



Commission for
Communications Regulation

Market Review: Broadcasting Transmission Services in Ireland

Non-confidential responses received to
ComReg consultation document 12/77

Submissions to Consultation

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Submissions Received from Respondents

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This publication of non-confidential submissions includes page numbers for reference in ComReg's response to consultation.

For reference, the numbering sequence supersedes numbering on individual operator responses.

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Parts of the submissions to consultation have been redacted due to confidentiality. This includes:

- Appendices 1 to 3 in eircom Ltd.'s submission to consultation
- Text in the body of Irish TV's submission to consultation
- Appendices 1 and 2 and text in the body of RTÉ / RTÉNL's submission to consultation
- Schedule A (appendices 1 to 6) in TV3's submission to consultation

1: Broadcasting Authority of Ireland



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18th September 2012

Mr. Jason Cleary
Commission for Communications
Regulation
Irish Life Centre
Abbey Street
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Re 12/77 Market Review: Broadcasting Transmission Services in Ireland

Dear Jason,

Further to your consultation paper and draft decision 12/77 – Market Review: Broadcasting Transmission Services in Ireland – please find enclosed response of the BAI. The BAI welcomes the publication of the consultation paper and draft decision and appreciates the opportunity afforded to respond on the issues arising in the markets specified.

The BAI submission builds on previous representations and submissions made by the BAI to ComReg regarding the provision of broadcasting transmission services in Ireland. The BAI's experience in this regard, garnered through its regulatory role with broadcasting contractors and applicants for DTT multiplex licences, has been reflected to a large extent in the consultation paper itself and, where this was the case, the BAI has not reiterated its experience at length but concurred with the position as set out by ComReg.

Furthermore, it is the view of the BAI that the direct experience of BAI broadcasting contractors who have dealt with RTÉ and RTÉNL over many years, as well as the experience of applicant groups who sought multiplex licences in 2008 but who failed subsequently to conclude a transmission contract with RTÉNL, would provide valuable and more detailed insights on a number of matters raised in the consultation.



The BAI would be happy to elaborate on or clarify any aspect of its submission, should you so require.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Celene Craig", is written over a thin horizontal line.

Celene Craig
Deputy CEO

Encl (1)

Broadcasting Authority of Ireland
Submission to ComReg

Consultation Paper and Draft Decision 12/77

Market Review: Broadcasting Transmission Services in Ireland

18th September 2012

Market A

Q. 1. Do you agree with ComReg's preliminary conclusions on the television and radio retail market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI concurs with Comreg's preliminary conclusions on the television and radio retail market assessment.

From a television perspective, the television retail market is national in scope and the free-to-air and pay television platforms are in separate retail markets. There are clear differences between free-to-air and pay platforms in terms of cost, choice, features, substitution and consumer migration as set out by ComReg in Sections 4 and 5 of the consultation document.

In terms of radio, the latest JNLR Ipsos MRBI Survey indicates that approximately 87% people listen to radio on a daily basis. The same survey indicates that less than 8% have accessed an internet radio stream in the past week. From a radio perspective, analogue terrestrial radio services predominate and are distinct from radio services transmitted over other platforms. This is supported by the share of listening via terrestrial radio receivers and also by the fixed, portable and mobile manner in which radio is consumed in Ireland. Commercial radio services can be delineated on a national and local/regional basis in terms of audience and advertiser expectations, their clearly defined franchise areas, lack of demand substitutability and, in particular, the tendency towards self provision of transmission facilities at a local/regional level versus "turn key" or hybrid outsourced networks at a national radio level.

Q. 2. Do you agree with ComReg's preliminary conclusions on the wholesale market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

In terms of the wholesale market, it is appropriate to consider that national television and radio broadcasting transmission services should be considered as part of the same market. Both are characterised by the requirement to use existing high power transmission sites at established elevated locations to provide terrestrial radio and television services for the purposes of both coverage and cost efficiency.

National terrestrial transmission is planned primarily on the use of the existing RTÉNL co-ordinated sites. Almost all national terrestrial television and radio broadcasters have contractual arrangements with RTÉ or RTÉNL for a fully managed transmission solution. The exception is Newstalk which is planned for mono reception on a quasi-national basis. Nonetheless, Newstalk requires the use of a number of RTÉNL transmission facilities to ensure adequate reception. The

hybrid¹ transmission network, used by Newstalk, is very much an exception due to frequency planning, financial and other technical constraints.

No meaningful, effective substitutes are available that can provide national free-to-air transmission coverage for television or radio stations. It is highly unlikely that any new terrestrial network could be established during the three-year period of the proposed decision. It is also worth noting that most broadcasters are required via contractual or legislative provisions to provide their services on a free-to-air terrestrial basis and, therefore, other platforms, such as cable, satellite or internet based, while available for carriage purposes, would not facilitate broadcasters in meeting the free-to-air requirement.

The BAI concurs with ComReg's assessment of the wholesale market and the elements of the two markets as outlined on Pages 71 and 76 of the consultation document. Market A acknowledges the requirement of national analogue radio as well as digital terrestrial television multiplex operators to access broadcast distribution and transmission services directly from RTÉNL. Market B recognises that access to transmission (and the associated share of costs for such transmission) for broadcasters who wish to be carried on a DTT Multiplex is primarily a matter for RTÉ. The differentiation between RTÉNL for Market A and RTÉ for market B is appropriate having regard to RTÉ functions as designated under statute.

Q. 3. Do you agree with ComReg's preliminary finding that each criterion of the three criteria test is satisfied in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI concurs with ComReg's draft finding that the first criterion is satisfied for Market A. The consultation document outlines the significant and non-transitory barriers to entry (e.g. legal, contractual, technical, structural) some of which the BAI has elaborated upon, in a previous submission and as set out in our responses to questions above. While some provisions of the 2009 Broadcasting Act are helpful, they do not necessarily address issues of transparency, non-discrimination, and the vertically integrated nature of RTÉ as a broadcaster and sole national terrestrial transmission platform operator through its subsidiary RTÉNL.

The BAI also concurs with ComReg's draft finding that the second criterion is satisfied for Market A. The market structure does not tend towards effective competition within the relevant time horizon. By illustration, this has been evident in recent developments in respect of DTT. The absence of a commercial DTT multiplex operator results in a situation where a television content provider seeking digital terrestrial carriage has no option for transmission except to deal with RTÉ. This is also the case in relation to analogue national FM radio where four of the six national radio services are operated by RTÉ. Over the past twenty-four years of independent radio broadcasting, there has been little or no incentive for a

¹ Hybrid network of local radio, telecommunications and RTÉNL transmission sites.

transmission operator to attempt to compete in the provision of national FM or terrestrial television services. The timeframe required to do so would be, at best, long term, given the requirements to acquire sites, obtain planning permission, develop masts and other infrastructure etc. The cost benefits of such an approach, the limited commercial opportunities arising and the duration of broadcasting licences versus the period required for a return on investment, makes such an approach unrealistic.

The BAI concurs with ComReg's draft finding that the third criterion is satisfied for Market A. In the regulatory experience of the BAI, *ex post* competition law alone is insufficient to address the market failure(s) concerned. Adequate competition does not exist in the provision of national terrestrial broadcasting networks nor is it likely to do so in the timeframe under consideration. The BCI and its successor the BAI failed to conclude a contract with either Boxer or One Vision – applicants for commercial DTT multiplex contracts (such services requiring transmission and distribution arrangements that fall within the definition of Market A). Both parties failed to conclude multiplex contracts with the BAI, citing an inability to reach agreement with RTÉNL on a transmission contract as being the principle reason for such a failure. In particular concerns were expressed about the requirement for financial guarantees on which no visibility was given while the licence competition was underway. The level of the financial guarantees required radically altered the business case for the operation of a multiplex service. The parties also cited difficulties of transparency in the construction of the tariff model. As ComReg was aware, such issues could not be addressed under competition law or other legislative provisions available to ComReg at that time.

In summary, the BAI concurs with the views expressed in section 6 of the consultation document and with ComReg's findings, in relation to all three of the criteria tests, having regard to the issues set out in the document and the BAI's own regulatory experience.

Q. 4. Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI concurs with ComReg's preliminary conclusions on the assessment and analysis of SMP in Market A and, in particular, that RTÉNL, a wholly-owned subsidiary of RTÉ, should be designated as having SMP in Market A.

RTÉNL is the only provider of national terrestrial broadcast transmission services in market A. This has been, and continues to be, the case since ComReg's last market review in 2003/2004. The issues as set out in Sections 7.13 to 7.66 of the consultation document provide a clear articulation of the reasons why RTÉNL should be designated as having SMP in Market A. The BAI's regulatory experience would support the position as set out in the consultation document.

Q. 5. Do you agree with ComReg's preliminary assessment of potential competition problems in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

As outlined in the consultation document, the potential exists for a vertically integrated SMP operator to limit access, foreclose or apply excessive pricing or market squeeze to disincentivise entry into Market A. Delays could also potentially arise in relation to parties seeking less than fully managed service e.g. those wishing to provide some elements of transmission equipment or seeking to combine signals into elements of the transmission infrastructure. Given that the potential exists to inhibit or delay access, it is appropriate to consider the introduction of *ex ante* regulation in Market A.

Q. 6. Do you have evidence/examples of competition problems in this market? Please provide all relevant factual evidence supporting your position.

As set out at question 4 above, BCI and its successor the BAI failed to conclude a contract with either Boxer or One Vision – applicants for commercial DTT multiplex contracts (such services requiring transmission and distribution arrangements that fall within the definition of Market A). Both parties failed to conclude multiplex contracts with the BAI, citing an inability to reach agreement with RTÉNL on a transmission contract as being the principle reason for such a failure. In particular concerns were expressed about the requirement for financial guarantees on which no visibility was given while the licence competition was underway. The level of the financial guarantees required radically altered the business case for the operation of a multiplex service. The parties also cited difficulties of transparency in the construction of the tariff model. As ComReg was aware, such issues could not be addressed under competition law or other legislative provisions available to ComReg at that time.

Broadcasters that use or have utilised RTÉNL's services may be in a better position to comment in greater detail on the specific issues encountered in this regard.

Q. 7. Do you agree with ComReg's proposals regarding the application of an access remedy and the conditions attached to the access remedy access to market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Having regard to the factors set out in the consultation document, as well as the BAI's regulatory experience, the BAI is of the view that the proposed remedy, as set out in section 9 of the consultation document, is necessary and appropriate. The BAI also considers the remedy proposed to be proportionate and the obligations are fair and reasonable, in particular having regard to the non-replicable nature of the network infrastructure in this market. The proposal takes into account the requirements of Section 12 of the Access Regulations (SI 334 of 2011) and relevant sections of the Communications Regulation Acts.

Network access, including access to associated facilities, as either a fully managed or unmanaged service or a combination of both at the customer's request is reasonable and proportionate and should provide a degree of flexibility for the customer seeking access.

Q. 8. ComReg has proposed an access remedy to RTÉNL's transmission and distribution network including associated facilities. What services/facilities do you consider should RTÉNL be obliged to provide in light of the considerations contained in Regulation 12(4) of the Access Regulations. In addition, what services/facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The services listed in Section 9.19 of the consultation document would appear to meet the "managed" or "hybrid" requirements in terms of access. Consideration might be given to extending the "connection to power" to also include "standby generators or similar facilities".

Consideration might also be given to matters that may fall under Section 12 (2) (e) or (g) of the Access Regulations. Open access to technical interfaces or protocols and interoperability could be required for enhanced RDS or other features of radio stations through to common data that may need to be transmitted across all multiplexes in the interest of the consumer.

Q. 9. ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the proposed SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Service credits are recognised and included in most contractual arrangements of the type proposed. They encourage compliance with terms of the contract and with Service Level Agreements (SLAs). The BAI can see no compelling reason as to why they would not be considered as part of a SLA covering the provision of wholesale transmission services in market A.

Q. 10. ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The list of parameters set out in Section 3.8 of ComReg Decision Notice (D16/04) would appear to capture the required elements. Independent broadcasters and RTÉNL, that have direct experience in such matters, may be better placed to

comment in greater detail on the adequacy of the matters that need to be addressed as part of a SLA.

11. Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

As suggested in the BAI's response to Q.8 above, consideration might also be given to matters that may fall under Section 12 (2) (g) of the Access Regulations. Interoperability could be required for enhanced RDS or other features of radio stations through to common data that may need to be transmitted across all multiplexes in the interest of the consumer.

Q. 12. Do you agree with ComReg's proposals regarding the application of the non-discrimination remedy? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The obligation of non-discrimination is appropriate for a provider that is designated with SMP. It is proportionate and reasonable and is balanced by the safeguards proposed to protect commercially sensitive material.

Q. 13. Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional issues come to mind at this time.

Q. 14. Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Transparency provides an appropriate and effective mechanism to monitor and where necessary report on discriminatory behaviour. It would be difficult to identify effectively discrimination or other potential competition problems without the obligation of transparency. The principle of transparency supports other obligations and is consistent with the ComReg decision of 04/2004.

Q. 15. ComReg has proposed that it should be notified of any proposed changes to the reference offer at least 3 months in advance of such changes coming into effect. Do you consider this timeframe as appropriate? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The three-month period proposed would appear to be appropriate. The provision for ComReg to extend or reduce this period, on a case-by-case basis and where appropriate, balances the proposal and extends an appropriate degree of flexibility to the Regulator.

Q. 16. Are there any additional issues or factors in relation to transparency which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI supports the proposed requirements to publish Reference Offers, Information about Products and Services, and Service Level Agreements. Such mechanisms should, in the view of the BAI, give meaningful effect to the principle of transparency.

Q. 17. Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Based on the rationale articulated in the consultation document and based on the regulatory experience of the BCI and BAI to date, the application of accounting separation remedy in this market is reasonable and necessary given the vertically integrated nature of RTÉ's operation. The current form of publicly available financial data for RTÉ and RTÉNL does not provide information of a sufficiently granular nature which would assist ComReg in its regulatory objectives.

The BAI would concur with ComReg's view that the provisions of the 2009 Act (in particular, section 109) are not sufficient for this purpose.

The approach proposed is similar in nature to that adopted by ComReg for other regulated entities but has been adjusted to reflect the particular nuances associated with national terrestrial transmission and the single provider RTÉNL. The remedy should support the objectives of transparency and non-discrimination, and support the implementation of price control and cost accounting obligations.

Q. 18. Are there any additional issues or factors in relation to this accounting separation remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

There are no further proposals which the BAI wishes to make at this time.

Q. 19. Do you agree with ComReg's proposals regarding the application of cost accounting and price control remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI supports the cost accounting and price control remedy in principle, based on its own regulatory experience to date, the information provided in the consultation document, and the rationale provided by ComReg. The proposals seem reasonable and appropriate, having regard to ComReg's regulatory experience to date. Price control and cost accounting obligations should improve the prospects for new entrants into the market by facilitating more accurate business planning, as well as providing increased certainty for current customers.

Q. 20. What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Currently, RTÉNL's tariff is set annually. RTÉNL may also amend a tariff during the 12-month period. Such timeframes create considerable uncertainty for other operators. A longer tariff period with interim or scheduled review periods is the norm in other regulated entities and supports better business planning.

An appropriate time frame of no less than five years (with certainty regarding the circumstances in which reviews would be scheduled) should have regard to a range of matters e.g. duration of term of broadcasting/multiplex licences (10 years+), level of investment and period for return on investment, desirability for a degree of certainty for business planning purposes etc.

Q. 21. Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence support your position.

Based on the information set out in the consultation document, and the rationale provided, the proposals appear to be comprehensive, reasonable and well founded. No amendments are considered appropriate at this time.

Q. 22. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The RIA is robust and complies with necessary legislation and best practice. It has identified the policy issues, objectives and the regulatory options available. It has also determined the impact on stakeholders and competition, assessed the impacts and selected the best option.

To a large extent, the RIA mirrors information and questions that have been raised as part of this consultation process. The BAI concurs with the preliminary conclusions in relation to SMP in Market A and that a full set of remedies is appropriate.

Q. 23. Do you agree with ComReg's draft Decision Instrument set out above? Do you agree with ComReg's Definitions and Interpretations as set out in Part 2? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

The BAI has taken note of the draft decision instrument and in particular ComReg's definitions and interpretations. The draft decision reflects and addresses the many issues that have been raised and commented upon as part of this consultation.

In relation to Section 7, (obligations to provide access) we suggest that ComReg consider whether it is necessary or appropriate for Section 12 (2) (g) of the Access Regulations to be added to this section in order to fulfil potential interoperability requirements between the transmission infrastructure and the requirements of distinct multiplex operators and various radio broadcasters.

Market B

Q. 24. Do you agree with ComReg's preliminary finding that each of the criteria of the three criteria test is satisfied in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI concurs with ComReg's preliminary findings that each of the criteria of the three criteria test is satisfied in Market B.

High and non-transitory barriers to entry exist as RTÉ is the only licensed DTT Multiplex operator. RTÉ's two DTT multiplexes are intended primarily to provide channels that are public service in nature. While additional services can be designated as being of public service by the Minister and RTÉ may use some of the capacity for commercial purposes, the mechanisms involved in reaching these outcomes may be difficult to achieve.

There is currently uncertainty as to whether a commercial DTT operator could be established during the three-year timeline of this market review given the steps involved from a BAI decision to seek applicants through to conclusion of contracts for the provision of a DTT multiplex system. Similar uncertainties and legislative requirements arise in relation to the potential for a "self provision" option for non-RTÉ broadcasters currently on the RTÉ multiplex.

Furthermore, it is unlikely that any business model for commercial DTT or self provision could be considered until the Market A review is finalised, decisions adopted and tariffs are published.

The potential for entry to the DTT market may also be influenced by the WRC decision in relation to further digital dividend capacity. The timeline as to when a new frequency plan for DTT services will be required is unclear and any potential investors would need to be cognisant of the additional costs involved in frequency changes from a technical and end user perspective. As a result of all of these issues, there is considerable uncertainty as to whether there will be a tendency towards effective competition in the relevant time horizon.

Competition law is restricted to *ex post* investigations only. A court applying competition law does not normally deal with or mandate particular pricing structures. *Ex ante* regulation is, therefore, more appropriate given the timeline horizons of this market review and the requirement for broadcasters to conclude carriage arrangements and costs on the PSB multiplexes with RTÉ in the context of ASO on October 24th 2012.

Q. 25. Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI concurs with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in market B, based on its own regulatory experience. A broadcaster that is required, or wishes, to be carried on a terrestrial free-to air multiplex has access to only one supplier, RTÉ. As set out in our response to Q.24 above, it is unlikely that a commercial or "self provision" multiplex could be established within the timeline horizon of this market review, in light of current market conditions and the timeframe associated with the regulatory and licensing requirements of the 2009 Act. Given the vertically integrated nature of RTÉ, the potential exists to act in an anti-competitive manner in terms of pricing, access or other matters.

Q. 26. Do you agree with ComReg's preliminary assessment of potential competition problems in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

As outlined in the consultation document, the potential exists for a vertically integrated SMP to limit access, whether through refusal to supply or delay, foreclosure or the application of excessive pricing or other measures to protect its existing dominance.

Given that the potential exists to control who gains access and on what terms to the PSB multiplexes, it is appropriate to consider the introduction of *ex-ante* regulation in market B.

Q. 27. Do you have evidence/examples of competition problems in market B? Please provide all relevant factual evidence supporting your position.

Comreg is familiar with the experiences of TV3 in respect of Market B and it is not our intention to restate these here. As a broadcaster that requires carriage on the RTÉ multiplexes, TV3 would be in a position to comment in greater detail in relation to the issues raised in this question.

Q. 28. Do you agree with ComReg's proposals regarding the application of an access remedy and the conditions attached to the access remedy in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Having regard to RTÉ's position in Market B, the BAI agrees in principle with the application of an access remedy. The proposed remedy, as set out in section 15 of the consultation document, is an appropriate regulatory intervention having regard to all the circumstances and the obligations are fair and reasonable. The proposal

takes into account the requirements of Section 12 of the Access Regulations (S.I. 334 of 2011), as well as relevant provisions of the Communications Regulation Acts.

The BAI concurs with ComReg's view that section 130 of the Broadcasting Act 2009 might support some of the potential competition concerns that may arise in this market but also agrees that section 130 would not be sufficient to address issues concerning the terms and conditions for the provision of access and, in particular, the price of such access.

Q. 29. ComReg has proposed an access remedy to RTÉ's multiplexes including associated facilities. What services/facilities do you consider should RTÉ be obliged to provide in light of the considerations contained in Regulation 12(4) of the Access Regulations. In addition, what services/facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The scope of any agreement should include authority to deliver signals to the multiplex head-end, in order to ensure onward distribution and carriage via an RTÉ terrestrial multiplex. SLAs could accommodate details of maximum, minimum and average bit rates, associated audio and data feeds, EPG, fault indices and other relevant issues. The Decision should include the relevant provisions pursuant to Section 12(2) of the Access Regulations.

Q. 30. ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Service credits are commonly recognised and included in most commercial contractual arrangements. They encourage compliance with terms of the contract and with Service Level Agreements (SLAs). Since it is proposed that service credits would form part of the SLA that would be in place between RTÉ and RTÉNL in the context of Market A, it would appear appropriate that a percentage of such credits would be passed on to broadcasters on the relevant RTÉ multiplex where appropriate. The BAI can see no compelling reason as to why they would not be considered as part of a SLA covering market B.

Q. 31. ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The list of parameters set out in Section 3.8 of ComReg Decision Notice (D16/04) would appear to capture the majority of the required elements. Broadcasters and RTÉNL, who have direct experience in such matters, may be better placed to comment in greater detail on the adequacy of the matters that need to be addressed as part of a SLA.

Q. 32. Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional issues come to mind at this time.

Q. 33. Do you agree with ComReg's proposals regarding the application of the non-discrimination remedy? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The obligation of non-discrimination is appropriate for a provider that is designated as having SMP. It is proportionate and reasonable and is balanced by the safeguards proposed to protect commercially sensitive material.

Q. 34. Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional issues or factors come to mind at this time.

Q. 35. Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Transparency provides a mechanism to monitor and where necessary to report on discriminatory behaviour. It would be extremely difficult to identify discriminatory or other potential competition problems without the requirement for transparency. This proposal is consistent with the ComReg decision of 2004 in relation to RTÉNL (D16/04) and its draft decision in respect of Market A.

Q. 36. ComReg has proposed that it should be notified of any proposed changes to the reference offer at least 3 months in advance of such changes coming into effect. Do you consider this timeframe as appropriate? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The three-month period proposed would appear to be appropriate. The provision for ComReg to extend or reduce this period, on a case-by-case basis and where appropriate, balances the proposal and extends an appropriate degree of flexibility to the Regulator.

Q. 37. Are there any additional issues or factors in relation to transparency which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI supports the proposed requirements to publish Reference Offers, Information about Products and Services, and Service Level Agreements. Such mechanisms should, in the view of the BAI, give meaningful effect to the principle of transparency.

Q. 38. Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

For the reasons set out in the consultation document and based on the BAI's and the BCI's regulatory experience to date, the application of accounting separation remedy in this market is critical to the provision of clarity and assurance to those in the broadcasting industry required to use the RTÉ multiplex.

