey cable	Cost	€20.66	€39.66	€52
	Programme Services	Basic	Basic + Sky sports 1, 2 & 3	Basic + movies

Digital subscription packages in 2003 are priced as follows:

ntl cable	Cost	€28.50	€49	€60
	Programme Services	Basic (40)	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies
ntl MMDS	Cost	€36.05	€56.55	€67.55
	Programme Services	Basic (40)	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies
Chorus cable	Cost	€27	€49	€60

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	Programme Services	Basic (30)	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies
Chorus MMDS	Cost	€28	€50	€74.5
	Programme Services	Basic	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies
Sky digital	Cost	€27	€49	€60
	Programme Services	Basic (70)	Basic + Sky sports 1, 2 & 3	Basic + Sky sports & movies