Q. 39. Are there any additional issues or factors in relation to this accounting separation remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The consultation document has highlighted the relevant differences between RTÉ and other regulated entities and ComReg has applied appropriate consideration of same in setting out its proposals.

Q. 40. Do you agree with ComReg's proposals regarding the application of cost accounting and price control remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

For the reasons set out in the consultation document, the application of cost accounting and price control remedy in the market is, in the BAI's view reasonable and appropriate. The proposed obligations should result in fair and appropriate wholesale prices for access to the PSB multiplexes. This should provide greater assurance to current customers and more certainty for new customers for business planning purposes.

Q. 41. What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The BAI, in its response to the market A consultation suggested that an appropriate time frame of no less than five years (with certainty regarding the circumstances in which reviews would be scheduled) should have regard to a range of matters e.g. duration of term of broadcasting/multiplex licences (10 years+), level of investment and period for return on investment, desirability for a degree of certainty for business planning purposes etc.

The decision in relation to market B needs to have regard to any decision made in respect of market A, as the costs are directly related. Hence, the BAI suggests that ComReg have regard to the BAI's proposals in respect of Market A, (see BAI response to Q.20 above).

Q. 42. Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Based on the information set out in the consultation document, and the rationale provided, the proposals appear to be comprehensive, reasonable and well founded. No amendments are considered appropriate at this time.

Q. 43. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

The RIA complies with necessary legislation and best practice. The BAI concurs with the policy issues, objectives and the regulatory options that have been identified. The impact on stakeholders and competition, as set out in the RIA,

appears to be appropriate. The BAI therefore supports ComReg's preliminary conclusion, in relation to SMP in Market B, that a full set of remedies is appropriate.

Experience to date would suggest that a full set of remedies is highly desirable to support the development of the indigenous television market in Ireland and the BAI's regulatory objective of diversity in content for Irish audiences. This is appropriate given that realistically only one entity can provide a Market B service to other broadcasters and this entity is in direct competition with the other services that are transmitted on its DTT multiplex. In the view of the BAI, ComReg's proposals are proportionate and well founded.

Q. 44. Do you agree with ComReg's draft Decision Instrument set out above? Do you agree with ComReg's Definitions and Interpretations as set out in Part 2? Please, explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

The BAI has taken note of the draft decision instrument and in particular ComReg's definitions and interpretations. The draft decision captures adequately and appropriately the many elements that have been raised and commented upon as part of this consultation.

In relation to Section 7, (obligations to provide access), the BAI suggests that ComReg considers whether it is necessary or appropriate for Section 12 (2) (g) of the Access Regulations to be added to this section in order to fulfil potential interoperability requirements between the various broadcasters on the multiplexes.

2: Eircom Ltd.

eircom Ltd.

**Response on behalf of eircom Ltd to ComReg
Consultation and Draft Decision 12/77:**

Market Review: Broadcasting Transmission Services in Ireland



19 September 2012

DOCUMENT CONTROL

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Introduction

eircom welcomes this opportunity to respond to ComReg’s market review of Broadcasting Transmission Services in Ireland. eircom believes that these services offer great potential for national economic development, job creation and innovation in the emerging digital age, especially as convergence between broadband and broadcasting and the devices used by consumers to receive audiovisual services via both types of media continues to evolve. eircom agrees with ComReg’s application of the “three-criteria test,” its market assessments and the proposed remedies.

As was the case in the analogue broadcasting world, DTT broadcasting services and facilities are in the sole ownership and control of RTÉ Networks Limited (RTÉNL). eircom agrees with the definition of the two markets that ComReg has identified as requiring *ex ante* regulation as a result of market failures: (1) the market for wholesale access to national terrestrial broadcast transmission services, and (2) the market for wholesale access to DTT multiplexing services.

In order to facilitate and encourage the development of DTT and other services, it is appropriate that RTÉNL should be designated as having significant market power (SMP) in both of the markets identified by ComReg. This is not a difficult analysis. RTÉNL controls 100% of the supply in both markets, a monopoly that RTÉNL has carried over from analogue terrestrial television.

Evidence of RTÉNL’s Market Power and the need for *ex ante* regulation

In its previous market review of the terrestrial broadcasting market in 2004, ComReg concluded that *ex ante* regulation (non-discrimination and transparency obligations) was necessary. Since that time, the case for *ex ante* regulation – and more effective obligations -- has been proven in the marketplace. There is clear evidence, based on recent experience, that the *ex ante* regulation of RTÉNL is necessary and that additional safeguards are fully justified under the “three criteria test”.

eircom was a member of the OneVision consortium that applied for a commercial DTT licence during the 2009/2010 commercial Digital Terrestrial Television (DTT) multiplex licensing process. The OneVision consortium was awarded a DTT licence by the Broadcasting Authority of Ireland (BAI). OneVision then attempted to gain access to the RTÉNL broadcasting network through a negotiation process.

In all there were three consortia that attempted to gain access to the RTÉNL broadcasting network. OneVision’s attempt was preceded by Boxer’s and followed by EasyTV. In all three cases the negotiation attempts ended in failure.

The separate negotiations between RTÉNL and the consortia failed. As the owner of the only broadcasting network in Ireland, RTÉNL held significant and disproportionate power in the negotiations process and did not hesitate to prevent competitors from entering the DTT market. With no alternative available, eircom and OneVision ended their attempt to establish a commercial television service. Had the proposed regulatory remedies been in place, the process might well have had a very different result.

In a subsequent report considering what transpired, the BAI discussed a review and de-briefing exercise which it had undertaken with the consortia that took part in the process. The BAI report observed that “[a]ll three [consortia] highlighted the economic circumstances and two made particular reference to the role of RTÉNL as the main contributing factors to the failure to achieve a successful outcome.”¹

In eircom’s view, the problems of the past will continue to impede any entrant interested in gaining access to RTÉNL’s facilities and services to provide television services on their own or as part of a package of services in some or all parts of Ireland. RTÉNL has the incentive and the ability to exclude potential competitors either through an unwillingness to negotiate in good faith or through the imposition of unreasonable commercial terms. This has been demonstrated time and again in eircom’s attempts to negotiate as described in the appendices.

Furthermore, there is insufficient evidence that the market will tend towards effective competition within a time-horizon that would be relevant to the commercial aspirations of potential market entrants including eircom.

Although ComReg’s present market review comes too late for the plans which eircom and its consortium had at the time, it is nevertheless welcome. The proposed regulatory remedies will help level the playing field for potential market entrants wishing to provide commercial services to retail customers by accessing RTÉNL’s national network. The remedies will also help promote access arrangements that are governed by appropriate contractual terms and conditions, including reasonable prices. This could be of considerable importance to new entrants seeking access to RTÉNL’s facilities in connection with the development of commercial DTT in Ireland and potentially the development of mobile television platforms. There will be a need for effective and efficient regulatory oversight by ComReg of wholesale access to RTÉNL’s broadcast transmission services and DTT multiplexing services. This includes price controls and prompt remedial action to prevent discrimination, for which the competition law regime is ill suited.

¹ BAI Statement on Conclusion of Commercial DTT Multiplex Licensing Process
http://www.bai.ie/?page_id=82

Accompanying this submission are three appendices containing previous eircom submissions, which we regard as confidential. These submissions describe eircom's previous experience in attempting to negotiate to gain access to the RTÉNL broadcasting network -- unsuccessfully. We wish to add these submissions to the record of this consultation to support the need for the *ex ante* regulation of RTÉNL as proposed by ComReg.

Conclusion

eircom considers that ComReg's market assessment and proposed remedies are well supported by the evidence. As convergence increases over the next few years, the need for regulatory safeguards in this area is likely to increase in order to encourage new entrants to assume significant commercial risks in providing innovative television offerings. DTT services may be used to complement the provision of IPTV services in areas where superfast broadband is not available, for example. And with the right incentives, DTT may evolve into new formats that will enable the development of a converged platform for DTT broadcasting and mobile television.² In this regard, we wish to emphasise how important it will be for Ireland to have a single, converged regulator that is well positioned to deal in a holistic way with the dynamic changes that convergence between broadcasting and fixed and mobile broadband is bringing to the marketplace -- not only as regards RTÉNL but also providers of subscription television services in their role as broadband infrastructure operators and service providers and, potentially, as content aggregators as well.

² See Speech of EU Commission N. Kroes to Spectrum Management Conference (19 June 2012) (promoting frequency sharing and a converged platform for mobile broadband and DTT.) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/459&format=HTML&aged=0&language=EN&guiLanguage=en>

Appendix 1 (confidential)

eircom response to ComReg consultation 10/98 on “Three Criteria Test on the Broadcasting Transmission Market”

Appendix 2 (confidential)

eircom response to ComReg questionnaire of 5th May 2010 (in relation to wholesale broadcasting transmission services)

Appendix 3 (confidential)

eircom response to the ComReg Market Analysis Broadcasting Questionnaire of 21st April 2011

3: Irish TV

White Cross,
Duleek,
Co. Meath

Mr. Jason Cleary,
ComReg,
Irish Life Centre,
Abbey St,
Dublin 1.

Tel: 086-279-4536

16th September 2012.

Dear Jason,

“Reference: Submission re: Market Review, Broadcasting Transmission Services in Ireland. ComReg 12/77”

I write to you as one of the promoters of **IrishTV** which was recently recommended by the Broadcasting Authority of Ireland to the Minister for Communications for inclusion on the RTE DTT system which will formally be launched on October 24th next.

At the outset let me say that we agree entirely with the position reached by ComReg that *ex-ante* regulations are required to address the current status quo which, we feel, is unacceptable.

While your survey requests responses to a number of positions outlined in document 12/77, I am writing to you to outline our views which are relative to the above but do not per say address all of the specific details contained in it.

[REDACTED]

Limited details of our proposal were published by the BAI on its website under the heading, *BAI DTT Expressions of Interest-Report and Recommendations Published.*

The entire proposal contained sections which were subject to confidentiality due to the unique nature of our idea.

[REDACTED]

RTE, in our case, has sought carriage costs in the region of €800,000 per annum.

This works out at close on €16,000 per week, a sum we feel would make our project completely unachievable after day-to day costs are dealt with.

Recent figures published by Price Waterhouse Coopers revealed that TV advertising spend for 2011 was down by 5.8%

The PWC Study also revealed that the shift in advertising spend to online services grew last year by 12%.

This trend suggests that with an ongoing fall in TV advertising and an increasing shift in spend to online outlets added to the growing fragmentation of the television audience, the charges being sought by RTE for a start-up broadcaster are, we believe, completely unrealistic and simply don't reflect the depressed dynamics of the current marketplace.

Added to this is the expectation that the Government will remove €3.6 billion from the State budget next December.

That, in theory, means that the amount of advertising spent in 2012/2013 is expected to be proportionately less next year as corporate and retail spend is likely to fall pro-rata.

[REDACTED]

[REDACTED]

Our scenario leads us to believe that if we attempted to get on the RTE DTT system paying the annual rates currently being sought (€800,000 per annum), our Channel would not survive.

With the above in mind, we believe that a number of options can be explored with a view to agreeing a satisfactory formula that is of mutual benefit to both RTE and the applicant channel.

They are as follows:

I. Introducing a format whereby there is free carriage costs for the first seven years on the basis that the proposed channels are of a public service nature and therefore are of a socio/cultural benefit to the State.

After seven years, annual carriage fees could be based on an upward sliding scale starting at 1% of pre-tax profits working up to a maximum of 5% after year 12 of operation.

2. Another possible format would be free carriage on the RTE system for five years by which time income and costs patterns would be established.

Based on annual revenues/costs, carriage costs could be determined on a percentage of annual profits ensuring that the channel company and RTE DTT both trade in such a way as to be financially viable on a year-to year basis.

3. An additional suggestion for the State broadcaster to consider is the possibility of RTE co-selling advertising for our Channel and carriage fees would be determined by taking a commission fee based on ads sold.

4. Another option is simply to persuade RTE to charge a low annual carriage fee that is not excessive and is acceptable-subject to regular review-to all the new broadcasters anxious to join the DTT system.

5. A final proposal is that RTE makes no charge whatsoever in order to add real competition to the domestic market. Remember the applicant channels do not benefit financially from TV licence fee income and are therefore at an unfair disadvantage.

So in point 1, carriage fees rise over a five-year period after year seven whereas in Point 2, the fees are charged as a per centage of profits.

In point 3, the more advertising RTE sells, the more it makes while in point 4, RTE simply charges an acceptable fee. In point 5, no charge at all should be applied.

We believe that a formula either replicating one of the above or similar in nature to any one of the four points mentioned needs to be adopted otherwise the independent channels that are approved by the BAI for this new system, will be discouraged from becoming part of the DTT set up and ultimately RTE will have most of the TV advertising market all to itself

It could also be debated that as the nature of our proposed channel is public service in nature because of its cultural promotion objective, consideration should be given to making a per centage of the TV licence fee available to us as RTE and TG4 are subsidised to meet their PSB (Public Service Broadcasting) requirements.

However that is a discussion for another day.

[REDACTED]

[REDACTED]

One final point that should be brought to your attention is that while we submitted our expression of interest to the BAI in the name of **IrishTV**, it is highly likely that should we get our channel on to the DTT system, we will be using a different brand name.

In all likelihood, that name will be **Sounds Irish TV** subject to legal clearance.

[REDACTED]

In conclusion, if realistic carriage fees are not agreed to, our channel and those proposed by others, will simply not make to it air which ultimately will prevent extra competition and deny diversity in choice.

Should you require any further details re: our proposed channel, I can gladly forward same.

Looking forward to hearing from you.

Yours sincerely.

Ken Murray

Email: ken.news@gmail.com

4: RTÉ / RTÉNL

RTÉ/RTÉNL

**Submission to ComReg Consultation No. 12/77
Market Review: Broadcasting Transmission Services in Ireland**

19 September 2012

Raidió Teilifís Éireann
RTÉ Network Limited

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EXECUTIVE SUMMARY

- This is a joint response by Raidió Teilifís Éireann (“RTÉ”) and RTÉ Network Limited (“RTÉNL”) to ComReg’s Consultation Document No. 12/77. RTÉ and RTÉNL welcome the opportunity to comment on ComReg’s proposals in relation to markets which were first and last reviewed 8 years ago. The review of the market for broadcasting transmission services as the Analogue Switch-Off approaches is particularly welcome as it will hopefully provide market participants with legal certainty as to the regulation of the services concerned.
- The content that may be offered to the public by way of terrestrial broadcasting transmission is a matter that is heavily regulated, in particular in the Broadcasting Act, 2009. In contemplating whether SMP regulation in relation to terrestrial broadcasting transmission services is appropriate, it is absolutely indispensable that ComReg gives adequate consideration to existing legislative provisions and their effect. RTÉ and RTÉNL disagree that regard should be had to the respective objectives and purpose pursued by the Regulatory Framework and the Broadcasting Act, 2009. The issue is not their purpose, but the place left for any further SMP regulation by ComReg. RTÉ and RTÉNL submit that ComReg’s approach, because it does not consider the effects of the provisions of the Broadcasting Act, 2009, is fundamentally flawed. As a result, the decisions proposed by ComReg would create very serious legal and practical difficulties.
- RTÉ and RTÉNL do not agree with ComReg’s analysis of the retail broadcasting market. In particular, the analysis is not prospective and fails to recognise that it cannot just be assumed that DTT will be a success in Ireland. There is no appropriate analysis of the impact on the terrestrial platform in the context of the forthcoming Analogue Switch-Off (ASO) and no proper recognition of the trend towards less and less exclusive reliance on the terrestrial platform. Other important retail developments are ignored, including the significance of the increasing convergence of telecoms and television services in “three play bundles”, soon to be offered not only by UPC but also Sky and eircom and other telecoms operators. For these reasons, RTÉ believes that it is not appropriate to derive a wholesale market that is limited to terrestrial transmission.
- In terms of the wholesale market, RTÉ and RTÉNL do not understand why ComReg now considers that radio and television fall within the same market. This is a radical departure from the analysis advanced in 2004 and for which no satisfactory explanation has been offered. RTÉ and RTÉNL note in relation to television that there is not going to be any customer of the service during the lifetime of the review and this calls into question the rationale and proportionality of ComReg’s intervention in this respect.
- RTÉ and RTNL note ComReg’s finding that entry in the market for the provision of terrestrial broadcasting transmission network services, including the provision of transmission services to analogue radio broadcasters and digital licensed multiplex operators, is not foreseeable during the timeframe of the review (the next three years). RTÉ and RTÉNL also note ComReg’s focus in this context on competition issues of vertical integration, including in particular discrimination. To the extent that obligations of access and price control are required – which in the light of the functioning of the market in 2004 is not established by ComReg – it is essential that the remedies reflect such findings. This means in particular that an obligation of access can only justifiably extend to a requirement to provide access to a managed transmission service, and not to unbundled or piecemeal elements of the transmission infrastructure. In respect of the latter, in the absence of an analysis by ComReg

of which sites are replicable or not, it would be in any event entirely disproportionate and unjustified to regulate the provision by RTÉ/NL of access to its sites.

- It is also essential that any obligation and conditions that are imposed are capable of compliance. Requirements in terms of Reference Offers must be reasonable and duly take into account the specific issues arising from the very large amount of common costs and the consequent sensitivity of prices to the number of services carried on the network. Requirements of publication and provision of information must recognise the size of the organisations and the corporate structure within which they operate.
- Any price control that is imposed in relation to “Market A” services must take due account of the approach taken by the Minister, in consultation with ComReg, in relation to the payments by broadcasters to RTÉ under section 130 of the Broadcasting Act, 2009.
- RTÉ fundamentally disagrees with ComReg’s proposals in relation to “Market B”. There are very serious difficulties which arise from ComReg’s proposals due to the fact that ComReg does not take proper account of the existing regulation of the services concerned under the Broadcasting Act, 2009, in particular RTÉ’s must-carry obligations. RTÉ submits in the first place that ComReg’s definition of Market B is not appropriate and is confusing because it amalgamates the provision of multiplexing services with the provision of multiplex access to the radio spectrum for broadcasting purposes – these are two entirely different issues. Secondly, RTÉ fundamentally disagrees with ComReg’s proposals to effectively regulate the provision of access to the PSB multiplexers by broadcasters. This is a matter that is exhaustively covered by the provisions of the Broadcasting Act, 2009. ComReg has no say in the matter. Instead, what ComReg could possibly have considered is the provision of digital terrestrial broadcasting transmission services to broadcasters who are entitled to be so broadcast in accordance with the provisions of the Broadcasting Act, 2009.
- There is regrettably no analysis of such a market because ComReg focuses on access to the multiplex itself. In the presence of the very significant constraints placed on RTÉ by the Broadcasting Act, 2009 in the form of must-carry obligations, including the obligation to carry the services on the PSB multiplexes for payments that may be directed by the Minister, it is not clear at all that there is any scope left for SMP regulation. To the extent that there is, then it should be limited to an obligation on RTÉ not to discriminate between the services broadcast on the multiplex, possibly supported by an obligation of transparency. In no circumstance can it be considered to be appropriate to impose a price control where this is a power afforded the Minister in section 130 of the Broadcasting Act, 2009. RTÉ notes that any other different approach would place RTÉ in the invidious position where its prices would be subject to different sets of regulation.
- On the basis of this submission, RTÉ and RTÉ/NL hope that ComReg will reconsider these matters in greater depth, review this consultation process in its entirety and consult further on this market review. RTÉ and RTÉ/NL look forward to engaging with ComReg.

INTRODUCTION

This is a joint response by Raidió Teilifís Éireann (“RTÉ”) and RTÉ Network Limited (“RTÉNL”) to ComReg’s Consultation Document No. 12/77. RTÉNL is an RTÉ subsidiary company which provides Broadcast Transmission services, on an arm’s length basis, to all Irish national television and radio broadcasters, including RTÉ. RTÉNL also provides mast and tower rental services to a range of telecommunications service providers and operators. RTÉ has a duty to manage and control all its subsidiary companies as detailed in the relevant legislation and codes of practice. Therefore, RTÉNL, as part of the RTÉ Group, is bound by the codes of practice and governance of the RTE Group. The RTÉ Board has overall responsibility for subsidiaries’ systems of internal control and for reviewing their effectiveness.

RTÉ and RTÉNL welcome the opportunity to comment on ComReg’s proposals in relation to markets which were first and last reviewed 8 years ago. The review of the market for broadcasting transmission services as the Analogue Switch-Off approaches is particularly welcome as it will hopefully provide market participants with legal certainty as to the regulation of the services concerned.

ComReg’s consultation raises several issues of very significant concern to RTÉ and RTÉNL, for two main reasons. Firstly, RTÉ and RTÉNL believe that ComReg significantly underestimate the constraints exercised on RTÉNL by alternative transmission platforms, including in particular cable and satellite, and wrongly ignores the fact that the digital terrestrial platform, as ASO is only about to happen at the end of October, is by no means established in Ireland among consumers/viewers.

Secondly, RTÉ and RTÉNL fundamentally disagree with the manner in which ComReg has taken into account the existing regulation of the sector, in particular in the provisions of the Broadcasting Act, 2009. In this regard, RTÉ and RTÉNL are of the view that ComReg is fundamentally mistaken in its approach to the definition of Market “B” and its finding of the existence of “market power” on the part of RTÉ.

The RTÉ and RTÉNL response is set out in three sections. In section One of our response, RTÉ and RTÉNL respond to Questions 1 and 2 of the consultation and address the points made by ComReg (at Sections 1-5 of the Consultation Document) in terms of its proposed wholesale broadcasting market definitions; notably Market “A” and Market “B” (as defined), as well as its analysis of the wholesale and retail broadcasting transmission trends.

Section Two will provide responses to the specific numbered questions raised in relation to ComReg’s proposed **Market “A”**. For ease of reference those questions will be set out at Section Two followed by the specific response provided by RTÉNL. Section Three will provide responses to the questions raised by ComReg in relation to its proposed **Market “B”** and the finding of SMP which has been made in relation to RTÉ.

SECTION I: BACKGROUND AND OVERVIEW

Two of the key goals of the regulatory framework for electronic communications services are to ensure harmonisation across the European single market and to guarantee legal certainty in the way markets falling under this broad sector are regulated. As previously submitted, RTÉ welcomes the overall objective of moving towards light-handed regulation underpinned by competition principles and evidence based economic research¹. To that end, RTÉ and RTÉNL understand the need to conduct market reviews under the regulatory framework. We note (as pointed out at para 3.7 of the Consultation Document) that this consultation process is a full market review which now includes an amended market definition and three criteria test analysis.

During the initial market review which commenced in October of 2003, RTÉ expressed the clear view that it is simply not accurate to define the wholesale terrestrial broadcast market as a separate market. Following that initial consultative process, RTÉNL (a wholly owned subsidiary of RTÉ) was designated with SMP in two wholesale markets: notably the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks and the wholesale market for television broadcasting transmission services on analogue terrestrial networks².

Subsequent to that initial submission and SMP designation, RTÉ and RTÉNL supported the Commission's Recommendation of 2007 in terms of its removal of the broadcasting transmission market from automatic ex ante regulation³. In the context of the approach taken by the NRA, it has been expressly noted at page 33 of the Commission Staff Working Document⁴, which accompanies the Communication from the Commission on Market Reviews under the EU Regulatory Framework, that a number of National Regulatory Authorities (NRAs) concluded on the absence of the fulfilment of the three criteria test and withdrew regulation.

The document goes on to note that the Commission re-iterated the need to monitor the competitiveness of the market in order to assess whether broadcasting transmission services provided over different platforms *"are developing to the extent that they are viable substitutes so that the terrestrial market would not constitute a market of its own, and therefore enable competitive pressure on the retail market absent regulation so that the first and/or second criteria of the three criteria test are no longer met"*⁵.

The document further proposes *"where NRAs intend to continue to regulate certain parts of the broadcasting transmission services, that in particular the assessment of the second criteria of the three criteria test should include an analysis of competition **on the entire broadcasting transmission market at retail level** (our emphasis) and the interrelationship of the markets where applicable..."*⁶. RTÉ and RTÉNL submit that there is a specific obligation on ComReg as the NRA to adopt this proposed approach in its market analysis.

¹ Please see RTÉ Response to ComReg Consultation Document on Market Analysis –Wholesale Broadcasting Transmission Services (Document 03/126 of 22/10/03).

² Designation of RTÉNL as having SMP with obligations of transparency and non-discrimination imposed.

³ See Commission Recommendation 17th December, 2007 on relevant product and services markets 2007/879/EC.

⁴ Commission Staff Working Document SEC (2010) 659 accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on market reviews under the EU Regulatory Framework (3rd Report).

⁵ Page 33.

⁶ Page 44.

To that end and during the preliminary three criteria test consultation of June 2011⁷, RTÉ and RTÉNL provided a response which explained that the wholesale and retail broadcasting markets have become increasingly competitive and that the national terrestrial broadcasting market should not be regarded as a separate and discrete wholesale market. We expressed the view that ComReg's approach to market definition was not correct as it overlooked the fact that other delivery options such as cable and satellite formed part of the same wholesale broadcasting transmission market.

ASO

RTÉ and RTÉNL re-iterate their position with regard to the approach to market definition which is again adopted by ComReg in this Consultation Document. This approach (again) proposes a separate specific market for wholesale access to national terrestrial broadcast transmission services (Market A). This definition is not correct. The consultation paper does not give sufficient weight to the compelling evidence of increasing competition from other platforms, or the impact of analogue switch off (ASO) as a stimulus to increased switching between platforms. This point is addressed in further detail below in answer to Question 1.

A very significant marketing campaign has been conducted by other significant delivery platforms such as Sky⁸ and UPC in order to ensure that consumers will switch to their respective pay platforms. Both the former quite rightly see this as an opportunity to increase their market share. Sky has access to very significant advertising budgets in order to ensure that consumers switch platforms during the window before ASO and similarly in the case of UPC. Other developments that ought to have been taken into account by ComReg in the context of its prospective analysis of the market is the fact that on the cable platform, and soon on the satellite and telecom broadband platforms, TV access is provided in the context of a bundle of such services such that any distinction between pay-TV and free-to-air in terms of platform access becomes irrelevant. In addition, such offers provide a significant reason for viewers to move to platforms other than terrestrial transmission. RTÉ and RTÉNL submit that in the context of the move to ASO and the changes in the provision of TV access, the wholesale market "does tend towards competition" and the three criteria test is not fulfilled. The wholesale market for terrestrial broadcasting transmission network services does not accordingly warrant ex ante regulation.

It also appears that the case for continuing regulation relies on the existence of a small minority of consumers who choose to continue to use the terrestrial platform exclusively. The consultation paper does not consider whether it is proportionate to require regulation solely on the basis of this declining number of consumers. Nor is it clear why the same argument does not lead to a need to regulate other platforms which some consumers choose to use exclusively.

Market B

ComReg also proposes to regulate a second and distinct wholesale market which is described as the market for wholesale access to DTT multiplexing services (Market B). RTÉ fundamentally disagrees with ComReg's proposals in this respect. In its proposals, ComReg is essentially seeking to regulate the access to the two multiplexes for which RTÉ holds licences in accordance with the requirements of the Broadcasting Act, 2009. RTÉ is of the view that the definition of the market proposed by

⁷ RTÉ and RTÉ Joint Response to ComReg Market Analysis Broadcasting Questionnaire, 3rd June, 2011.

⁸ The message being used is very direct, targeted at those about to switch at ASO to the DTT platform, such as Sky's 'simple guide to the switchover' which offers 'Free Sky+ box, Free standard set-up and Half price Sky TV for 2 months' starting at €25 per month; and UPC's 'cheapest way to go digital' messaging offering 'UPC Digital TV at Home and Phone' at €25.40 per month. Both Sky and UPC are aggressively exploiting the digital window as a commercial opportunity to increase their respective market shares, and their advertising spend reflects this strategy.

ComReg is fundamentally flawed. Not only does it not allow to identify any issues of market power but it encroaches upon the powers explicitly granted to the Minister under the Broadcasting Act, 2009, in particular section 130.

RTÉ is obliged by law to establish operate and maintain a national DTT multiplex and is also entitled to seek a second multiplex licence from ComReg in relation to a second national DTT multiplex. Both of these multiplexes are public service multiplexes which are operated for RTÉ by its wholly owned subsidiary RTÉNL. The Broadcasting Act, 2009 sets out specific provisions whereby the two multiplexes operated by RTÉ, which have a Public Service nature, are regulated. These provisions follow from Section 114(1)(i) which sets out as an express object of RTÉ the right “to establish, maintain and operate one or more national multiplexes”. This specific obligation has been contracted by RTÉ to its subsidiary RTÉ Network Limited (RTÉNL). While the Broadcasting Act provides for the licensing of additional commercial multiplexes, none to date has been established and the tenor of ComReg’s proposals is significant regulation in relation to the two national public service broadcasting (PSB) multiplexes.

ComReg recognises and acknowledges that there are in existence legislative provisions in relation to the two national PSB multiplexes in question and that it is obliged by the European Commission Recommendation to consider this legislation in considering whether or not this market is susceptible to “ex ante” regulation. ComReg acknowledges at para 12.22 of its consultation document the following “ current supply of DTT multiplex services in market B is via the RTÉ multiplex(es) which is subject to conditions, standards and regulatory approval for public service broadcasting (our emphasis)”. However, ComReg ignores what the effect of existing legislation is on the pretext that it does not pursue the same objectives as ComReg. This is entirely irrelevant. Regardless of the objectives being pursued, it is absolutely essential that obligations are not imposed that undermine existing provisions or conflict with existing requirements. ComReg’s exclusion from its proposals of broadcasters included in the PSB Muxes under section 130(1)(e) shows that this is an issue of which ComReg is aware. Unfortunately, ComReg has failed to properly consider the effect of the provisions of section 130 in its analysis of the market.

As ComReg is aware, the national PSB multiplexes are specifically regulated by the very extensive provisions of Section 130 of the Broadcasting Act, 2009. The detail of this regulation is very much in keeping with the notion of public service national multiplexes. ComReg states that “ most of the programme services available via RTÉ’s first multiplex are RTÉ’s own programme services”. In fact, five of the television programme services on the first multiplex are RTÉ’s; RTÉ One and RTÉ Two as specifically provided for and designated at Section 130(1)(a)(i) and the three additional “new” programme services approved by the Minister in consultation with the Broadcasting Authority of Ireland (BAI), following specific “ex ante” process (including a Sectoral Impact Assessment by the BAI) as outlined at Section 103 of the Broadcasting Act, 2009. The Ministerial Decision with regard to the new RTÉ Services, (Results of Minister’s Analysis and Consideration of 23rd February, 2011) is available at www.dcenr.ie). This decision itself shows that RTÉ may only introduce “new” services which have passed a detailed public value test.

ComReg proposes that an extensive raft of legislation is justified by the provisions of Section 130(1)(a)(iv) which specifically provides at this sub-section for the compulsory carriage by RTÉ of “*such other television services, having the character of a public service, as may be designated by the Minister by order...*”. ComReg suggests that RTÉ has the potential to behave in an anti- competitive fashion in the context of these “*other programme services*” notwithstanding that they may be designated by the Minister which effectively would mean that RTÉ would be directed to carry them. As the wording of Section 130(1)(a) is prefaced by “*shall*”, this means in effect that RTÉ would be obliged to carry those services. On the face of it, it is not quite clear how RTÉ would be in a position to effectively refuse to comply with a statutory obligation following the designation by the Minister

of a specific “television service” pursuant to Section 130(1)(a)(iv). Any attempt by RTÉ to delay access or to act unreasonably could be construed at law as an effective failure to comply. With regard to the second national multiplex, given that RTÉ is the sole supplier and it is vertically integrated, ComReg’s concern appears to be that RTÉ has the “potential to limit access” by other programme services to its DTT multiplexes. Rather than limit access, RTÉ has sought to accommodate other broadcasters, as can be seen from the request for TV3 to allocate a previously allocated RTÉ News Now EPG listing for 3e on SAORVIEW.⁹ Neither is it clear to RTÉ what “other programme services” are at issue, given that the provisions of Section 130 carry a range of requirements from “must carry” in relation to Section 130(10) in the context of TV3, to specifically designated channels, and to content having a public service character and designated by the Minister. It seems that what ComReg proposes to regulate is what is referred to at para 15.12 of the consultation document, which states that “*whilst RTÉ has specific public service obligations in relation to PSB multiplex(es), the measures proposed in this market would apply to broadcasters designated by the Minister under Section 130 (our emphasis) (excluding those addressed by Section 130(1)(a)(e) who if spare capacity was available outside of those covered by Section 130, can negotiate with RTÉ for access on a commercial basis*”. In other words, ComReg appears to be concerned only with the conditions of access of must-carry programmes, the terms of which are already the subject of specific provisions under section 130. ComReg’s rationale is difficult to understand.

As ComReg may be aware pursuant to Statutory Instrument No. 67 of 2011 (Conferral of Additional Functions – Broadcasting Services Order 2011), specific and additional functions were passed to the BAI which arise pursuant to Section 130. In this context, the BAI has become responsible for making recommendations to the Minister as to what services should be provided for at Section 130(1)(a)(iii)(iv) and Section 130(1)(e) of the Broadcasting Act, 2009. This means that there are existing restraints on the programme materials which may be included under section 130(1)(e).

It is clear from this that RTÉ does not have any role in determining the content in relation to any spare capacity on the second multiplex. Even in relation to spare capacity that RTÉ may be entitled to use for its own commercial purposes, RTÉ requires the consent of the Minister following recommendations of the BAI (which however, ComReg does not propose to regulate).

RTÉ submits that what is proposed here by way of regulation is entirely disproportionate and irrelevant to the potential services at issue. RTÉ is unaware of any evidence that suggests that it might behave in an unfair, unreasonable and untimely manner in relation to access by those television services designated by the Minister, contrary to what is suggestion at para 15.24 and elsewhere in this consultation paper, and it is difficult to see how regulation proposed by ComReg would be appropriate to address what would amount to a breach of statutory duty on the part of RTÉ. If RTÉ is obliged by law to carry a television service, then how can it apply a “tactical refusal of access” as suggested at para 16.24.? ComReg has already stated that the legislation takes “prominence”, which again RTÉ has taken to mean that it takes precedence.

In addition, this proposed regulation begs three important questions in the context of what is proposed by ComReg in relation to its proposed Market B. The first question is what evidence exists in relation to RTÉ denying access to such “other television services” ? The second question is what “other television services” have actually been designated by the Minister? The third question is what spare capacity is there on the second multiplex which may be available to “television services” that have been designated by the Minister pursuant to Section 130(i)(a)(iv).

⁹ Please see attached correspondence from BAI to RTÉ dated 4th July 2012 (email and letter) – Appendix 1. Please see also the Record of the Minister’s decision to include 3e on SAORVIEW available at <http://debates.oireachtas.ie/dail/2011/05/18/00099.asp>.

The reality is that if a potential Film channel is included¹⁰ and a potential Oireachtas channel, as have been specifically provided for at Section 130(1)(a)(iii) (consistent with the public service nature of the national multiplexes), along with potentially a HD version of TG4 and TV3, then the actual potential spare capacity on the second national multiplex will be limited. In light of the fore-going questions, what is the basis for this proposed regulation which is far reaching and extensive and which results in RTÉ being designated in a market which simply does not warrant any ex ante regulation? ComReg refers to the BAI document which was published in August 2011. RTÉ submits that there is no evidence of excessive pricing or unreasonable access as is suggested in that document. Indeed as ComReg is aware those services that may be designated by the Minister come within the parameters of Section 130(8) with regard to the discretion that the Minister has to determine the tariff that is paid by such broadcast customers to RTÉ.

However, RTÉ has no power which it can exercise in relation to such access because this is an issue which is entirely regulated under the Broadcasting Act, 2009. The consultation document states that the proposed regulatory process in relation to Market B is meant to “*complement*” and “*support*” the provisions of the Broadcasting Act, 2009. RTÉ and RTÉNL submit, however, that there is neither need nor space for additional regulation and that any obligation placed on RTÉ in relation to “Market B” will only create legal uncertainty.

The issues addressed by the Broadcasting Act, 2009 concern both the channels that must be included in the PSB Multiplexes and the price at which such access is to be provided. Section 130(1) deals with the proposed content and specifies the carriage of the specific television services including a Film Channel and Oireachtas Channel. Thereafter, it is clear from the provisions of Section 130 as well as those of Statutory Instrument (S.I.) No.67 of 2011¹¹, that the responsibility for determining the actual broadcast content of both public service multiplexes rests primarily with the BAI who then makes specific recommendations to the Minister. If appropriate, the Minister then directs RTÉ to provide capacity for the channel. RTÉ has already been directed to carry TV3 and 3e following TV3’s request to the Minister.¹² In light of the fact that RTÉ does not control or determine the broadcast content of either national multiplex, it cannot be suggested, as ComReg purports to do, that the allocation of capacity is a matter that is within the power of RTÉ and accordingly, that it might not be in RTÉ’s interests to facilitate more competition¹³ where there is capacity on RTÉ’s second national multiplex. This is not an issue that arises.

In the context of the application of the three criteria test in relation to Market B, the presumption is made (particularly) at Sections 2.58 and 2.61 of the consultation document that it would not be in RTÉ’s interests to facilitate competition thereby “allowing” new entrants onto the second PSB multiplex where there is capacity for more non-RTÉ digital channels. As RTÉ understands it, if certain broadcast services are designated by the Minister (following recommendations by the BAI), then RTÉ is obliged to carry them. As Section 130 is obligatory, then any failure on RTÉ’s part would in effect mean that RTÉ would be failing to comply with a statutory obligation. It is not at all clear to RTÉ why an additional layer of regulation is necessitated.

Furthermore, it should be noted that the issue of providing access to new services is of an extremely limited scope. Only limited capacity will be available on the second multiplex following the carriage of TG4 and TV3 each in high definition (HD), (and allowing for a Film Channel and Oireachtas Channel

¹⁰ See *Sunday Independent*, 16 September 2012.

¹¹ Broadcasting Act, 2009 (Section 26(5)) (Conferral of Additional Functions – Broadcasting Services) Order 2011.

¹² Please see Appendix 1. Please see also the Record of the Minister’s decision to include 3e on SAORVIEW available at <http://debates.oireachtas.ie/dail/2011/05/18/00099.asp>.

¹³ Section 2.58 of the Consultation Document.

to be carried). In this context, it is not at all clear to RTÉ how this potential limited available capacity justifies such an extraordinary and excessive degree of regulation as is proposed in the consultation document including in particular an access obligation.

In fact, it appears to RTÉ that the issues highlighted above arise from the delineation of Market B. In this regard, it does not seem to RTÉ that the focus should be on the provision of access to the PSB Multiplexes. Rather, the focus should be on the provision of digital terrestrial transmission services to terrestrial broadcasters, that is, in the case of the DTT PSB Multiplexes, to broadcasters who have a right to be included in the multiplex. Whether or not such a market ought to be distinguished from Market A is an issue that ought also to be considered.

If ComReg were to maintain its definition of Market B, which for the reasons explained above, would cause very significant legal issues and practical difficulties, the consultation paper fails to demonstrate that *ex ante* regulation of such a market is justified. The consultation paper concludes that RTÉ holds SMP in this market and that the three criteria test is met. However, the analysis that leads to these conclusions is based on speculation and assertions rather on evidence and empirical analysis of the market. The consultation paper does not represent an “evidence-based” approach to regulatory decision making.

Again, the consultation paper fails to take into account the impact of the significant changes associated with ASO. The consultation paper does not consider the impact of ASO on the demand for DTT services or on switching between terrestrial and other platforms. More generally the consultation fails to provide any meaningful analysis of expected future demand for DTT services and implications for new entry in this market.

The consultation paper also concludes that RTÉ will have the ability and incentive to engage in “vertical foreclosure” based on a purely theoretical analysis that takes no account of the relevant features of this market. The consultation paper assumes that RTÉ would be harmed by the success of new multiplexes, whereas in fact RTÉ could well benefit from the success on new multiplexes carrying additional channels since they would make the DTT platform more attractive to consumers. In addition, even if the theory advanced were correct, the consultation paper also fails to analyse whether or not RTÉ would actually have an incentive to engage in vertical foreclosure given the relative margins available upstream and downstream. These and other deficiencies in the analysis of Market B are explained in more detail in section 3 of this response.

It is not at all clear how the proposed remedies in relation to Market B and in particular those financial remedies are to “complement” the consultation process which has already commenced in the context of Section 130 of the Broadcasting Act, 2009. ComReg will be fully aware that this process has now formally commenced. This was preceded by a number of detailed reports (interim and final) commissioned by ComReg to Deloitte Consultants over a two year period (commencing in the summer of 2010 when the Minister first asked ComReg to review DTT tariffs and to advise on simulcast and post ASO tariff). RTÉ and RTÉNL engaged fully with this process providing full details of the relevant tariff models. These reports looked in detail at the principles for setting DTT tariffs and the proposed pricing methodology proposed by RTÉ/RTÉNL and consequently the tariff model has been the subject of rigorous financial review. It is particularly notable that the principles proposed by Deloitte to ComReg, and ComReg to the Minister, are identical to the principles that ComReg itself follows in price regulation, and obligations of cost-orientation, and it is difficult to see what place is left to SMP price regulation in the face of the Minister’s intervention under section 130 of the Broadcasting Act, 2009.

Having regard to the relevant provisions of the Broadcasting Act, 2009, in particular section 130, and the proposed intervention by the Minister in terms of determining the payments that broadcasters

must pay RTÉ in consultation with ComReg, RTÉ and RTÉNL submit that the terms of ComReg's proposed intervention in DTT are wholly unreasonable, inconsistent with the Broadcasting Act, 2009 and the principles underpinning the regulatory framework as well as incompatible with the principle of legal certainty.

1. Do you agree with ComReg’s preliminary conclusions on the television and radio retail market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 55)

1.1 RTÉ and RTÉNL do not agree with ComReg’s preliminary conclusions in terms of the television and radio retail markets. In addition to the points made above, some additional and more specific points are set out below.

1.2 ComReg’s analysis provides that 31% of homes rely on free to air (FTA) broadcast transmission. However later in the document it is noted that 19% of homes rely on terrestrial for their entire viewing¹⁴. The 12% difference relies on terrestrial for secondary and tertiary sets and not as their primary source. In addition the number of terrestrial homes in Ireland has declined over the past 10 years¹⁵. Para 4.13, figure 6 provides that approximately 50% of television homes use a free to air reception method (aerial, other/local supplier, UK’s Freeview DTT service and other satellite) for television viewing, as a television home may have more than one television set. This 50% of television homes may also have a pay television service. It is not valid to include reception methods within this table as these are not mutually exclusive, and as a result this overstates the number of homes accessing FTA services. It is not clear that “other/local” supplier is necessarily always FTA.

1.3 The information set out in figure 6 also shows that as 69% of television homes have a pay television reception method, 31% of television homes must have a FTA reception method only (that means FTA terrestrial and free to view satellite services which is not necessarily mutually exclusive). It is stated that although pay television has gained in popularity over time, increasing by 6 percentage points between 2003 and 2012, the proportion of television homes with FTA television services only has remained relatively stable since 2008 (averaging 31%). It is not clear why two different time periods are compared here. Pay trend is over a ten year span and FTA over a five year span. Between 2003 and 2012 pay TV services have gained six points. Even using the questionable approach of adding the “free” services, these have shown an eighteen point attrition in the same period indicating that there is movement between Pay and Free platforms, and that the terrestrial platform may well be directly substitutable with other delivery platforms. As noted earlier, this may be particularly so with the advent of analogue switch off (ASO) at which time switching is bound to occur which means that this market may well decline further. The blurring of the distinction between pay-TV and FTA platforms is also being accelerated by the increasing convergence of broadcasting and telecoms services in the form of bundled offers including for a fixed price phone calls, broadband access and television access such as UPC’s “triple play” offers. With the anticipated entry of Sky in telecoms and eircom in IPTV, this is no longer the preserve of UPC. It is also relevant to note that all RTÉ’s FTA services are available to any platforms on a “must-offer” basis including IPTV and all such Internet services.

1.4 The advent of ASO is absolutely a time of change for consumers. As regards their television service provider, the consumer has to choose between the continuation with FTA services or the adoption of pay services. This is a time when the consumer will weigh up the options and has to actually “act” to adopt FTA services by purchasing a new box or television;

¹⁴ Para 4.10.

¹⁵ Nielsen Est Survey showing decline in Irish Terrestrial households from 286,000 in September 2002 to 202,000 households in September, 2012. Please see Appendix 2.

alternatively the consumer can adopt a Pay television service by calling a service provider and arranging an installation. The latter is made easier for the consumer when one sees the extensive marketing campaigns that other delivery platforms such as Sky have engaged in terms of seeking to extend their market share in light of ASO¹⁶. All of their advertising literature include special offers and freezing of prices to attract new consumers¹⁷. Consumers are attracted by this kind of advertising and Sky is a known entity to many. The attractive offers it can make mean that subscription costs are either frozen or reduced. Whilst RTÉ continues to promote the SAORVIEW platform and is cognisant of its public service obligations in this regard, its financial resources are far more limited than the other significant pay platforms; notably satellite and cable with which it directly competes.

1.5

[REDACTED]

1.6 At para 4.12, reference is made to the SAORSAT option. Whilst this is primarily an infill solution for viewers who cannot receive SAORVIEW, there is nothing to prevent any viewer choosing to receive SAORSAT. The technical requirements are for a minimum dish of 80 centimetres diameter and a maximum of one metre dish (which falls within the limit for planning permission). Once the dish is aligned for SAORSAT at nine degrees east by mounting a second offset LNB, other FTA services can also be received on the same dish. The UK Freesat channels will become available on this and in this way the content will not necessarily be more restricted than other platforms and it may become a very attractive option to consumers.

1.7 ComReg is specifically addressing the “national analogue” radio market. From the point of view of the radio market and listener, this does not take cognisance of regional and local analogue radio services, or the “quasi-national” Newstalk radio service. There are more than thirty local and regional radio services available in Ireland and it would be interesting to consider what service providers exist to provide for these radio stations.

1.8 ComReg does not appear to have fully taken into account the interrelationship between the markets and the degree of substitutability that other platforms provide. FTA households might switch to pay television platforms and retail substitution away from FTA in the context of ASO is a matter that ComReg has not fully included in its analysis. In the context of para 5.11, switching for FTA viewers can be facilitated through subsidised or free connection and

¹⁶ The message being used is very direct, targeted at those about to switch at ASO to the DTT platform, such as Sky’s ‘simple guide to the switchover’ which offers ‘Free Sky+ box, Free standard set-up and Half price Sky TV for 2 months’ starting at €25 per month; and UPC’s ‘cheapest way to go digital’ messaging offering ‘UPC Digital TV at Home and Phone’ at €25.40 per month. Both Sky and UPC are aggressively exploiting the digital window as a commercial opportunity to increase their respective market shares, and their advertising spend reflects this strategy.

¹⁷ An example of a recent advertisement by Sky states that “ On 24th October, the old analogue signal is being switched off, and unless you switch to digital TV, it will be goodbye to all of your favourite TV shows”.

¹⁸ [REDACTED]

associated hardware. Contrary to what is suggested at para 5.21 of the consultation document, anecdotal evidence suggests that some viewers are considering moving to FTA to avoid monthly bills. There is no evidence to support the comments at para 5.24.

2. Do you agree with ComReg's preliminary conclusions on the wholesale market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 78)

- 2.1 RTÉ/RTÉNL do not agree with ComReg's preliminary conclusions of the wholesale market assessment. There are a number of issues arising.
- 2.2 Firstly, ComReg proposes to identify a single wholesale market for television and radio terrestrial transmission services. RTÉ/RTÉNL note that in 2004, an entirely different conclusion had been reached and it is not clear the reason why the existing market definition should not continue to apply.
- 2.3 Secondly, on the basis of our analysis of the retail market above, RTÉ and RTÉNL find that it is not appropriate to limit the scope of the wholesale market to terrestrial transmission.
- 2.4 Thirdly, in terms of ComReg's description of the terrestrial digital broadcasting transmission supply chain, RTÉ and RTÉNL wish to note, for the avoidance of doubt, that there is a fundamental difference between access to a multiplex, the operation of which requires a licence under the Broadcasting Act, 2009, and access to "multiplexing services". Unfortunately the terminology used in the consultation document is somewhat confusing. Multiplexing is a method where a multiple of signals or data streams are combined into one signal: this is a technology which has been in use in all telecommunication networks for many decades and which is a service RTÉNL has provided to analogue television and radio services since the early 90's. By contrast, a multiplex licence is a licence to use a national UHF spectrum layer to deliver a number of signals or data streams which are multiplexed. It is important to distinguish between the two.
- 2.5 RTÉNL provides multiplexing, distribution and transmission services and is happy to provide any one or any combination of the three services. In terms of multiplexing services as defined above, they are available from many providers in Ireland. These services together with distribution services can easily be used to input services to the DTT system at either the transmission or distribution level. RTÉNL for example uses its digital multiplexing equipment to output DVB-T for DTT and DVB-S2 for the SAORSAT service. On the RTÉ Donnybrook Campus, ARQIVA are using digital multiplexing equipment to output DVB-T and BSkyB are using digital multiplexing equipment to output DVB-S1. RTÉ, as well as TG4 and TV3 have various multiplexing arrangements for satellite vans, studio feeds, EBU feeds, internet players etc.
- 2.6 By contrast, only RTÉ has a licence to use the UHF spectrum. The BAI and the DCENR are the gatekeepers to this layer of UHF spectrum and decide what services can or cannot be put into/onto it. It appears to RTÉ and RTÉNL that the focus of the review should be on the provision by RTÉ/RTÉNL of access to terrestrial broadcasting transmission network services, whether to multiplex operators or to terrestrial broadcasters. There may be differences between the provision of these services to multiplex operators as opposed to terrestrial broadcasters directly, including the requirement that the signals be multiplexed. In any event, RTÉ/RTÉNL submit in this respect that the description of so-called "Market B" at p. 78

in the graph at the top of the page cannot be correct. In particular, it is not correct to suggest that the services provided in Market B are in any way separate from the use of the transmission network. It would be more correct to include within the services offered in "Market B" the service provided in "Market A". In other words, "Market B" can be considered to be a market downstream from Market A, with Market A services a wholesale input into "Market B".

- 2.7 Even if it is appropriate to identify a second market "B", then that market should not be concerned with the provision of access to the PSB multiplexes, which is a matter that is entirely regulated under the Broadcasting Act, 2009, but with the provision of transmission services to the broadcasters which are entitled in accordance with the provisions of the Broadcasting Act, 2009 to be transmitted terrestrially.
- 2.8 In particular, the provision of access to RTÉ's multiplexes is not a service that is offered by RTÉ in a market that is susceptible to regulation. The matter of access to RTÉ's multiplexes is not one which is in the hands of RTÉ: rather it is a matter of content regulation that is laid out in the Broadcasting Act, 2009. RTÉ has no choice in the matter of access to its PSB multiplexes. Which programmes may be transmitted is set out in section 130 of the Broadcasting Act, 2009 and in relation to any remaining capacity, is a matter for the Minister under the recommendation of the BAI. As RTÉ has no choice in the matter, there is no power that can be exercised and therefore no purpose to the regulation.
- 2.9 In considering the competitive situation of Market B, defined as the provision of digital terrestrial transmission services to broadcasters and in considering any remedies that may be imposed, it is absolutely essential that adequate and full account is taken of the provisions of the Broadcasting Act, 2009 which govern the terms and conditions of the provision of terrestrial transmission services. This is particularly the case in considering a price control obligation, in circumstances where the regulation of payments is already provided for under the Broadcasting Act, 2009, as well as the matter of the provision of sufficient capacity.
- 2.10 In this context, having regard to RTÉ's obligations in relation to the operation of the PSB Multiplexes and its lack of power in terms of the selection of the programmes to be broadcast under the Broadcasting Act, 2009, there is little scope left for SMP regulation. In particular, while it is correct that RTÉ as the multiplex operator could charge different tariffs to the programmes included in the multiplex, the price regulation provided for under Section 130 means that RTÉ has no latitude in this regard either. This means that in terms of television broadcasting, the scope of regulation of Market A is limited to the terms of access offered by RTÉ to the commercial multiplex operators that may be licensed under the Act. RTÉ and RTÉNL note however that it is not foreseen that a licence for the operation of a commercial multiplex will be awarded during the time of the review (which may not exceed three years under the Framework Regulations, 2011). In these circumstances, RTÉ and RTÉNL again submit that ComReg's intervention under SMP regulation is disproportionate and unwarranted, having regard to the existing level of regulation under the Act. In this regard, RTÉ and RTÉNL submit that the relevant matter is not the objectives pursued by the relevant regulatory provisions but their effect.

SECTION II. “MARKET A”

As mentioned above, having regard the absence of any meaningful changes in relation to the market for analogue radio transmission, RTÉ/RTÉNL do not understand why it is now proposed to include both analogue radio and digital television transmission within one market. RTÉ and RTÉNL do not believe that this is appropriate. The position of digital terrestrial radio services is not addressed by ComReg in this review. It may be interesting to examine this for the future.

In terms of the regulation of the provision of national radio broadcasting transmission services, RTÉ and RTÉNL believe that the current level of regulation is appropriate and if any regulation is to be left in place, then it should not exceed RTÉNL’s current obligations in the matter. RTÉ and RTÉNL submit that under the Framework and the Access Regulations, where ComReg examines a market that it has previously reviewed, it must consider whether to maintain, withdraw or impose obligations and this requires that the effectiveness of existing obligations be considered. There is no such consideration by ComReg of whether the current obligations imposed on RTÉNL have been sufficient to address any perceived issues of market power. It is RTÉ and RTÉNL views that there have been no difficulties arising in the operation of the market since 2004 and that the obligations of non-discrimination and transparency are sufficient in this respect.

The responses to the questions below should be read subject to these comments.

3. Do you agree with ComReg’s preliminary finding that each criterion of the three criteria test is satisfied in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 88)

3.1 For the reasons set out above in response to Question 2, RTÉ/RTÉNL do not accept that the scope of the wholesale market is properly assessed in the light of current retail trends, the importance of the very well established cable and satellite platforms in Ireland and the uncertainties surrounding the take-up of DTT post ASO. RTÉ/RTÉNL’s comments below are without prejudice to this position.

3.2 Prior to assessing whether the market for access to broadcasting transmission network services meet the three criteria test, ComReg considers in section 6.1 “*the effect other legislation may have on this wholesale market*”. RTÉ/RTÉNL agree that this is the correct approach. However, we do not believe that sufficient consideration is given to the potential impact of existing legislation in terms of the possibility of ComReg regulating further the activities concerned. In particular, the question is not, as ComReg suggests, whether the legislative provisions in place “*result in similar conditions which would arise under ex ante regulation*” but whether the scope of existing legislation allows for further regulation. If it does, then it is essential that any further obligations that are imposed do not encroach upon existing obligations.

3.3 Insofar as the market for access to broadcasting television transmission network services is concerned, RTÉ/RTÉNL submit that ComReg must fully consider the resulting constraints placed on RTÉNL where the Minister already is exercising its powers under section 130 of the Broadcasting Act, 2009 to direct the relevant payments that must be paid by broadcasters to RTÉ and the existence of section 130 regulation must be taken into account in devising any remedies that ComReg imposes. This is also the case in relation to the provision of access to broadcasting infrastructure, which is governed by section 115 of the Broadcasting Act, 2009.

- 3.4 In terms of ComReg’s analysis of the barriers to entry, RTÉ/RTÉNL note ComReg’s view that there will be no market entry in the market for the provision of terrestrial broadcasting transmission network services in Ireland in the timeframe of the review (para. 6.12 and 6.22 refer). RTÉ/RTÉNL note that the timeframe for a prospective market review is now limited by law to three years under the Framework Regulations, 2011. RTÉ/RTÉNL do not disagree that there are high costs associated with the construction of a national terrestrial broadcasting transmission network and agree that a national network is not easily duplicated (para. 7.26). RTÉ/RTÉNL also note ComReg’s reference to the fact that it can be expected that RTÉNL will continue to supply terrestrial broadcasting transmission services to RTÉ thereby reducing the commercial opportunity for a competing wholesale service is reduced.
- 3.5 RTÉ/RTÉNL do not take issue as such with these comments but note that they can be considered to be a barrier to entry only on the assumption that there is a separate market for terrestrial transmission. For the reasons explained above, RTÉ/RTÉNL believe that this analysis is flawed. Regardless of whether the barriers to entry are high, there are already several broadcasting transmission platforms and this, as identified by the European Commission, give more power to broadcasters in their negotiations with transmission companies.

<p>4. Do you agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 103)</p>

- 4.1 The position set out in response to Questions 1 to 4 also applies in response to Question 4. In particular, in terms of television transmission, any finding of SMP is clearly dependent on the unjustifiably narrow definition of the wholesale market and the exclusion of competing transmission platforms and/or the taking into account of the indirect constraints that their presence exercises on RTÉ/RTÉNL. This is especially the case at a point in time where the DTT platform is not established.
- 4.2 RTÉ/RTÉNL notes ComReg’s findings that *“there may only be room for one network provider to fully exploit economies of scale in light of the finite spectrum availability in bands allocated to broadcasting of terrestrial services”* (para. 7.46). This is very much relevant to the determination of the remedies that may be considered to be appropriate.
- 4.3 RTÉ/RTÉNL do not agree that their vertical integration mean that RTÉ has the incentive to exclude potential competitors, namely broadcasters and multiplex operators from accessing RTÉNL’s network. On the contrary, having regard to the cost to RTÉ of the transmission network, RTÉ has all the incentives to ensure that as many broadcasters/multiplex operators are also on its network so that it can recover costs from them also. RTÉ and RTÉNL submit that ComReg’s analysis included at para. 8.19 is flawed.

5. Do you agree with ComReg’s preliminary assessment of potential competition problems in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 110)

5.1 RTÉ/RTÉNL understand on the basis of the analysis of ComReg as set out in the Consultation document in sections 7 and 8 that it is concerned with the market for the provision of terrestrial transmission network services to broadcasters and multiplex operators competing downstream with RTÉ. Having regard to the finding highlighted above that there may be room only for one network provider, it is not concerned with facilitating entry in the market for the provision of such services. This is in stark contrast with the approach adopted in other countries such as the UK and France where obvious differences in the size of the countries and the distribution of the population mean that there is the possibility of having competing network providers.

5.2 RTÉ/RTÉNL do not disagree that this is correct but wish to emphasise that this has important repercussions in terms of addressing any potential competition problems. RTÉ and RTÉNL in particular do not believe having regard to the market analysis that the question of access is not a competition problem that is likely to arise. This is because the question of access is one that must be framed in terms of access to transmission services, not to the network elements that support it (since the indication is that there is scope only for one operator). Since RTÉNL offers such access to RTÉ, an obligation of non-discrimination is entirely sufficient.

5.3 RTÉ/RTÉNL further note that the question of access to infrastructure elements as a competition problem would meet with very different responses, depending on the specific elements concerned and the level of their “replicability”.

6. Do you have evidence/examples of competition problems in this market? Please provide all relevant factual evidence supporting your position. (Page 110)

6.1 Please our response to Question 5 above.

7. Do you agree with ComReg’s proposals regarding the application of an access remedy and the conditions attached to the access remedy access to market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

7.1 RTÉ and RTÉNL do not understand the basis for ComReg’s proposals regarding the application of an access remedy. In particular, RTÉNL does not understand why ComReg is of the view that the introduction of access will likely result in additional competition in the downstream markets in Ireland, and therefore how the introduction of an access regime may result in benefit to end consumers (viewers and listeners). As explained in further detail below, ComReg’s proposals represent a fundamental departure from the regulatory approach adopted in 2004 and no proper justification is being offered in circumstances where RTÉNL has not strengthened its position as a provider of national broadcasting transmission services. In 2004, ComReg did not find it appropriate to impose obligations of access on RTÉNL and limited the obligations imposed on it to obligations of transparency and non-discrimination. It is not at all clear why ComReg no longer finds such remedies to be sufficient.

- 7.2 RTÉNL already meets reasonable requests for a national digital broadcasting transmission service in relation to both radio and television. In the past RTÉNL has consistently met all reasonable requests in terms of such services.
- 7.3 In particular RTÉNL has historically offered its national transmission customers a fully managed service under which RTÉNL takes all responsibility for the provision of a contractually defined level of service. In providing services on this basis, RTÉNL has been responsive to customer requests with respect to parameters such as the extent of coverage and hours of operation, as shown from the examples below:
- TV3 commenced broadcasting in 1998 for 12 hours per day. This was extended in 1999 to a 24 hour a day service. RTÉ CEL, the RTÉ subsidiary then responsible for providing transmission services, made all technical and commercial information available to TV3 and fully co-operated with TV3 and its advisors to ensure that the expansion of service provision was facilitated seamlessly and economically. Radio Ireland Ltd, trading as Today FM, commenced broadcasting in 1997 from 19 sites within the RTÉ network. In 2008 Radio Ireland sought to expand their coverage. Full co-operation was given by RTÉNL to facilitate the design, coverage planning and implementation of all system elements to provide the revised service required by Radio Ireland. This included both expansion to sites previously not occupied by Radio Ireland and the cessation of service provided during the initial contract period.
 - RTÉNL has been similarly market focussed in its discussions with potential new customers, particularly commercial MUX operators. When potential MUX operators approached RTÉNL each operator was given the opportunity to select the extent of coverage they required. RTÉNL then provided indicative quotes to each potential MUX operator based on their own individual requirements. In this respect, and for the avoidance of doubt, RTÉ and RTÉNL fundamentally disagree with the suggestion that *“the failure of the commercial DTT negotiation process may be indicative of such potential issues”* of denial of access. It is not the case that RTÉ and RTÉNL refused access to Commercial MUX operators including by way of excessive pricing and RTÉ and RTÉNL reject any such suggestion.

It is not clear why, in the light of the above, ComReg considers that an obligation of access is required in the first place and why obligations of transparency and non-discrimination are no longer sufficient.

- 7.4 RTÉNL is very concerned that the obligation of access imposed by ComReg is open-ended and goes much further than an obligation to provide broadcasters/multiplexers with access to national broadcasting transmission services, as it is proposed to require that RTÉNL offer services or physical access to equipment and premises rather than only provide a fully managed service.
- 7.5 RTÉNL considers that an obligation of access as proposed by ComReg will potentially result in additional technical, operational and contractual complexity and therefore significant additional costs beyond those that would be incurred were the obligation of access, and other proposed regulatory obligations such as transparency, non-discrimination, price control and cost accounting, and accounting separation properly limited to an obligation on RTÉNL to provide managed broadcasting transmission services tailored to the needs of its customers. As such, RTÉNL is of the view that the obligation of access proposed by ComReg in the consultation document, in particular in the form proposed, is unnecessary and disproportionate. This is addressed further in response to Q. 8. below.

8. ComReg has proposed an access remedy to RTÉNL's transmission and distribution network including associated facilities. What services/facilities do you consider should RTÉNL be obliged to provide in light of the considerations contained in Regulation 12(4) of the Access Regulations. In addition, what services/facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 120)

8.1 As noted in response to Question 7 above, RTÉNL does not believe that the access remedy proposed by ComReg is appropriate. This is because the obligation of access as proposed by ComReg is cumbersome and represents a very significant change to the services that are currently the subject of regulation. It also does not address the competition problems which ComReg seeks to address. The scope of the remedy access proposed by ComReg is for these reasons inconsistent with the requirement of the Access Regulations that regulatory obligations be, *inter alia*, "based on the nature of the problem identified and proportionate".

8.2 The obligation of access proposed by ComReg is drafted in such a way in the Draft Decision Instrument that it appears to entitle access seekers to "unbundled" access to any element of the distribution and transmission infrastructure maintained by RTÉNL for the purpose of providing a wholesale national broadcasting transmission service. Clause 7 of the Draft Decision Instrument sets out an obligation of access that is in this respect open-ended. RTÉ and RTÉNL believe that such a definition is not helpful and that it is essential that the matter of the scope of any obligation of access be clearly set out and further clarifications are required in this respect.

8.3 In terms of the "associated facilities" that would be included under an obligation of access, it is important to bear in mind that associated facilities are defined under the Regulatory Framework as facilities that enable an access seeker to avail of the service that is the subject of the access obligation. In other words, there can be no obligation to provide access to associated facilities where no access is sought to the regulated service in the first place. In this regard, RTÉ and RTÉNL believe that further clarifications are required in terms of the services that must be provided (the scope of the access obligation), and the facilities associated with same.

8.4 This is particularly so where the requirement of provision of access to infrastructure suggested by ComReg is not a remedy that can be justified by ComReg's finding that the broadcasting transmission infrastructure is "non-replicable" (para. 9.18) and the absence of interest of broadcasters in having such type of access, as ComReg had correctly identified in the 2004 market review.

8.5 On the basis of ComReg's findings, it is clear that what broadcasters require is access to a (managed) national broadcasting transmission and distribution service and this in turn allows them to compete as free-to-air services with RTÉ. There is no suggestion in the market analysis that what is required is the provision of access in such form as to enable competition to RTÉNL in the market for national broadcasting transmission services. In this regard, the position in Ireland is fundamentally different to that which prevails in France or the UK for example, where the NRAs have identified a number of facilities in respect of specific sites that are considered to be non-replicable and to which the SMP operator must provide access to. The obligation of access as defined by ComReg potentially regulates the provision of access to sites and masts which are not in a unique position and for which an obligation of regulated access can find no justification.

- 8.6 In imposing an obligation of access, ComReg must not only consider whether it is proportionate having regard, notably, to the criteria set out in Regulation 12(4) of the Access Regulation, but it must also, before doing so, be satisfied, under Regulation 12(1), that "*the denial of [the form of access concerned] or the imposition by operators of unreasonable terms and conditions having a similar effect— (a) would hinder the emergence of a sustainable competitive market at the retail level, (b) would not be in the interests of end-users, or (c) would otherwise hinder the achievement of the objectives set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations.*"
- 8.7 There can be no suggestion that the provision of access in the extensive form suggested by ComReg, in addition to the provision of a managed broadcasting transmission service, is necessary within the meaning of Regulation 12(1). Again, what may be needed - and has been required and continue to be required by Irish broadcasters - is access to a national broadcasting transmission *service*. In the presence of vertical integration, where RTÉNL will provide such service to RTÉ, it appears to RTÉ and RTÉNL that an obligation of non-discrimination, supported by an obligation of transparency, is entirely sufficient to ensure competition in the retail market, as ComReg had concluded in 2004.
- 8.8 In addition, and for the avoidance of doubt, an obligation to provide access to "unbundled" or piecemeal elements of the transmission elements at any point in the distribution and/or transmission network and in accordance with the terms otherwise proposed by ComReg in relation to non-discrimination and transparency, would require that attention to a large number of issues, some of which are listed below, which make the provision of access technically difficult, such that any such obligation would not be proportionate for the purpose of Regulation 12 of the Access Regulations:
- (a) Across RTÉNL's portfolio of transmission sites there is a variety of ownership, access, landlord, legal and commercial arrangements. In circumstances where RTÉNL is not in full control any necessary arrangements would have to be agreed between the party looking for access, the property or rights owner and RTÉNL and the party seeking access would need to pay any associated costs, rents or levies.
 - (b) Where any development work is proposed, including, but not limited to, building modifications or additions, mast alterations and the addition of antennae, the party seeking access would have to secure all of the necessary licences, permissions, permits and planning permissions and pay any associated costs or levies.
 - (c) In relation to any access granted, in addition to the site being able to physically accommodate the equipment the installation design and specification proposed by the party seeking access must be such that there is no interference, or risk of interference or damage, to other services. This would include that the installation would not be capable of causing damage during fault or mal-operating events.
 - (d) Access for third party personnel to RTÉNL transmission sites or other facilities would be contingent on the third party fully complying with all RTÉNL policies and procedures. Where a third party requires access to an area containing equipment intrinsic to RTÉNL's core services facilitation and supervision by RTÉNL personnel will be required.
- 8.9 There would also be very significant issues arising in terms of network integrity. In relation to distribution RTÉNL has no difficulty with any party installing equipment at any of its sites, where the site is capable of accommodating that equipment. (Facilitating distribution

systems for various telecommunication services providers, fixed telephone, mobile telephone, broadband, closed and open networks accounts for in the order of 1/3 of RTÉNL's current revenues.) However, unlike distribution where a faulty or mal-operating services has little potential to cause actual damage (these may cause outages and trips but not physical damage), transmission equipment has the potential to significantly damage antenna systems (combiners, cables and antenna). In addition to the fact that that antenna systems can cost up to circa €1m to design and install and that repairs are costly, should a major fault occur at a time of year when weather prevents repair work being undertaken, it is possible that all of the services using that antenna could have to operate at low power or indeed be off air for a number of months until a repair can be effected. Accordingly, were access to an RTÉNL antenna system required, it would be absolutely essential that RTÉNL retain full ownership and control of combiners, cables from the combiners to the antenna and the antenna. Any third party transmission equipment connected to an RTÉNL antenna system must not be capable of causing damage during normal operation, fault or mal-operating events. RTÉNL would therefore need to specify the relevant technical parameters for equipment to be connected by a party seeking access. Similarly, where access is required for a third party antenna and this can be physically accommodated, it is critical that the new antenna does not interfere with antenna systems of other services or interfere with the normal operation of the mast or transmission site (Non-Ionising-Radiation). RTÉNL would therefore need to specify the relevant technical parameters for equipment to be connected by a party seeking access.

- 8.10 RTÉNL would also need to install professional interface and monitoring equipment at the interface point. This monitoring equipment would record the signal being provided by the third party, including all technical parameters. This equipment would be capable of immediately disconnecting the service from the antenna system should a harmful event occur. Analysis of the recordings of the monitoring equipment would be critical in any dispute resolution process.
- 8.11 Finally, while RTÉNL does grant access to third parties to substantial areas of the buildings at transmission sites, third parties are not allowed to access the rooms containing the transmitter and other equipment used to provide national terrestrial broadcasting. RTÉNL does not believe, in the interests of maintaining system integrity, that it would be appropriate to allow such access. In the alternative, if access was to be allowed, then very significant constraining procedures would have to be put in place to protect adequately equipment intrinsic to RTÉNL's core services.
- 8.12 For these reasons, RTÉ and RTÉNL are of the view that not only is this remedy entirely unnecessary and inappropriate because the competition problems that it would address do not exist in the Irish market, but also in any event it is not a proportionate remedy.
- 8.13 RTÉNL would also point out that where capacity is available, RTÉNL grants third parties (local/regional/quasi national radio services, mobile phone and fixed line phone operators, broadband, emergency services, revenue, army, etc) access to masts for the purpose of installing and maintaining equipment and connecting equipment to power supplies. Were there a demand for access to masts and sites for the purpose of providing a national wholesale broadcasting transmission service, RTÉNL would expect to apply the same/similar terms as reached under commercial arrangements for same or similar access.

9. ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the proposed SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 121)

- 9.1 RTÉNL has service credits in its service level agreements with customers for the provision of analogue transmission services and its agreement with RTÉ for the transmission of DTT through the PSB MUX. Accordingly, RTÉNL is content that service credits should form the part of any future new SLAs.
- 9.2 RTÉNL agrees with ComReg (paragraph 9.42) that the process for compensation should not be burdensome and that the methodology used to calculate the amount due should be clearly explained in the SLA. In its current contracts RTÉNL is liable for service credits in accordance with a formula which links the amount due to customers to the extent and duration of the national coverage lost. RTÉNL believes that such an approach is entirely consistent with ComReg's observations in paragraph 9.42 of document 12/77. RTÉNL is therefore concerned that in paragraph 8.2 (iii) of Section 11 ComReg suggests that the service credits should be the subject of negotiation.
- 9.3 In particular, ComReg's proposal would imply that SLAs may differ between customers and therefore RTÉNL presumes would be a matter which is subject to considerations of commercial confidentiality. This appears, therefore, to be inconsistent with the suggestion in paragraph 9.80 that all SLAs should be published on the RTÉNL website. While RTÉNL agrees that the SLA should specify an adequate level of compensation for a breach of the SLA, an adequate level of compensation is one which is calculated by reference to the extent of the breach to the SLA. For the avoidance of doubt, adequate compensation does not, and cannot, require compensation for any consequential losses that could be suffered by broadcasters.
- 9.4 The general concept of service credits as outlined by ComReg in 12/77 and applied in existing SLAs works well when RTÉNL is providing its customer with a fully managed service. The situation is much more complex under the regime of access proposed by ComReg when what each customer wants may differ, both between customers and at individual sites, and accordingly the allocation of responsibilities differs.
- 9.5 For example, if an access customer were to connect its own transmitter equipment at the combiner then the customer would be able to determine the power of the transmission within the limits agreed between the customer and RTÉNL. Under such a scenario, a formula for calculating the service credit due as a result of any failure on the part of RTÉNL could not be linked to the loss of coverage as the extent of the coverage would be determined by the transmitter output which would be under the control of the customer.
- 9.6 RTÉNL's current view is that service credits under an access regime would therefore need to be site and customer specific and would likely involve a formula for calculating rebates on the site specific charges. It is unclear if this is what ComReg is referring to when it refers to "negotiation" and it would therefore be helpful if ComReg could clarify. If this is what ComReg is referring to, then RTÉNL remains concerned about whether it would be possible to publish SLAs which are the result of individual negotiation.
- 9.7 In paragraph 9.42 ComReg suggests that RTÉNL should be under an obligation to make payment of any service credits "in a timely and efficient manner". Under its current SLAs,

RTÉNL is not required to make payment of the service credits to its customer because it has the right to offset these against the next invoice. RTÉNL believes that the making of payments under SLAs would incur additional administrative burden and transaction costs. In the interests of efficiency the right of off-set should be in place. For the avoidance of doubt, RTÉNL wishes to make it clear that it does not believe that it would be appropriate to require it to pay service credits to a customer whose account with RTÉNL was in arrears.

10. ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 121)

10.1 In principle RTÉNL has no difficulty with any of the items listed being included as part of an SLA, however only where they are relevant to the service being provided and can be pragmatically applied.

10.2 A party only requiring access to antenna systems at main transmission sites will require a different SLA to a party requiring a distribution and transmission service. This in turn differs from the current service being provided to RTÉ for the PSB multiplexes which includes multiplexing, distribution and transmission, where the SLA includes the totality of the service being provided.

10.3 RTÉNL cannot make commitments in a SLA beyond its ability to deliver and accordingly the conclusion of any SLA will be dependent on negotiation in good faith by both parties.

11. Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 121)

11.1 RTÉNL notes that in paragraph 9.37 of document 12/77 ComReg suggests that there should be an *"obligation to ensure that legally binding SLAs are appropriately concluded and implemented"*. RTÉNL notes that for any SLA to be concluded and implemented there must be agreement between the parties as to the terms of the SLA. RTÉNL is unsure on what basis it is possible to impose an obligation on the parties to reach such an agreement. RTÉNL suggests that as drafted this proposal is unworkable. RTÉNL is happy to negotiate in good faith.

12. Do you agree with ComReg's proposals regarding the application of the non-discrimination remedy? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 123)

12.1 As noted by ComReg in paragraph 9.47, RTÉNL has been operating under a non-discrimination obligation in relation to the provision of national analogue TV and radio transmission services for a significant period of time. RTÉNL accepts that this should be extended to the provision of digital terrestrial transmission services. RTÉNL is satisfied that it has complied with this obligation in relation to customers of both of the existing services and as between the two existing services (TV service to TV service, Radio service to Radio service and TV service to Radio service) and notes that this was also the finding of ComReg when it investigated RTÉNL's compliance with its obligations. Non-discrimination has also served as one of the bases for the calculation of charges for actual and potential MUX operators.

12.2 RTÉNL understands that ComReg is seeking to ensure that it does not discriminate between its customers, and in particular that it does not operate in a way which may confer commercial benefit to RTÉ over its competitors in downstream markets. However, it appears to RTÉNL that the form of the obligation of non-discrimination proposed by ComReg does not recognise the specificities of the market concerned. As a result, RTÉNL regards the proposal set out in paragraph 9.53 of ComReg Document 12/77 as unworkable in practice.

12.3 RTÉNL notes the following:

12.4 The form of the obligation of non-discrimination proposed by ComReg appears to be based on the premise that there is a direct link between retail and wholesale services such that any changes to the wholesale service will directly and immediately have an impact on the retail service being offered to end customers. However, this is not the case, due to the two-sided nature of the market. Having regard to the market concerned, RTÉNL is of the strong view that the focus of the obligation of non-discrimination should not be on the time at which information is provided to customers of RTÉNL, but rather on the substance of what is being provided. RTÉNL would accept that the service provided to the various broadcasters need to be delivered on a non-discriminatory basis, including in terms of the service available regarding coverage, the quality of service delivered and associated prices. RTÉNL rejects any suggestion that in order to achieve this the obligation of non-discrimination must include an obligation to provide information concerning any changes to the service at the same time to all customers. It is entirely sufficient that an appropriate notice period be observed before implementing any change.

12.5 RTÉ and RTÉNL will also not be in the position to comply with the obligation of non-discrimination in the form proposed. RTÉNL is a wholly owned subsidiary of RTÉ, with members of RTÉNL's board also being members of the board of RTÉ. By virtue of these ownership and governance structures, it is inconceivable that RTÉNL would be able to contemplate major capital expenditure or other decisions which may impact upon its financial position or the level of tariffs without the prior consideration and approval of RTÉ being received. Accordingly, RTÉ will necessarily be aware of information about the future level or direction of tariffs before its competitors. Similarly, it is necessary for RTÉNL to share information with RTÉ.

12.6 A further practical difficulty is that RTÉ is a direct customer of RTÉNL in Market A as regards analogue radio transmission services while in relation to DTT RTÉ is both RTÉNL's customer in Market A and the supplier in Market B. In order that prices in both markets can be

communicated simultaneously, RTÉ will need to know of any changes to the tariffs levied on it by RTÉNL in respect of the PSB MUXs before its downstream competitors.

- 12.7 RTÉNL notes that there is an inconsistency between what is proposed in paragraph 9.53 of 12/77 and how the obligation is expressed in paragraph 9.3 of Section 11 of 12/77 (the Draft Decision Instrument). Specifically, the latter refers to ensuring that information is known to RTÉNL itself as the same time as it made known to others, including RTÉ. RTÉNL is unclear as to what this means and how ComReg intends that this should apply in practice given the other difficulties outlined above regarding the impracticality of ensuring that RTÉ and third parties have access to information simultaneously.

13. Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 123)

- 13.1 Given the small size of RTÉNL's total operations and turnover and given that, post Analogue Switch Off on the 24 October 2012, RTÉNL will only have two national terrestrial broadcast customers that operate within Market A (RTÉ, including Analogue Radio and DTT, & Today FM), the non-discrimination obligations as proposed are impractical, disproportionate and unworkable in their present form.

14. Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 128)

- 14.1 As noted by ComReg in paragraph 9.59, RTÉNL has been operating under a transparency obligation in relation to the provision of national analogue TV and radio transmission services for a significant period of time. RTÉNL accepts that this should be extended to the provision of digital terrestrial transmission services. RTÉNL has published details of its tariffs on the website together with details of the model used to calculate them.

- 14.2 RTÉNL has a number of concerns about the feasibility of providing reference offers and about the scope of the obligations to do so. These concerns exist despite ComReg's comment in paragraph 9.64 that the details associated with the reference offer should not "represent an exhaustive list of the services which might be the subject of a reasonable request".

- 14.3 Even if RTÉNL is not required to provide the extensive and very detailed information that is published by Arqiva in the UK, RTÉNL's view is that ComReg may have significantly underestimated the complexity of what is being proposed and the time that will be required to produce the information unless its obligations are strictly limited and tightly defined. RTÉNL's concerns are compounded by the uncertainty of the scope of its proposed obligation of access.

- 14.4 RTÉNL's approach to setting of tariffs has always been that it should be able to recover all of its costs while earning a reasonable margin. This is consistent with ComReg's preliminary conclusion in paragraph 9.186 and 9.229 of 12/77. Given the significant extent to which RTÉNL's fixed assets and operating costs are common to more than one service or customer,

the level of charges faced by each customers is therefore highly dependent upon the number of customers over which these costs are spread. RTÉNL only has a small number of customers and therefore changes to the size of the customer base can significantly impact the allocation of common costs.

- 14.5 RTÉNL's view is that reference offers can only be based upon the status quo and can only apply to the next customer.
- 14.6 RTÉNL proposes that any obligation to publish a reference offer that ComReg would impose should be limited to the provision of a fully managed national service to a new MUX operator, based on the prevailing configuration of the network and the existing customer base. The price associated with the service set out in the reference offer would be calculated on the basis of the incremental capital and operating costs together with the new service's appropriate share of common costs. Producing this information would not be particularly onerous given that many of the key associated technical and cost implications have already been considered.
- 14.7 RTÉNL would also be able to supply the relevant technical information and provide details of the basis on which the charges have been calculated. RTÉNL is keen that the amount of information it is required to produce as part of the reference offer is proportionate to the likelihood that an enquiry will be made. In RTÉNL's view it would be inefficient to require RTÉNL to undertake extensive further work to deal with a hypothetical request and that it would be more appropriate for such work to be performed as required in response to a genuine enquiry or when given notice by ComReg, and/or the BAI that a licence for a new service is forthcoming.
- 14.8 It would also be possible to indicate how the introduction of such a new service would impact upon the prices charged to existing customers. RTÉNL believes that visibility of this would be of interest to its existing and potential customers.
- 14.9 In principle RTÉNL could also provide a reference offer for a national managed analogue radio transmission service. However, to request that RTÉNL do so would be disproportionate in practice because currently there is insufficient spectrum available in which to launch such a service. RTÉNL could only provide a reference offer for such a service if it were provided with the details of the terms on which the Broadcasting Authority of Ireland and ComReg would award a licence for such a service and RTÉNL could then undertake the necessary engineering studies to assess the technical implications, identify the appropriate technical solution and determine the associated costs.
- 14.10 For the avoidance of doubt, and without prejudice to RTÉNL's position in relation to the scope of any obligation of access on Market A, an obligation to publish a reference offer for services that are not presently provided by RTÉNL, in particular the provision of access to part of the transmission infrastructure, would be entirely unreasonable in the absence of any actual request for such services. It would require RTÉNL to undertake an extensive exercise of compiling pricing and technical details which would be disproportionate to the benefit that potential users might gain. This is because it is hard for RTÉNL to second guess what a potential customer might request, particularly given that the implications may differ between sites. The task is further complicated if what is requested is piecemeal access, i.e., it differs between sites and/or does not cover all sites.
- 14.11 RTÉNL therefore proposes that any obligation to publish a reference offer should be limited to providing a reference offer to the first new MUX operator wishing to connect to RTÉNL's

assets at the combiner at all sites currently used by the PSB MUXs. This offer would be on the basis that the new MUX operator would be responsible for the provision of all assets and the performance of all activities upstream of the point of interconnection. RTÉNL would be able to provide a costing for access to its infrastructure downstream of the interconnection point together with the associated technical details.

- 14.12 Regardless of the manner in which the market is defined, RTÉNL would not in any event propose to provide indicative charges for any aspects of piecemeal access. As explained in response to Question 8 above, RTÉNL has already concluded contracts for similar access arrangements with local radio broadcasters, mobile telephony companies and others and would expect to apply the charging principles used when concluding agreements with these customers to setting the charges for piecemeal access. It is RTÉNL's practice to respond to requests for piecemeal access and to negotiate in good faith the terms on which such access could be granted in a manner that is responsive to the particular request, having regard to the operational and cost implications.
- 14.13 RTÉNL notes that paragraph 10.2 (iii) of Section 11 states that the Reference Offer will include at least "an over-view of how prices are derived". This appears to be at odds with the content of paragraph 9.64 which states that these should include prices. It would be helpful if ComReg could clarify its intentions. As noted above, RTÉNL proposes that it should only be required to include the proposed prices for a limited number of reference offers together with details of its pricing principles. In RTÉNL's view it would be disproportionately burdensome to expect it to produce additional information.

<p>15. ComReg has proposed that it should be notified of any proposed changes to the reference offer at least 3 months in advance of such changes coming into effect. Do you consider this timeframe as appropriate? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 128)</p>
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- 15.1 As noted in response to Question 14 above, RTÉNL's limited customer base and significant level of common costs mean that charges to individual customers are sensitive to the allocation of these costs and hence to the number of RTÉNL's customers. It is for this reason that RTÉNL proposes that it calculate for the purpose of its reference offer the charges that would be levied to the next new customer, assuming no other changes to the prevailing customer base or changes to the costs other than those associated with meeting the requirements of the new customer.
- 15.2 In the normal course of business RTÉNL does not experience regular or significant changes to its customer base and accordingly the periods proposed for notification of changes to reference offers to reflect changes in costs or a change in the customer base should be achievable. However, it is possible that there will be circumstances in which the delay causes problems. Those envisaged by RTÉNL include customers seeking to rely on the reference bids while they are in the process of being revised or circumstances in which the bids need to be revised again for some reason during the notification period.

16. Are there any additional issues or factors in relation to transparency which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. Page 128)

16.1 RTÉNL has expressed its concern regarding the publication of SLA's containing commercially sensitive information in response to Question 12 (which related to non-discrimination). RTÉNL notes with some concern the content of paragraphs 9.77 and 9.78 which also appear potentially to involve an obligation to publish commercially sensitive information. RTÉNL should not be required to publish its own commercially sensitive data that may be of benefit to customers and potential competitors but should instead be under an obligation to disclose this under appropriate confidentiality agreements in the context of commercially meaningful discussions and/or "in good faith" negotiations where the disclosure of such information is necessary for the discussions and/or negotiations to proceed.

17. Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 140)

17.1 RTÉNL understands ComReg's motivations for requiring the company to produce more disaggregated financial information, and for some of this to be made public while other, more commercially sensitive information, is provided to ComReg on a confidential basis. RTÉNL is confident that it could satisfy the proposed requirements as set out in Section 9 and Appendix C of document 12/77 if these are specified in sufficient detail and that RTÉNL is given sufficient time to make any necessary changes to its accounting systems and other processes.

17.2 RTÉNL cannot stress highly enough the need for such changes to be made in advance of the financial year for which additional or new information is needed or the financial years in which it is to be required to apply new policies and procedures.

17.3 RTÉNL notes that in paragraph 9.84 ComReg refers to requiring separated accounts for "the main products and services" while in paragraph 2.1b of Appendix C the obligation appears to be in relation to Market A and "where specified, for Services". In this context Services is defined as being "all of RTÉNL's network, including but not limited to all antennae, towers, masts, buildings, licensed multiplexes, associated facilities and associated services". It is unclear from this what level of separation ComReg intends should be provided by RTÉNL. RTÉNL proposes that the definition of Services and the resulting presentation of separated accounts are matters which can be agreed by RTÉNL and ComReg as part of the process referred to in the paragraphs below.

17.4 As noted above, it is critically important that the degree of separation is agreed between RTÉNL and ComReg significantly in advance of the financial year to which it applies. A full timeframe for the review process and the decision on the imposition of obligations on RTÉ/RTÉNL by ComReg has not been defined. In that context it is unreasonable and illogical to set out a timescale for the implementation of any specific measures that may form part of the overall package of obligations until the composition of the whole package has been defined.

- 17.5 In order to be feasible and proportionate any timescale for detailed implementation must be based on a lead time from the date of finalisation of the review process. RTÉ/RTÉNL propose a start date for detailed implementation of all of the new accounting and reporting obligations of no earlier than Jan 1 2014, that being the commencement of the first financial year which can be reasonably expected to occur after the completion of the review process. RTÉ/RTÉNL will commit to working with ComReg to ensure that if certain information can reasonably be provided at an earlier date, such information will be made available.
- 17.6 RTÉNL notes that in paragraph 9.99 ComReg states that it does not at this stage wish to prescribe the format of the separated accounts and indicates that the appropriate format may need to be changed. RTÉNL is happy with this in principle, but again requests that the format to apply to any financial year be determined as early as possible. Ideally, this should be sufficiently before the start of the relevant financial year to allow RTÉNL to make any necessary changes to the accounting records and other systems and processes can be put in place. RTÉNL notes that ComReg's stated intentions not to impose an unnecessary burden and to use information which can be obtained from within RTÉNL's current accounting systems as much as possible.
- 17.7 RTÉNL notes that ComReg is proposing that the separated accounts should be submitted to ComReg within four months of the end of RTÉNL's financial year end. It is the normal practice of the RTÉ group to finalise its financial statements and for these to have been audited within three months of year end. However, ComReg should be aware that the accounts are not final until they have been approved by Cabinet. RTÉNL can make draft financial statements available to ComReg within four months of year end on a strictly confidential basis. However publication must be in line with the finalisation, approval and publication of RTÉ annual report and financial statements.
- 17.8 Subject to the points raised above regarding the businesses or services for which separate information is needed, RTÉNL does not envisage any significant difficulties with satisfying the proposed requirements set out in paragraphs 9.104 to 9.113 inclusive. In reaching this conclusion, RTÉNL has had discussions with its auditors regarding the acceptability in principle of the auditors being engaged by and having duties to both ComReg and RTÉNL. Consistent with the points raised above, RTÉNL has some concerns with the suggestion in paragraph 9.117 that it is only before the end of the financial year that ComReg will discuss the audit requirements with respect to the Additional Financial Data.
- 17.9 It is RTÉNL's opinion that ComReg's requirements for Additional Financial Data and the associated audits should be agreed before the start of the financial year so that these can be discussed with the auditors and RTÉNL has sufficient time to put in place any changes that may be required to ensure the necessary information and audit evidence is collected throughout the financial year. This is particularly important given the text of paragraph 4.5 of Appendix C regarding survey techniques and also the need to ensure that adequate controls are in place throughout the year on which management and auditors can rely to ensure that the cost allocation system is free from material error (paragraph 5.4e of Appendix C).
- 17.10 Given the comments above, it would be helpful if RTÉNL and ComReg could agree and publish a standardised annual timetable which sets out when requirements for any particular financial year are to be determined and when after year end different information is to be provided to ComReg and/or published on the RTÉNL website.

17.11 RTÉNL has no further significant comments regarding ComReg's proposals on accounting separation, the associated documentation and the audits beyond those set out above.

18. Are there any additional issues or factors in relation to this accounting separation remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 140)

18.1 The proposed requirement under 6.3 of Appendix C is that RTÉNL prepare and submit draft Regulated Accounts and Additional Financial Information to ComReg within four months of the Effective Date. As there is no detail as to the extent or scope of this requirement RTÉNL is not in a position to confirm whether or not it can comply with this requirement.

19. Do you agree with ComReg's proposals regarding the application of cost accounting and price control remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 155)

19.1 RTÉ and RTÉNL do not agree with ComReg's proposals in terms of price control principally because in relation to digital terrestrial transmission services, they are redundant having regard to the fact that the Minister will direct the payments to be made by broadcasters in relation to the transmission services provided by RTÉ in the PSB Multiplexes.

19.2 In this context, RTÉ and RTÉNL submit that were it determined that a commercial multiplex may be licensed within the next three years, then it would be more proportionate and sufficient that RTÉNL be subject to an obligation of non-discrimination including in terms of tariffs so that the effective regulation of Market A services extend to a commercial multiplex operator.

19.3 RTÉNL believes that the concerns outlined above are very real. RTÉNL notes the comments in paragraph 9.157 regarding ComReg's on-going review of RTÉNL's tariff models. ComReg will be aware from this review that the way in which costs are allocated within these models does not follow the hierarchy set out in paragraph 4.2 of Appendix C. ComReg will also be aware that RTÉNL, after consultation with ComReg, is currently in the process of finalising the new tariff model for the post ASO period using the same cost allocation process as has been applied in previous models. RTÉNL is therefore surprised to learn from document 12/77 that its approach is not in line with ComReg's expectations and, therefore, that some of the considerable effort and expense expended to develop the model may have been wasted. To the extent that ComReg were to proceed with its proposal, and without prejudice to RTÉ and RTÉNL's position in relation to the propriety of ComReg's intervention, RTÉNL would welcome urgent clarification on this matter from ComReg as part of the ongoing review process or as part of this process.

19.4 For the avoidance of doubt, RTÉNL is not opposed to the principle of cost-orientation of tariffs. RTÉNL also agrees with ComReg that determination of cost oriented tariffs is a complex process. As noted above with respect to the models, it is one that RTÉNL has been engaged in for a significant period. RTÉNL notes that ComReg believes that this may require a further consultation process. RTÉNL requests that ComReg define an overall timetable for the finalisation of the Decision Instrument, the development of the framework for setting regulated, cost-oriented tariffs and introduction of the new accounting and reporting

obligations. It is important that all of these activities are delivered in a coherent manner and that all parties are able to plan for the associated work.

- 19.5 RTÉNL notes that ComReg favours the use of WACC as a basis for calculating normal returns to investors. RTÉNL agrees that this is a commonly used approach but shares ComReg's concern that in situations in which the services being provided are not capital intensive, such an approach would yield negligible returns (paragraph 9.184). It is possible that customers seeking access may request services that fall into this category.
- 19.6 One option would be for RTÉNL to be able to set its charges for such services in line with the prevailing market rate. As noted above, RTÉNL does provide access to infrastructure elements such as sites and masts and the charges levied for these may provide a suitable basis for charging for similar services.
- 19.7 In any event, RTÉNL should be allowed to charge a mark-up on efficient operating costs which allows it to make a reasonable profit.
- 19.8 RTÉNL finds paragraph 9.185 slightly difficult to understand. RTÉNL agrees that the first two sentences reflect the factual position and the incentive properties of allowing a mark-up on costs respectively. The third sentence may also represent ComReg's position. However, RTÉNL is unable to see the link between the first two sentences and the third. The issue under consideration in this paragraph and the second half of the preceding paragraph is what should be done in situations in which the appropriate solution to providing the service is not one which relies significantly on capital investment.
- 19.9 RTÉNL notes that it should be incentivised to adopt the most efficient solution and make the appropriate trade-offs between capital expenditure and operating expenditure to achieve this.
- 19.10 RTÉNL agrees with ComReg's preference for 'cost orientation' over 'retail minus' and 'reasonable costs' and with ComReg's reasoning for this preference.
- 19.11 When considering whether 'cost orientation' should be based on 'benchmarking' or the 'cost base', RTÉNL also agrees with ComReg that difficulties are likely to arise in relation to benchmarking externally many of its activities and that accordingly using the company's actual costs is the best approach. However, RTÉNL also noted above that it already has in place charges and charging principles which could be used for some access-based services in Market A because such services are already provided to local broadcasters and others.
- 19.12 RTÉNL notes the comments made by ComReg about the advantages and disadvantages of historical cost and current cost as the basis for the valuation of the assets in the cost base. RTÉNL agrees that much of its asset base has recently been renewed in connection with the launch of DTT, and notes that over the next few years this will continue to be the case as the last mast replacements are complete and RTÉNL undertakes a programme of replacing old buildings on transmitter sites with new ones. Accordingly, for these assets good cost information is available and historical cost will approximately equate to current cost.
- 19.13 A potentially important exception to this is the cost of land owned by RTÉNL, much of which was acquired very many decades ago. Unlike many entities, RTÉNL has not subsequently revalued the land in its financial statement or the underlying accounting records. RTÉNL considers that the introduction of regulated tariffs, whether for fully managed services alone or also for other infrastructure access would, in principle, represent a sensible time to

undertake such an exercise as it would ensure that prices charged more accurately reflect the costs that would be faced by an entrant and would therefore help ensure efficient investment decisions. RTÉNL notes, however, that determining a value for the land, and necessary supporting infrastructure, on a basis which does not reflect its revenue generating ability as a location for providing transmission and telecommunication services may be difficult, and that setting the value on the basis of income generation involves a degree of circularity.

- 19.14 Subject to the point above regarding possible revaluation of land, RTÉNL agrees with ComReg that the historical cost basis for the valuation of assets within the cost base is appropriate.
- 19.15 RTÉNL agrees with both ComReg's conclusion that a Top Down model is preferable to a Bottom Up model and with its reasoning for this conclusion.
- 19.16 RTÉNL agrees with both ComReg's conclusion that a fully distributed cost approach is preferable to any variant of Long Run Incremental Cost and with its reasoning for this conclusion.

20. What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 155)

- 20.1 RTÉNL recognises that its customers value certainty with regard to the level of charges or that if the amount is not certain, it is clear in what circumstances the charges will vary and therefore it is possible for customers to anticipate such changes.
- 20.2 In the past RTÉNL (and RTÉ) have entered into long term contracts for the provision of analogue transmission services, most notably with Radio Ireland Ltd and with TV3 Television Network Limited. In each case the contracts negotiated and signed by the parties were for ten years (that being the duration of the broadcast companies' respective licences). These contracts were entered into when the asset base required to provide the services was known with reasonable certainty and therefore it was not anticipated that there would need to be significant changes to charges during the contract period to reflect the replacement of assets at a differing cost to those initially in place. These contracts also provided for the indexation of certain categories of operating cost to reflect inflation, with certain other categories of cost, most importantly power costs, the subject of pass through terms.
- 20.3 In 2008 and 2009 RTÉNL and RTÉ held discussions with possible operators of commercial MUXs regarding the prices which RTÉNL and/or RTÉ might seek to charge for the provision of capacity as well as for transmission and distribution services. In these discussions RTÉNL and RTÉ recognised that those considering the launch of commercial MUXs would require a degree of certainty or predictability as to the level of charges. Accordingly, the discussions were held on the basis that long term contracts would be put in place and that the basis of the charges would be transparent as would the basis on which these might vary over the duration of the contract.
- 20.4 As RTÉNL has shown through its past conduct, RTÉNL is willing to enter into long term agreements subject to terms which result in an appropriate allocation of risk and return between the parties. Similarly, RTÉNL is willing to have its charges regulated for periods of

more than one year but believes that it is critical that the duration of the control is linked to the construction of the price control. That is, the duration must be considered as part of a package which also takes into account the form and structure of the control, including most importantly absolute clarity as to what changes to charges can be made during the period of the price control, in what circumstances and what the mechanism for making those changes is to be.

- 20.5 RTÉNL notes the reference to BAI granting contracts for periods of 7 to 10 years in paragraph 9.235. RTÉNL believes that this is too long a period for setting regulated charges. RTÉNL believes that setting charges for a period of 3 to 5 years, as is most common in other regulated sectors in Ireland and elsewhere, is generally more appropriate. A key factor to consider in the duration, or alternatively as part of the process by which charges can change during the price control period, is the certainty with which the asset base in place can be determined or predicted. Having regard to the requirement under the Framework Regulations that a market review is undertaken three years after an obligation is first imposed, RTÉNL would suggest that a period of three years is adequate.
- 20.6 RTÉNL has recently invested significantly in DTT related assets, including new masts. However, some of its assets will need replacing within the foreseeable future. These include analogue transmitters used for the broadcast of national radio services and the distribution system. While the anticipated cost of replacing the analogue radio equipment can be estimated with reasonable certainty because it is a stable technology, the costs of replacing the distribution system installed as part of the DTT project cannot. This is because the related technology is constantly evolving and therefore what it will be replaced with at the end of its 5 year useful economic life cannot be known and nor can the associated cost. RTÉNL therefore proposes that the maximum duration over which tariffs can be set should not be longer than that over which the capital base can be predicted with a reasonable degree of certainty.
- 20.7 As noted above, the form and structure of the price control mechanism affecting RTÉNL's tariffs must be considered alongside the issue of the duration.
- 20.8 One important issue will need to be addressed in detail is how variations in costs are to be reflected in changes to prices during the price control period. RTÉNL's preference would be for costs which fall outside its direct control, such as power and rates, to be the subject of automatic pass through on a yearly basis. As regards operating costs which are more within the control of RTÉNL, RTÉNL would expect any controls over tariffs which extend for more than one year to allow for an annual inflation adjustment mechanism.
- 20.9 As noted in response to Question 14, RTÉNL has a very significant level of common costs and also a relatively few number of customers from which to recover these costs. Therefore, any change in the number of customers for whom RTÉNL is providing a fully managed service or to whom access may be granted will result in a change in the appropriate allocation of these costs. The price control mechanism will need to be explicit about how such volume related changes are dealt with during the price control period.
- 20.10 Similar issues also arise in relation to the recovery of RTÉNL's investment in fixed assets through depreciation and the return it earns on this investment. While RTÉNL would expect to set charges based on its best estimate of capital investment, it is possible that the level of investment and its timing may not actually be the same as that forecast. Such differences may result in over or under recovery. The price control mechanism will need to be explicit about how these are accounted for in the level of tariffs actually charged, and when.

- 20.11 When considering how the issues identified above should be handled as part of determining how long tariffs should be set for, it will also be important to consider whether RTÉNL (or other parties) should be able to request or alternatively trigger an interim review, and if so whether the ability to do so should be at a particular date, in response to specific defined triggers or a more loosely determined right. Additionally, it will be important to determine whether there should be a clause which would allow for a redetermination of tariffs if, for example, RTÉNL faced significant financial distress which might jeopardise its ability to provide the services on which broadcasters with public service obligations rely in order to meet these obligations.
- 20.12 Finally, when considering the appropriateness of the duration of the period for which tariffs are set it will be important that the mechanism and process for dealing with each of the issues identified above is clearly defined, including the roles and responsibilities of RTÉNL, ComReg and others and the associated timetables.
- 20.13 RTÉNL recognises that it has raised many detailed points above, and that these will need to be the subject of detailed consideration by ComReg, RTÉNL and other parties in due course should ComReg proceed to with issuing a Decision Instrument which is in anyway similar to that in Section 11 of ComReg document 12/77.

21. Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence support your position. (Page 155)

21.1 The major issues have been identified in Q20 above.

22. Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 171)

- 22.1 In paragraph 10.57 ComReg recognises that the introduction of an access obligation will impose a time and other burdens on RTÉNL. ComReg identifies the requirement to provide SLAs as a specific incremental cost which RTÉNL will incur directly as a result.
- 22.2 RTÉNL believes that it will incur costs in developing a service offer based on ComReg’s proposed obligation of access, in its current form, even if no customers approach it seeking to gain access to its facilities rather than purchasing the managed service which RTÉNL has traditionally provided to its customers. This will include developing the general operational rules governing third party site access for the installation and maintenance of equipment. These costs will be wasted in the event that no access is sought as a result of the obligation being imposed. RTÉNL may continue to incur costs in keeping such arrangements, including specimen SLAs up to date.
- 22.3 RTÉNL will incur further additional up-front costs in the event that an existing or potential customer approaches it seeking access arrangements. These costs will relate to the discussion of the specific requirements at individual sites, the terms on which access is to be granted (which may need to be site specific) and the conclusion of agreements. These costs may be wasted if no agreement is reached.

- 22.4 Once access has been agreed, RTÉNL would incur additional costs in operating the access agreements, particularly where it is necessary for RTÉNL to have supervisory staff on site when its customers or those working on its customers' behalf are on site and where additional monitoring of interface points is required.
- 22.5 RTÉNL will seek to recover the costs of developing the access regime and operating access agreements from its access customers, however RTÉNL notes that ComReg 12/77 does not comment on how RTÉNL should recover its costs in the event that access is not sought or for how long RTÉNL might be expected to carry such costs if there is a delay between the costs being incurred and the granting of access.
- 22.6 Having regard to ComReg's market analysis and the perceived problem that regulation seeks to address, RTÉ and RTÉNL are of the view that the access obligation in the form proposed by ComReg is unjustified and inappropriate as well as costly.
- 22.7 RTÉNL is unable to provide an estimate of the additional costs it will incur in relation to the proposed accounting separation obligations. These will depend on the extent of the initial changes required and the extent and frequency of subsequent changes. RTÉNL's auditors are also unable to quantify the likely additional fees they will charge until the detail of the proposed separation is finalised and the scope of the audit work agreed.
- 22.8 In paragraph 10.98 ComReg suggests that the additional costs that the proposed obligations will place on RTÉNL will be exceeded by the benefits enjoyed by end-users from the promotion of competition. RTÉNL notes that this assertion does not appear to be supported by any quantitative analysis of the likely costs and benefits. In the absence of such estimates it is RTÉNL's view that it is not possible to determine whether the proposed requirements are proportionate to ComReg's assessment of its perceived risks.
- 22.9 RTÉNL notes that the terms of the Draft Decision Instrument will, as pointed out by ComReg, impose additional up-front and on-going costs on the company. The obligations with regard to accounting separation, price control and cost accounting would also appear to require that ComReg will also be required to expend additional resources in its role as a regulator. It seems likely that this will result in ComReg incurring additional cost as compared with the current situation. If it is the intention of ComReg to recover such costs from RTÉNL these additional charges will in turn need to be recovered from RTÉNL's customers by way of increased tariffs. This effect appears not to have been captured by ComReg's Regulatory Impact Assessment of its proposals with respect to Market A.

23. Do you agree with ComReg’s draft Decision Instrument set out above? Do you agree with ComReg’s Definitions and Interpretations as set out in Part 2? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer. (Page 182)

23.1 RTÉ and RTÉNL refer to their comments in response to the questions above, including in particular in relation to the remedies proposed for Market A -the draft Decision should be amended to reflect these comments. A number of specific comments are made below.

23.2 For the reasons explained in the responses to Questions concerning Market A, RTÉ and RTÉNL are of the view that any obligation of access should be clearly defined so as to be limited to the provision of a wholesale terrestrial broadcasting transmission service. In particular, it is entirely inappropriate and disproportionate to regulate the provision by RTÉNL of access to its infrastructure. In this regard, RTÉ and RTÉNL are of the view that the draft Decision Instrument needs to be amended, in particular section 7.2 thereof (p. 177 of 12/77). It is not appropriate to mandate access to equipment and accommodation having regard to the findings of the market analysis.

23.3 The wording and scope of the obligation of non-discrimination are not clear.

23.4 Having regard to the issues of overspill in broadcasting transmission, RTÉ and RTÉNL would suggest that the definition of Ireland, understood as the Republic of Ireland, be specified.

23.5 The first sentence in section 10.2 should be amended by included “a” before “Reference Offer”.

23.6 Having regard to the manner in which prices are derived, in particular the fact that price levels are highly dependent on the number of users of the network, RTÉ and RTÉNL are of the view that the obligation to notify in advance should not apply to changes in prices.

23.7 In terms of ComReg’s proposed Appendix C, RTÉ and RTÉNL would point to the following:

- (a) In Para 1.1, reference should be to RTÉNL Network Limited, not RTÉNL Transmission Limited.
- (b) The timeline set out in Para 3.2.5 do not appear to be consistent with the proposed main decision instrument or the discussions in the consultation document.
- (c) In relation to Para 3.3.2, please note that RTÉNL’s accounting records do not distinguish between internal and external costs in relation to all of the items listed in para 4.3.2. This is not a reasonable or proportionate requirement.
- (d) Regarding Para 4.2.1, it is important to ensure that the cost allocation hierarchy is consistent with the tariff model currently under development.
- (e) Any requirement for regular updates of survey should be applied reasonably and not impose a disproportionate or otherwise excessive burden on RTÉ.
- (f) At Para 5.3.2, it is unclear what “following ComReg’s approval” means, in particular whether it concerns the policies and approaches or the way in which they are described. Any specific timelines should be specified more clearly.

- (g) It is not clear what purpose is served by the requirements at Para 6.3. Nor are the requirements clear.

SECTION III. “MARKET B”

ComReg has proposed to define a market downstream from the market for access to terrestrial broadcasting transmission network services, namely the market for access to multiplexing services. For the reasons explained in response to Question 2, RTÉ and RTÉNL find the use of this terminology confusing and inaccurate. Having regard to the description of what services would be offered in this market, it appears that what ComReg is in fact proposing to regulate is the access to RTÉ’s PSB Multiplex and terrestrial transmission services. RTÉ does not believe that it is lawful for ComReg to seek to regulate access to the PSB Muxes, that is to seek to regulate the right to be broadcast terrestrially. In particular, ComReg appears to consider, on the view that the Broadcasting Act, 2009 and SMP regulation pursue different purposes and objectives, that it is entitled to regulate the granting of access to the PSB Muxes, save where RTÉ has no pre-existing must-carry obligation.

This is an approach that is very difficult to understand. In effect, ComReg is proposing to impose a series of obligations ignoring the requirements that are already imposed on RTÉ by way of statutory obligations. To suggest, as ComReg does, that the imposition by ComReg of SMP obligations will be more efficient and constraining than statutory obligations is simply impossible to understand. It is RTÉ and RTÉNL’s view that the approach proposed by ComReg is not correct and consistent with ComReg’s remit, taking into full consideration not only the purpose and objective of the Broadcasting Act, 2009, but also its *effect*. In particular RTÉ and RTÉNL do not believe that it is within ComReg’s remit to seek to impose obligations in relation to matters, such as access, that are entirely governed by legislation. The rationale used by ComReg to forbear from intervening in to the context of section 130(1)(e) should be applied equally in relation to the other provisions of section 130.

RTÉ and RTÉNL submit that the issue, if any, in relation to any “Market B” does not arise in relation to the selection of the material that may be broadcast terrestrially – this is an issue of content regulation and retail market which does not fall within the possible scope of SMP regulation – but in relation to the conditions of *transmission* that RTÉ offers other broadcasters on the PSB Muxes, that is, with the provision of digital terrestrial transmission network services.

In this regard, the analysis of “Market B” set out in the consultation document does not consider the issues that are relevant to determining whether, in the presence of regulation in Market A, and the regulatory scheme provided under section 130 of the Broadcasting Act, 2009 in terms of capacity and payments, there is any scope for further regulation. RTÉ and RTÉNL submit in this respect that having regard to the manner in which a multiplex operates, the regulation of market A is entirely sufficient in the presence of the regulatory constraints set out directly in the Broadcasting Act, 2009 or which are in the power of the Minister and/or the BAI to impose.

RTÉ and RTÉNL’s position is set out in further detail below in response to the specific questions raised by ComReg.

24. Do you agree with ComReg’s preliminary finding that the each of the criterion of the three criteria test is satisfied in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 193)

24.1 In essence, ComReg’s analysis of market B finds that:

- Currently RTÉ is a monopoly supplier in this market since the previous attempts to introduce commercial competitors failed.
- Although spectrum capacity has been allocated for up to four commercial competitors to enter the market, any commercial entrant would face entry barriers related to:
 - The regulatory process for obtaining a contract from the BAI to operate a DTT multiplex;
 - Sunk costs and the need to provide universal coverage;
 - RTÉ’s vertical integration; and
 - Lack of demand and uncertainty of demand.
- Consequently ComReg expects RTÉ to maintain (and exploit) a monopoly position which will require *ex ante* regulation because the three relevant conditions are met (high and non-transitory barriers to entry exist, there will be no tendency towards effective competition over the relevant time horizon and competition law is not sufficient to deal with potential competition problems).

24.2 It is RTÉ’s view that the provisions of the Broadcasting Act, 2009 more than adequately address the issues that ComReg has identified by way of justification for its proposed intervention and in fact exhaust the possibility of any further intervention. For example Section 12.15 of the document states that “*if RTÉ has residual spare capacity remaining after meeting all of its obligations, it may seek to exploit such capacity commercially*”. As previously pointed out this is not within RTÉ’s ability: rather it is the BAI who recommends to the Minister what channels should ultimately be provided with capacity on the second PSB Mux. There is accordingly no basis for ‘ComReg’s finding at Para 12.34 that whilst capacity may be available on RTÉ’s second PSB multiplex capable of providing for more non-RTÉ DTT channels “*it may not be in RTÉ’s interests to facilitate more retail competition which would result in a loss of market share ...*” In light of the BAI’s role in recommending to the Minister the types of services that should be considered for inclusion on the second multiplex, how could RTÉ be in a position to behave in such a way?

24.3 In this regard, RTÉ and RTÉNL do not agree that the relevant approach is, as suggested by ComReg at paras 12.11 and 12.12, to consider the objectives pursued by existing legislation or whether any price control would be “*one that would arise under the electronic communications regulatory framework*”. The relevant question is the scope left for additional regulation, that is, whether there is any scope left for the exercise of market power, if market power exists at all. In this regard, it is difficult to see what scope there is left for any obligations of access once the Broadcasting Act, 2009 prescribes the choice of programmes to be included in the PSBs as well as the amount of capacity that can be provided to a broadcaster or a price control where the Minister direct the appropriate payments to be by broadcasters to RTÉ.

24.4 Para 12.16 refers to the need to provide “stability and assurance” to a market which currently comprises two PSB multiplexes that are heavily regulated in terms of access and tariff costs. RTÉ submits that this form of regulation is directly contrary to ComReg’s stated aim in its own Strategy Document. This document states that ComReg’s approach is guided by the “Better Regulation” principles of necessity, effectiveness and proportionality...” . RTÉ submits that the kind of regulation proposed is simply not necessary and is entirely disproportionate. Any capacity which may exist on the second multiplex will be quickly filled (on the basis of the recommendations of the BAI to the Minister) as provided for at Section 130(1)(a)(iii) and with the potential carriage of the High Definition versions of TG4 and TV3.

24.5 The document goes on to state that ComReg believes in evidence based regulation. ComReg’s analysis of the first two conditions in substance relies on the arguments regarding existing market structure and entry barriers above. ComReg’s arguments on these points tend to be quite speculative and generally lack any detailed analysis of relevant evidence to support them. Virtually no economic data is presented to support ComReg’s conclusions. Some specific examples of these weaknesses in ComReg’s arguments are set out below.

- Regulatory barriers

- ComReg asserts that the need to obtain a contract from the BAI would entail delays and consequential commercial uncertainties (paras 12.22 and 13.26). ComReg does not explain why such delays would occur, how significant they would be or what commercial impact they would have.
- Given that the State has allocated sufficient spectrum to allow for up to four commercial competitors, it is surprising that ComReg concludes that regulatory barriers to entry are high enough to require *ex ante* regulation.
 - The preferred solution in this situation would normally be to reform the regulatory process to remove this regulatory failure rather than impose additional *ex ante* economic regulation.
 - The regulatory system in this market allows for up to five competitors, in which case RTÉ would control only one-third of the available capacity. Markets with this structure are not normally subject to *ex ante* regulation. The underlying issue here seems to be not so much the regulatory process and its impact but rather the current lack of demand for additional supply, and the consequent lack of commercial competitors to RTÉ, which are discussed below.

- Sunk costs

- ComReg identifies the existence of some sunk costs, although it acknowledges that most costs of entry are not in fact sunk (paras 12.23 and 13.21). ComReg does not quantify the costs of entry. It does not assess what proportion of entry costs would be sunk or how significant these would be relative to the size of the market and potential profit opportunities.
- ComReg notes that the costs of entry are higher for an entrant that wishes to supply to TG4 or TV3 given the consequent need for national coverage (para 13.15). Again it does not quantify the impact of this on the costs of entry, the proportion of these costs that would be sunk or their significance in the

context of this market. It merely asserts that “the incremental costs in such a case *may* outweigh the potential benefits of doing so” [emphasis added], i.e. these costs may (or may not) outweigh the profits that would be earned from entry. In addition, this argument suggests that TG4 and TV3 would only be broadcast on a competing commercial multiplex. This ignores, however, the fact that RTÉ, as the operator of a PSB Multiplex, has the obligation to include TG4 and TV3 in its offerings. In this context, TG4 and TV3’s requirements in terms of coverage do not need to prevent them being available on other multiplexes.

- Vertical integration

- ComReg identifies that RTÉ would be unlikely to switch to a new entrant given that it is vertically integrated into market B itself. It also argues that TV3, TG4 and other RTÉ customers would be unlikely to switch given their existing long-term contracts with RTÉ (para 12.24). However, ComReg does not analyse the impact of the relevant contractual terms, quantify the switching costs that TV3 and/or TG4 would face or analyse whether these would prevent them from switching to a competitor in response to potential exploitation by RTÉ.
- The argument is also somewhat speculative since ComReg seems to be uncertain as to whether or not customers have entered into such long-term contracts, it merely assumes that they have (paras 12.39 and 13.17).

- Lack of demand and uncertainty of demand

- ComReg concludes that it is unlikely that a commercial operator would enter the market to constrain RTÉ due to the lack of and/or uncertainty over the level of future demand (12.32). This conclusion appears to be purely speculative. No analysis of the market is provided. No reference is made to any forecasts of demand for these services in Ireland. No comparison is made with how demand for these services has developed in other countries.

24.6 The relevance of ComReg’s considerations in term of the barriers to entry to a commercial MUX is also not entirely clear in the context where ComReg has defined a market that is limited to “public interest” channels which as a matter of legislation must be carried in the PSB Multiplexes. ComReg also entirely ignores the fact that the DTT platform is a nascent platform that has to be established.

24.7 Moreover, and fundamentally, ComReg’s analysis in any event focuses on the wrong issue, namely that of access to the PSB Multiplexes, which is a matter that is cared for under the Broadcasting Act, 2009. This means that no consideration is given to what competition issues, if any, may arise in relation to the provision of terrestrial broadcasting transmission services in the presence of existing regulation, both under the Broadcasting Act, 2009 and in the upstream market (Market A). RTÉ is of the view that existing regulation does not leave scope for any anti-competitive behaviour on its part.

25. Do you agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position (Page 202)

- 25.1 RTÉ notes that the analysis in this section of the document largely repeats the arguments used in the previous section discussed above. RTÉ disagrees with the analysis of ComReg and the finding that RTÉ should be designated as having SMP in Market B. In essence, ComReg’s basis for imposing SMP designation is based on ensuring that RTÉ does not engage in anti-competitive behaviour with regard to potential non RTÉ channels of a public service character and who may wish to have access to the multiplex. As previously pointed out, access to the multiplex is not a matter that is within the remit of RTÉ since RTÉ has must-carry obligations in relation to these channels. In addition, even if this was a matter within RTÉ’s power to decide (which it is not), then it is of note that the capacity that remains available is very much limited, on the reasonable assumption that both HD versions of TG4 and TV3 will be carried. As previously outlined, it is not clear that the proposed regulation is relevant or proportionate to the actual available capacity on the second PSB multiplex. On the basis of available capacity alone, RTÉ strongly submits that there is no case for a finding of SMP status here and no market B to regulate.
- 25.2 Furthermore, in its analysis ComReg also concludes that TV3 and TG4 cannot exercise countervailing buyer power to constrain RTÉ. This argument is based on the lack of existing competing providers of DTT services (paras 13.28 to 13.32). ComReg does not consider the alternative possibility that these customers could sponsor the entry of a commercial competitor to RTÉ, helping it overcome some of the entry barriers identified above. TV3 and TG4 could decide to form an alliance and to fill a multiplex as both main channels have clear plans to broadcast on a high definition basis in addition to 3e which is part of the TV3 services.
- 25.3 ComReg’s line of reasoning also entirely ignores the fact that broadcasters such as TV3 and TG4, but not only (in fact any programme material that may be included in the PSB Mux) have must-carry status such that it is not possible for RTÉ to refuse them access. In addition, the payments that may be required by RTÉ are subject to directions of the Minister. This is also the case of the capacity that must be available to them.
- 25.4 Obviously these obligations place very serious constraints on the ability of RTÉ to “*act independently of competitors, customers and consumers*” as ComReg suggests including at para. 13.34. On the contrary, RTÉ, being directly regulated under the Broadcasting Act, 2009, does not enjoy any “significant market power” as ComReg suggests. RTÉ notes further that as it carries its own services in the same multiplexes as the services of other broadcasters, there is no possibility for it to discriminate in relation to the quality of the transmission service offered and therefore no power in the hand of RTÉ in respect of any aspect of the transmission service provided to third party broadcasters.

26. Do you agree with ComReg’s preliminary assessment of potential competition problems in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 207)

26.1 RTÉ and RTÉNL do not agree with ComReg’s analysis of the potential competition problems in “Market B”. ComReg’s analysis is largely theoretical and includes no specific analysis of how likely it is that these problems would in fact occur in this market.

26.2 For example, ComReg identifies various ways in which a vertically-integrated monopolist could engage in “vertical foreclosure” to exclude actual or potential competitors in an associated market (Paras 14.13 to 14.21). It is well established in economic theory that these harms will occur *only* if the vertically-integrated firm has both the *ability* and *incentive* to engage in such practices. Incentives depend on whether the losses incurred in upstream market are outweighed by additional profits resulting from foreclosure of the downstream markets. This in turn depends on, amongst other things, the relative profit margins upstream and downstream. ComReg presents no analysis of RTÉ’s incentives and makes no reference to its relative upstream and downstream margins. In this regard, we submit that it is in RTÉ’s interest, having built the platform, to have a successful DTT platform. The consultation paper assumes that RTÉ has an incentive to foreclose competing DTT channels, since they are substitutes for its own services. However, ComReg fails to take into account the network effects between different channels using the same distribution platform. RTÉ could well benefit from existence of additional DTT channels since they would make the DTT platform more attractive to consumers.

26.3 In any case, it is difficult to see the relevance of the theories put forward in the consultation paper, having regard to the range of obligations already imposed on RTÉ in relation to access to the PSB Multiplexes. Issues of access cannot arise on the part of RTÉ where it is the BAI along with the Minister who decides the number of “ non-RTÉ broadcasting programme services on its multiplexes” referred to at para 14.20. It also ignores the fact that even if RTÉ in some way was the determinant of the channel line up on its multiplexes, which it is not, any new proposed RTÉ television service would be the subject of strict *ex ante* approval procedures in Section 103 of the Broadcasting Act, 2009.

26.4 As previously outlined above at Section One of this response, these procedures mean that any new RTÉ services would only be approved following consultation by the BAI with the Minister following a full public value test process. RTÉ completed such a process prior to the approval of the three additional new television services which are carried on the first PSB multiplex. (There are five RTÉ services on the first multiplex and not six as the consultation document incorrectly refers at para 14.23 and elsewhere). Indeed one of the conditions of approval of one of these new RTÉ services (RTÉ Junior) was that RTÉ would not be permitted to advertise on this service. On this basis not only is there very limited potential capacity on the second PSB multiplex for non RTÉ services, if RTÉ wished to place a new service on this multiplex itself, it would have to go through the rigorous *ex ante* procedures provided in the Broadcasting Act, 2009. This directly limits RTÉ’s ability to include its own services on the multiplex to its own advantage.

26.5 The comments made to the effect that RTÉ could devise charges that could discriminate against other broadcasters runs directly contrary to the provisions of Section 130 of the Broadcasting Act. The Minister recently stated in the Oireachtas that Section 130 provided to him a “ discretionary role” in relation to the DTT tariffing and he outlined that this work had commenced in summer of 2010. In view of the Minister’s intervention under section 130, it is cannot be suggested that RTÉ will have the ability to discriminate and/or charge

excessive tariffs. ComReg’s assessment of RTÉ’s potential ability to operate in an unfair and anti-competitive manner in relation to charging its competitors for capacity on its multiplex entirely ignores the very significant work that has been undertaken over a two year period in relation to the RTÉ/RTÉNL tariff model, **with ComReg**. It is simply incomprehensible that ComReg would ignore the reports that it would have itself commissioned to Deloitte Consulting supporting its own recommendations in terms of the costing methodologies and principles that **should be followed by the Minister in regulating** DTT tariffs. The very purpose of this very extensive two year review was to ensure that the proposed DTT tariffs for broadcast customers fairly reflected the cost of the service (including an appropriate level of return).

27. Do you have evidence/examples of competition problems in market B? Please provide all relevant factual evidence supporting your position. (Page 207)

27.1 RTÉ and RTÉNL fundamentally disagree with ComReg’s approach to “Market B”. RTÉ has no market power in the market as defined by ComReg and the competition problems purportedly identified by ComReg simply do not arise having regard to the constraints placed by legislation on RTÉ. As such, the approach taken by ComReg is not guided by the principles of proportionality or of necessity.

27.2 In addition, even if RTÉ had the latitude that ComReg assumes, the proposed regulation is entirely disproportionate, excessive, onerous and burdensome when one considers the potential available capacity on the second multiplex for services which could potentially come within Section 130(1)(a) of the Broadcasting Act, 2009. The available capacity is limited and RTÉ’s ability to behave in an anti-competitive fashion severely curtailed by the role of the BAI, Sections 103 and 130 of the Broadcasting Act, 2009 respectively. It has been noted earlier in Section One of this submission that the legislative provisions in question take precedence.

27.3 Furthermore RTÉ has a statutory obligation in relation to the establishment operation and maintenance of a national television multiplex, which obligations are performed by its wholly owned subsidiary RTÉ Network Limited (RTÉNL). These services are provided by RTÉNL to RTÉ on an arm’s length basis subject to a tariff model that has already been scrutinised in detail by ComReg on request by the Minister.

28. Do you agree with ComReg’s proposals regarding the application of an access remedy and the conditions attached to the access remedy in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 217)

28.1 On the basis of ComReg’s definition of Market B, RTÉ and RTÉNL fundamentally disagrees with the imposition of an access obligation. This is because RTÉ would simply not be in the position to meet “reasonable requests for access” for access to its multiplexes because whether television programmes may be broadcast by way of terrestrial transmission is not a matter that is in fact within RTÉ’s power.

28.2 In accordance with our comments above regarding the appropriate scope of the market, RTÉ suggests that any obligation of access should be limited to an obligation to provide digital terrestrial transmission services to broadcasters which have the right to be so broadcasted, for example because they are specifically mentioned in section 130(1) or because they have been granted public interest status by the BAI.

- 28.3 Any other form of access obligation would encroach upon the statutory function of the Minister and the BAI and would accordingly be unlawful and unable to be complied with.
- 28.4 Having regard to the constraints placed on RTÉ by section 130, it would be entirely sufficient, and it would be proportionate, to limit such an obligation to negotiate in good faith. For the avoidance of doubt, were the scope of the access obligation any wider, then it should be limited to the types of services that are within RTÉ's capability to deliver.

29. ComReg has proposed an access remedy to RTÉ's multiplexes including associated facilities. What services/facilities do you consider should RTÉ be obliged to provide in light of the considerations contained in Regulation 12(4) of the Access Regulations. In addition, what services/facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 217)

- 29.1 As mentioned above, any obligation of access on RTÉ should be expressed as an obligation to provide terrestrial transmission services to broadcasters which have the right to be so broadcasted.
- 29.2 Having regard to the constraints of digital transmission, in particular the requirements that the signals be multiplexed before they are broadcast, such an obligation of access should be limited to an obligation to provide a national fully managed digital terrestrial transmission service. Associated facilities should be limited to what is necessary to avail of such a service.
- 29.3 RTÉ/RTÉNL do not believe that it is appropriate to require RTÉ to provide the multiplexing of the signals itself. This is because there are a number of providers operating audio and video multiplexing services in Ireland, including for example, Eircom, UPC, BT and Arqiva and BSkyB who even have multiplexing equipment on the RTÉ Donnybrook campus.

30. ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 217)

- 30.1 RTÉ is not clear what SLA obligation is referred to in this question.
- 30.2 RTÉ holds the licence to operate the PSB multiplex and in turn has appointed its wholly owned subsidiary RTÉNL (which at law it is entitled to do) to provide and operate the infrastructure necessary to provide an integrated multiplexing, distribution and transmission service, as instructed in the 2009 Broadcasting Act. The contractual arrangement in place between RTÉ and RTÉNL in terms of the provision of this service includes an SLA in terms of the provision of distribution and transmission services. There is no SLA in place concerning the interaction between the multiplexing equipment and distribution / transmission equipment.
- 30.3 While RTÉ does not believe that this is what is being proposed by ComReg, for the avoidance of doubt, RTÉ and RTÉNL are of the view that such an obligation would serve no good purpose and would unnecessarily introduce capital expenditure and operating costs. This is

because professional monitoring equipment would have to be established at both sides of the interface point and that monitoring equipment would have to be monitored on an ongoing basis. If Market B is more properly defined as the market for the provision of digital terrestrial broadcasting transmission network services to terrestrial broadcasters, then it could be considered that SLAs in the same form as those proposed in relation to Market A could be agreed. Please refer to our comments in relation to the latter at Question 9.

31. ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 218)

31.1 Any SLA between RTÉ and the relevant broadcasters could only reasonably mirror the terms agreed between RTÉ and RTÉNL in the context of Market A. Having regard to the technical characteristics of digital terrestrial transmission for multiplexed services, RTÉ does not believe that it is reasonable or appropriate to allow for the specific service levels to be agreed for different broadcasters in a single MUX. Rather, RTÉ should be required not to discriminate between the RTÉ services and other broadcasters' services in relation to SLAs and compensation.

31.2 In relation to compensation, please refer to our response to Question 9 in relation to Market A, which applies *mutatis mutandis*.

32. Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 218)

32.1 For the reasons previously explained, RTÉ and RTÉNL are of the view that the proposed obligation of access raise very difficult questions concerning its compatibility with the function reserved to the Minister and the BAI under the Broadcasting Act, 2009. This is particularly the case having regard to the definition of the market proposed by ComReg.

32.2 RTÉ suggests that the appropriate market to define is the market for the provision of digital terrestrial broadcasting transmission services to terrestrial broadcasters. While the purpose of an access obligation in these terms would be easier to understand, it is far from clear that it is in fact necessary. Once a broadcaster has been designated as having the right to broadcast in the PSB Multiplexes, it is difficult to see how RTÉ could possibly act contrary to the clear instructions of the Minister and/or the Broadcasting Act, 2009 and deny access. RTÉ believes that it is entirely sufficient to impose an obligation of non-discrimination that would ensure, if need be, that all services within a multiplex are treated equally, possibly accompanied by an obligation to negotiate in good faith.

33. Do you agree with ComReg's proposals regarding the application of the non-discrimination remedy? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 219)

33.1 RTÉ does not disagree with the proposed obligation of non-discrimination. However, contrary to the suggestion in paragraph 15.50 of the ComReg consultation document, RTÉ is not aware that at anytime there would have been question of excessive or discriminatory pricing or proposed pricing by RTÉ or RTÉNL in the provision of multiplexing, transmission or distribution services. RTÉ rejects in the clearest terms any such allegations.

33.2 As noted by ComReg in paragraph 9.47, RTÉNL has been operating under a non-discrimination obligation in relation to the provision of national analogue TV and radio transmission services for a significant period of time. RTÉNL accepts that this should be extended to the provision of MUX transmission services for DTT and to such other services as it may provide. RTÉNL believes it has complied with this obligation in relation to customers of both of the existing services and as between the two existing services. It has also sought to apply this concept when calculating charges for actual and potential MUX operators.

33.3 While RTÉ does not disagree with a requirement not to discriminate in terms of the services offered to broadcasters, including its own services, any requirement to provide information must recognise the fact that RTÉ as the operator of multiplexes by law is not in the same position as the third party broadcasters that it must carry. To the extent that it is necessary, then it should be made clear that any obligation of non-discrimination in terms of provision of services is complied with when sufficient and reasonable notice is provided to third parties. Please also refer to our comments in relation to Market A in response to Question 12.

34. Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 220)

34.1 RTÉ notes that the obligation of non-discrimination would extend to the tariffs charges raised from the terrestrial broadcasters. While RTÉ does not disagree with this principle, compliance with any such obligation should be subject to RTÉ's compliance requirements with the directions of the Minister under section 130.

35. Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 223)

35.1 To the extent that ComReg's proposals ought to be understood as proposing the publication of a draft contract (the Reference Offer) between RTÉ and a Terrestrial Broadcaster for the provision of a fully managed multiplexed distribution and transmission service, then RTÉ does not disagree with this proposal. It would appear to RTÉ that any such offer would be largely similar to the Reference Offer suggested in relation to Market A.

35.2 RTÉ refers to the comments made in relation to ComReg's proposals in the matter in relation to Market A which also apply here.

36. ComReg has proposed that it should be notified of any proposed changes to the reference offer at least 3 months in advance of such changes coming into effect. Do you consider this timeframe as appropriate? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 223)

36.1 RTÉ refers to the response to Question 15 in relation to Market A. RTÉ notes that there are circumstances in which the level of charges to be levied on RTÉ by RTÉNL may vary more frequently than this and that therefore this may present difficulties for RTÉ. In particular, while changes to the price to a multiplex operator (i.e., the total charge to RTÉ for a MUX) would typically happen only once each year, changes to the charges in relation to the broadcaster on the mux could, until it is full, happen each time a new user is added. Hopefully this will happen more often than every 3 months as the MUX fills up. An obligation to publish the cost per broadcaster at least 3 months before it is changed could cause accordingly cause difficulties.

37. Are there any additional issues or factors in relation to transparency which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.(Page 224)

37.1 Please see RTÉ and RTÉNL's response to Question 36 above.

38. Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 227)

38.1 RTÉ does not agree with the proposals regarding the application of accounting separation in this market. In particular, RTÉ is of the view that having regard to the fact that RTÉNL operates the PSB multiplexes on behalf of RTÉ, and invoices RTÉ in relation to same, and that a separate accounting remedy has already been proposed in respect of RTÉNL, the application of parallel accounting separation obligations on RTÉ would provide no additional transparency or control. It would simply impose an additional administrative cost. In effect, this obligation would require setting up a mirror system that would process the charges imposed by RTÉNL adding nothing to the transparency already available as a result of the imposition of a separate accounting obligation on RTÉNL.

38.2 The meaning of para 15.82 is unclear. It appears to indicate that overhead costs incurred by commercial subsidiaries should be the minimum overhead costs allocated. Section 108 of the Broadcasting Act, 2009 provides that RTÉ ensures that transactions between activities in pursuit of RTÉ's public service objectives and activities in pursuit of the commercial exploitation obligation are conducted on an arm's length basis. This effectively requires shared costs to be charged to commercial operations at market rates where such are available.

39. Are there any additional issues or factors in relation to this accounting separation remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 227)

39.1 Please see our response to Question 38 above.

40. Do you agree with ComReg's proposals regarding the application of cost accounting and price control remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 241)

40.1 RTÉ does not agree with ComReg's proposals. While RTÉ does not disagree with the principle of a price control, RTÉ does not believe that ComReg may lawfully impose a price control in circumstances where the Minister is exercising its power to direct payments from broadcasters to RTÉ under section 130 of the Broadcasting Act, 2009.

40.2 Having regard to the essential role played by ComReg in the review of RTÉNL/RTÉ tariff model and ComReg's function under section 130 to make recommendations to the Minister, it is difficult to understand ComReg's position in the matter. In particular, there is no place for a price control being imposed by ComReg in relation to payments by broadcasters because this is clearly within the remit of the Minister.

40.3 RTÉ notes further that ComReg's proposals, if implemented, would place RTÉ in the invidious position where it may be required to charge different prices for the same services and accordingly would be placed in an impossible situation of non-compliance.

41. What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 242)

41.1 For the reasons explained above, RTÉ is of the view that it is not permissible for ComReg to impose a price control having regard to the provisions of section 130 of the Broadcasting Act, 2009.

41.2 Without prejudice to this, maybe for the purpose of ComReg's recommendations to ComReg, we refer to our response to Question 20 above in relation to Market A.

42. Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 242)

42.1 For the reasons explained above, RTÉ is of the view that ComReg's proposals ignore the role of the Minister in determining the payments to be made by broadcasters and for this reason are flawed.

43. Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position. (Page 257)

43.1 RTÉ does not agree with the preliminary conclusions arrived at here. RTÉ notes that the RIA is effectively a summary of the discussions presented in the other sections of the consultation document. RTÉ’s position is accordingly that which it expresses in response to the questions above, namely that regulation by ComReg is not an appropriate course of action to take by ComReg in the presence of its DTT must-carry obligations. It is not permissible for ComReg to intervene having regard to existing regulation under the Broadcasting Act, 2009.

43.2 Having regard to the fact that the matter of access to the PSB Muxes is an issue that is dealt with under the Broadcasting Act, 2009, there is no “entry” that can be encouraged through regulation and RTÉ entirely fails to see how ComReg’s proposed obligations would increase the potential for entry and expansion of non RTÉ services to the benefit of end-users, as it suggests. In any event, even if there were, the limited capacity that is available on the PSB Muxes makes it an entirely disproportionate intervention.

43.3 RTÉ finds accordingly that ComReg’s proposed intervention is not justified and is inconsistent with the principles of Better Regulation. In ignoring the effect of the Broadcasting Act, 2009, and the fact that the matter of access and pricing are already regulated, ComReg’s proposals would if implemented create various serious legal and practical difficulties.

43.4 Following this submission, RTÉ and RTÉNL expect that ComReg will consider these matters in greater depth, review this consultation process in its entirety and consult further on this market review.

44. Do you agree with ComReg’s draft Decision Instrument set out above? Do you agree with ComReg’s Definitions and Interpretations as set out in Part 2? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer. (Page 267)

44.1 RTÉ does not agree with the proposed draft Decision Instrument for the reasons set out in the responses concerning Market B. As a matter of fact, it is RTÉ’s position that the market is not suitable for ex ante SMP regulation. RTÉ accordingly submits that no decision at all should be made. The comments below are made without prejudice to this position.

44.2 To the extent that a decision is made, then RTÉ refers to its responses to questions in this section III. All comments below should be viewed in the overall context of RTÉ’s submission.

44.3 The definition of the market should be amended in accordance with RTÉ’s comments in this section III. In particular, any reference to “multiplexing services” should be avoided because it is confusing and inaccurate.

44.4 The wording of the obligation of non-discrimination is not clear. There should be no obligation to provide information “at the same time” as this is not a requirement that can be met by RTÉ.

- 44.5 The meaning of section 9.4 is not clear. No rationale has been set out that is capable of explaining the scope and content of this obligation.
- 44.6 For reasons explained in response to the questions concerning Market B, no price control may be imposed because this is a matter that is within the remit of the Minister.

Following this submission, RTÉ and RTÉNL expect that ComReg will consider these matters in greater depth, review this consultation process in its entirety and consult further on this market review.

APPENDICES

- 1.** Correspondence from BAI to RTÉ dated 4th July 2012 (email and letter)
- 2.** Nielsen Est Survey

5: TG4

Response to Consultation on Broadcasting transmission markets

Introduction

TG4 are the Irish TV Broadcaster established in 1996 as a fully owned subsidiary of RTÉ. TG4 generates its own Irish language content as part of its scheduling and is purely a broadcaster of content. TG4 does not have any transmission assets.

As a Broadcaster, TG4 provide the content and the schedule. It is delivered into people's home by a transmission company, RTÉ NL. TG4 connect from TG4 HQ to RTÉ Dublin by fibre and that signal is distributed nationally by the RTÉ Transmission system.

TG4's policy is to be available on all platforms however TG4 have statutory obligation to be broadcast on the island of Ireland. The Broadcasting Act 2009 states that:

118.—(1) The objects of TG4 are—

(a) to establish, maintain and operate a national television broadcasting service, which shall have the character of a public service, be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland,

In terms of other platforms only analogue/digital terrestrial (RTÉ NL – penetration 98%) satisfies this legal obligation. TG4 are also on other platforms but other platforms have a number of drawbacks. Satellite (Sky) has 100% penetration but is not free to air. Cable/UPC have approx 40% coverage but are equally not free to air.

In relation to DTT there is a similar statutory obligation in S.130 of the Broadcasting which obliges RTÉNL to host TG4 on the national multiplex. The section accepts the need for TG4 to make payment for this access however it is envisaged that ComReg may have a role in setting those charges:

(2) TG4 shall make to RTE´ such periodic or other payments in respect of any service provided by RTE´ for the purposes set out in subsection (1)(a) of broadcasting by digital means TG4 as the Minister, after consultation with the Communications Regulator, RTE´ and TG4, may direct.

TG4 is funded from a number of sources including grant in aid from exchequer; the licence fee and commercial income.

TG4 has a ten year contract with RTÉNL to transmit its analogue service. The contract was signed in 2003 prior to TG4 being established as an independent statutory commercial state company. In 2003 TG4 had no independent input to the terms and conditions of the broadcasting agreements with RTÉNL.

In April 2007, TG4 were established as an Independent statutory commercial state company.

The commercial arrangement with RTÉ NL is according to the contract. RTÉNL advise us annually of the charge broken down by:

- Distribution;
- Transmission;
- Fibre Feeds, and
- Satellite Uplink.

The Distribution and Transmission tariffs are further divided into Capital, Opex and Power. RTÉNL add a mark up to the costs for capex and opex which further increase the cost.

While RTÉNL have discussed the model used to allocate charges to the users with us they have not provided clarity on the actual costs or the allocation basis and due to the lack of this supporting data there is no transparency.

Response to Consultation Questions

Q. 1. Do you agree with ComReg's preliminary conclusions on the television and radio retail market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with ComReg's conclusions

Q. 2. Do you agree with ComReg's preliminary conclusions on the wholesale market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with ComReg's conclusions

Q. 3. Do you agree with ComReg's preliminary finding that each criterion of the three criteria test is satisfied in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 supports ComReg's conclusions on the three criteria for market A and has submitted to ComReg supporting points in earlier consultations

Q. 4. Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 supports ComReg's preliminary conclusions on market A

Q. 5. Do you agree with ComReg's preliminary assessment of potential competition problems in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

TG4 agrees with the potential competition problems in market A and has made arguments in relation to abusive pricing by RTENL in these markets in earlier consultations

Q. 6. Do you have evidence/examples of competition problems in this market? Please provide all relevant factual evidence supporting your position.

TG4 believes in this market RTENL has been operating abusive pricing for a number of years in pricing both analogue and digital transmission access costs.

Q. 7. Do you agree with ComReg's proposals regarding the application of an access remedy and the conditions attached to the access remedy access to market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with this proposal

Q. 8. ComReg has proposed an access remedy to RTÉNL's transmission and distribution network including associated facilities. What services/facilities do you consider should RTÉNL be obliged to provide in light of the considerations contained in Regulation 12(4) of the Access Regulations. In addition, what services/facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

In TG4's view RTENL as the dominant operator in this market should continue to provide existing access and associated facilities in this market and where appropriate should be subject to an obligation to provide access and associated facilities on the basis of a reasonable request

Q. 9. ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the proposed SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 supports this proposal

Q. 10. ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 believe the existing mandated provisions should continue in the new SLA

Q. 11. Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 12. Do you agree with ComReg's proposals regarding the application of the non-discrimination remedy? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with this proposal

Q. 13. Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 14. Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with this proposal

Q. 15. ComReg has proposed that it should be notified of any proposed changes to the reference offer at least 3 months in advance of such changes coming into effect. Do you consider this timeframe as appropriate? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

TG4 agrees with the notification period

Q. 16. Are there any additional issues or factors in relation to transparency which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 17. Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with this proposal

Q. 18. Are there any additional issues or factors in relation to this accounting separation remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 19. Do you agree with ComReg's proposals regarding the application of cost accounting and price control remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 believe ComReg should consider LRIC based pricing as the most appropriate forward looking methodology to assess the most efficient prices in this market.

Q. 20. What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 believe strongly that ComReg should set an interim cost related price for this market at the time the SMP decision is made and obligations are set. The launch of the DTT platform means that any excessive pricing by RTENL cannot be allowed to continue into the near future.

TG4 believe cost model consultation and methodologies should be completed as soon as practicable and the interim price replaced with a final cost price for access and with retrospection of tariffs in place.

Q. 21. Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence support your position

No Additional comments

Q. 22. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the conclusions

Q. 23. Do you agree with ComReg's draft Decision Instrument set out above? Do you agree with ComReg's Definitions and Interpretations as set out in Part 2? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

TG4 agrees with the draft instrument

Q. 24. Do you agree with ComReg's preliminary finding that the each of the criterion of the three criteria test is satisfied in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the findings

Q. 25. Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the conclusions

Q. 26. Do you agree with ComReg's preliminary assessment of potential competition problems in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the assessment

Q. 27. Do you have evidence/examples of competition problems in market B? Please provide all relevant factual evidence supporting your position.

TG4 refer ComReg to the answer to Q5

Q. 28. Do you agree with ComReg's proposals regarding the application of an access remedy and the conditions attached to the access remedy in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the proposals

Q. 29. ComReg has proposed an access remedy to RTÉ's multiplexes including associated facilities. What services/facilities do you consider should RTÉ be obliged to provide in light of the considerations contained in Regulation 12(4) of the Access Regulations. In addition, what services/facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 believe access issues are similar to those in market A and would refer ComReg to its reply to Q8

Q. 30. ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider that service credits should be a condition of the SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 supports this provision

Q. 31. ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg Decision Notice (D16/04) should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 supports the imposition of obligations previously imposed in the SLA

Q. 32. Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 33. Do you agree with ComReg's proposals regarding the application of the non-discrimination remedy? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the proposals

Q. 34. Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 35. Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the proposals

Q. 36. ComReg has proposed that it should be notified of any proposed changes to the reference offer at least 3 months in advance of such changes coming into effect. Do you consider this timeframe as appropriate? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the proposal

Q. 37. Are there any additional issues or factors in relation to transparency which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 38. Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 supports the proposals

Q. 39. Are there any additional issues or factors in relation to this accounting separation remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 40. Do you agree with ComReg's proposals regarding the application of cost accounting and price control remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 believe the same competition problems exist in this market as in market A above and would refer ComReg to our answer to Q19

Q. 41. What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 would refer ComReg to its answer to Q20

Q. 42. Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

No additional comments

Q. 43. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 agrees with the conclusions

Q. 44. Do you agree with ComReg's draft Decision Instrument set out above? Do you agree with ComReg's Definitions and Interpretations as set out in Part 2? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

TG4 agrees with the draft decision

6: TV3



Mr Jason Cleary
Commission for Communication Regulation
Irish Life Centre
Abbey Street
Dublin 1

19th September 2012

Ref: Market Review-Broadcasting Transmission Services in Ireland-12/77

Dear Jason,

I refer to the above matter. Please find enclosed TV3 response to the above consultation together with a confidential annex.

Please note that the annex contains commercially sensitive information and is not to be provided to any third party without TV3's prior written consent.

You might also set out the next steps of the process and the associated time frame.

Please acknowledge receipt at your earliest convenience.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'David McMunn'.

David McMunn
Director of Government, Regulatory and Legal Affairs

Executive Summary

1. ComReg 's Consultation Paper and Draft Decision 12/77 ("ComReg 12/77") on its Market Review of Broadcasting Transmission Services in Ireland provides an important opportunity to address known and understood market dominance in the broadcasting transmission market in Ireland, through the use of the full suite of regulatory tools (including *ex ante* regulation) available to ComReg.
2. ComReg's own conclusions in 12/77 along the Irish Competition Authority Enforcement Decision on Television Advertising (E/12/001), earlier this year, clearly confirms that the Irish broadcasting market does not tend towards effective competition and also highlights the insufficiency of *ex post* competition law alone to address market failures (in both the television advertising market and the television broadcasting transmission markets).
3. In TV3's view, the analysis presented in ComReg 12/77 provides a real basis, with the appropriate and necessary regulatory standards, to set fair and reasonable tariffs. TV3 believes that LRIC is the most appropriate cost model and pricing mechanism to utilise as RTÉ is required to provide the multiplexing, transmission and distribution network for its own use and to broadcast state channels. An incremental costing model would ensure that unnecessary and inefficient barriers to entry are removed and that only costs specific to adding new services to the platform are charged to network users by the network provider. LRIC has also been used as the appropriate cost accounting methodology in other regulated infrastructure companies in this jurisdiction.
4. TV3 believes that any cost accounting remedy introduced by ComReg needs to make specific provision regarding the Regulatory Asset Base and the operating cost base of the SMP operator. Regulatory principles dictate that an SMP operator should not be allowed to recover any inefficient costs incurred in its operating businesses and should as SMP operator should not earn a return on any capital invested in infrastructure that is excessive to meet customer demand. In this respect, a Bottom Up cost model should identify an acceptable asset and cost base of an efficient operator and this could be used as a comparison to the RTE Fully distributed Top-Down cost model, to ensure that customers are not overcharged and that RTE does not earn a return on network infrastructure that is not required to carry existing services.
5. ComReg 12/77 provides a platform for a professional and structured approach to setting transmission tariffs to the required regulatory standard. The outcome of this consultation process should be the setting of a fair, reasonable, proportionate, transparent and non-discriminatory free-to-air transmission (post-ASO) tariff for the Irish market, in accordance with EU policy. This is critical as it should serve to both correct historic opaque transmission pricing and over-charging (Ref TV3 Complaint S5 01/10-still awaiting resolution) while also encouraging media plurality and the development of a broadcast sector appropriate to a modern democratic economy.
6. The outcome of this consultation process should comprise, inter alia, a list of *ex ante* regulations which should be published and implemented in a well-publicised and defined time frame.
7. While TV3, the only independent national commercial television broadcaster, has survived over four years of recession through constant cost-cutting and best-in-market commercial management, the company is not in a position to meet all the investment requirements of the business. The uncertainty surrounding the ASO/ DTT project has made financial planning

impossible in contrast to the experience in other EU countries. The charges for the DTT platform, one month from ASO remain unknown and the success of the platform is at risk because of the failure to appoint a commercial partner.

8. Regarding DTT transmission TV3 will continue to pay RTÉ transmission fees for analogue and digital distribution up to ASO. Post-ASO it is unclear what fees will apply. We are awaiting a regulated fee set according to best regulatory practice (as outlined in ComReg 12/77) and for an interim price to be set by the Minister under the current Section 130 of the Broadcasting Act 2009. It is imperative that ComReg sets a regulated tariff at the earliest possible moment.
9. In terms of specific requests and/or clarifications, TV3 requests that ComReg should detail how it intends to monitor compliance in respect of the issuance of a Reference Offer (as provided for paragraph 9.74 of ComReg 12/77).
10. TV3 requests that the obligations and conditions attached to access remedies outlined above must be subject to transparent, published criteria and the approval of ComReg regarding RTÉ's operation of the services. It is imperative that once the obligations are introduced that they are overseen by ComReg with a quarterly performance report published on the ComReg website (or something similar).
11. TV3 requests a specific right of access to any co-location servers, racks or similar equipment that are owned or managed by TV3 within any point of the transmission /multiplexing chain (i.e. both Market A and Market B).
12. TV3 is broadly supportive of the key conclusions reached in ComReg 12/77 and accordingly our comments are confined to those areas of the Draft Decision, where greater specificity is required both in terms of actions and timelines for same. For ease of reference, please see attached table (below) with the areas that TV3 would like to see strengthened in ComReg's Draft Decision.
13. Please note that TV3 has provided, where appropriate, evidence of specific examples of competitive problems as requested in the consultation paper, in particular questions. Please note that the material provided is only part of a large catalogue of evidence/examples that could be provided and are indicative of competition concerns. **Please note that the information in the appendix is provided strictly on a confidential basis only.**

General requests	
1	TV3 requests the ComReg research benchmark transmission tariff data for EU member state markets post ASO. The EU norm for DTT transmission tariffs has been a reduction of between one half and two-thirds at the time of ASO.
2	TV3 requests that ComReg introduces the full suite of <i>ex ante</i> regulatory powers available to it under European and Irish law, simultaneously with the introduction of a fully regulated, fair and non-discriminatory broadcasting transmission tariff (post-ASO) (See sections 2.45 and 2.70).
3	TV3 would request that ComReg seek benchmarking data from other EU member states for the costs of DTT network deployment.
Access remedy requests	
4	TV3 requests that the necessity to carry out maintenance on all associate facilities should be a legal requirement in the Access Regulations.
5	TV3 asks that at a minimum service credit levels ensure that customers' commercial loss is compensated in full should any SLA breach occur. TV3 also asks that the customers' reputational damage is also factored into the service credit calculation and ComReg should determine the service credit on a case by case basis should any SLA breach occur.
6	TV3 asks that all current and prospective SLA's should be more readily accessible by customers and TV3 also asks that any SLA service credit costs incurred by RTÉNL be excluded from the RTÉNL DTT tariff model.
7	TV3 request that an additional factor be added to those listed on pages 260-270 of ComReg 12/77, namely an Agreed Closing-Out Process in respect of any fault incident reported.
Non-discrimination remedy requests	
8	TV3 ask that the non –discrimination remedy be extended to those who want to compete as well as those who have accepted a Reference Offer. TV3 believes that in order to encourage entry into the broadcasting market, new market entrants need access to similar information to existing broadcasters to facilitate informed investment assessment and decision making. TV3 also ask that ComReg define specific areas where non-discrimination is appropriate (products, information, service etc) and areas where discrimination is acceptable (price).
9	TV3 requests explicit clarity regarding the implementation and supervision of non-discrimination targets. TV3 can see no way for this to operate correctly other than the fees payable by all parties being made available in an open and transparent manner to all other contracting parties (published on ComReg website).
10	TV3 request that ComReg should detail how it intends to monitor compliance in respect of the issuance of a Reference Offer (as provided for in paragraph 9.74 of ComReg 12/77)
11	TV3 asks Comreg to formalise a complaint procedure in a written, published format and make it available on the ComReg website. This complaint procedure document should detail exactly how any user complaints related to RTÉ's Transmission Network will be responded to, including a detailed list of the steps that will be taken and also the response time for a conclusive response. There should be a dedicated resource within ComReg to deal with this.
Accounting Separation requests	
12	TV3 asks that ComReg review the Secondary Accounting Documentation and ensure that commercial sensitivity is not used by RTÉNL to avoid disclosing accounting/ financial information to the market.
13	TV3 asks that ComReg ensures that Ireland adopts International best practice for each of the five Accounting Separation proposals listed at paragraph 9.98.
14	TV3 asks that non-compliance measures should be identified by ComReg as part of this process and that the measures identified and implemented should be sufficient to deter any non-compliance with the accounting separation requirement.
Cost accounting and price control remedy requests	
15	TV3 asks that ComReg recommend a Bottom Up LRIC model be used to determine the RTÉNL cost base and transmission tariffs charged to customers.
16	TV3 asks that broadcasting transmission tariffs be set every three years with an annual review, after which tariffs are adjusted downwardly, if RTÉNL achieves some efficiency savings in that period.

Question 1

Do you agree with ComReg's preliminary conclusions on the television and radio retail market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 1

TV3 would accept that households which access the Irish channels on an FTA terrestrial basis are in a separate retail market to Pay TV. In respect of free to view satellite services, they are very unlikely to change the dynamics of the broadcast market as, with the exception of Saorsat, they do not offer a large selection of UK channels combined with the indigenous Irish channels in an easy to operate turnkey solution.

TV3 believes that if RTÉ had concentrated on a Saorsat type solution instead of a DTT solution, that this might have been a cheaper and more efficient method of attaining true universal population coverage.

The increasing availability of cable, satellite and broadband services has not significantly altered this group in terms of size. Pay TV, at an EU level, has long been seen as separate market [Case M.2876 News Corp/Telepiu, 2003].

The legal position whereby FTA services have to be made available to the public by the provider of that service means that a provider of DTT transmission wholesale services will not see their customers move to another platform within this territory if another platform is not available.

TV3 finds it difficult to believe that RTÉ can readily disagree with the views as set out in this section. If RTÉ do disagree, the question must be asked as to why RTÉ invested heavily (between €40-70m euro) in DTT to date.

Question 2

Do you agree with ComReg's preliminary conclusions on the wholesale market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer2

TV3 accepts that there are two distinct markets for national terrestrial products/services. Broadcast transmission services are separate from DTT multiplex services.

TV3 does not agree with ComReg's statements at Section 5.108 concerning the materiality of a 5%-10% increase in a wholesale price for terrestrial broadcast transmission services.

This would appear to indicate that ComReg does not believe that this issue has a significant impact upon a broadcasters' spend generally.

The reality is that any additional costs to a commercial broadcaster has a direct and immediate impact on its ability to compete, particularly with a dual funded state broadcaster which takes over 50% of the domestic advertising revenue (when the EU norm is that over half of state broadcasters in the EU receive no advertising revenue whatsoever) and which also controls the broadcasting transmission market.

Importantly, the consequence of this significant reduction in transmission tariffs, allowed commercial broadcasters to broadcast a second channel and in addition save on operating costs.

The current wording of section 5.108 and 5.134 could be understood to mean, that given the limited share of the broadcast transmission costs in the overall cost base, the final level of the broadcast transmission tariff is unlikely to affect TV3's competitive position.

In a commercial enterprise, where every cent is accounted for, any increase in operating costs presents an immediate and direct challenge to the business in the struggle to compete with an over-funded, under-regulated State broadcaster and international broadcast service providers.

Accordingly, it is remarkable and unacceptable that ComReg would seem to countenance **any** level of increase in broadcasting transmission charges with ASO.

TV3 requests ComReg to provide benchmark transmission tariff data for EU member state markets post ASO. To date, the EU norm is that broadcasting transmission access tariffs across EU Member States have tended to decrease substantially (by between one half to two thirds) with analogue switch off, owing to the minimal incremental costs associated with ASO.

Question 3

Do you agree with ComReg's preliminary finding that each criteria of the three criteria test is satisfied in Market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer3

In respect of the market for wholesale access to national terrestrial broadcast transmission services (Market A) we agree that:

- there are high and non-transitory barriers to entry;
- there is no tendency towards effective competition;
- competition law alone is not sufficient to adequately address known and understood market failures.

The Act (Broadcasting Act 2009, in particular ss.114 – 15 & 130) does not provide enough detail to ensure access on a fair, reasonable and non-discriminatory basis to third parties. RTÉ does not have appropriately separate accounts nor has the Department sought the BAI's involvement, limited as this is under Statute, in providing guidelines for accounting processes as provided for under ss.109 – 111 of the Act.

TV3 would also make a key point in relation to *ex ante* regulation generally. ComReg sets out on numerous occasions within ComReg 12/77 the negative experiences of non RTÉ broadcasters in respect of engagement with RTÉ. TV3 believes that this factual experience should be a cornerstone to the introduction, monitoring and maintenance of a comprehensive *ex ante* regulatory regime. [Paragraphs 9.150-9.170 and 10.25-10.27]

The statements that ComReg makes about high non-transitory barriers to entry are correct. It is interesting to note that when the BAI sought a commercial multiplex operator no party attempted this on the basis of establishing its own network, despite several infrastructure- owning/provisioning entities, including the - Eircom/Arqiva consortium. There has been no attempt by a new entrant to enter this market in the recent past.

In relation to competition law, TV3 notes that the application of competition law alone would not adequately address the market failures in the market concerned. In addition it considers competition law to be an *ex post* remedy and the ancillary reliefs necessary to affect any form of control similar to that set out in ComReg 12/77 would only arise after a very long, complex and costly judicial process. As *ex post* does not provide a substitution for appropriate regulation, TV3 supports ComReg's conclusions regarding the introduction of *ex ante* regulation. However, as per TV3 experience, *ex post* remedies could as well play a complementary role as to address the abuse in the Irish market (see Ref TV3 Complaint S5 01/10)

As per sections 2.45 and 2.70 TV3 requests that ComReg introduces the full suite of *ex ante* regulatory powers available to it under European and Irish law, simultaneously with the introduction of a full regulated, fair and non-discriminatory broadcasting transmission tariff (post-ASO).

Question 4

Do you agree with ComReg's preliminary competition analysis and assessment of SMP in market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer4

The reality is that in respect of:

- existing competition;
- potential competition; and
- the strength of countervailing buying power;

none of these factors are likely to change significantly in the next three to five years. The reasons for this are detailed below.

RTÉ has had and continues to hold 100% market share. The nature of this service is such that its replication would be difficult in the extreme as it depends on the ownership and control of transmission sites with very specific physical characteristics, which are already controlled by RTÉ.

There is also no countervailing buying power since there are no options available to the existing customer base that would meet the necessary legal or licence obligations regarding the percentage of population coverage that must be met on a free to air basis (90% in the case of TV3).

TV3 also notes that whilst it agrees overall with ComReg's analysis, it does believe that the costs attributed to RTÉ (section 7.41) have not, to the best of our knowledge been verified in any way, and indeed ComReg makes this point generally in section 9 of ComReg 12/77. The level of costs identified at section 7.41 for the deployment of the DTT network seem remarkably high, per site, in comparison with the level of expenses mentioned in other Member States.

TV3 requests that ComReg should seek benchmarking data from other EU member states for DTT network deployment.

Question 5

Do you agree with ComReg's preliminary assessment of potential competition problems in Market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer5

We note that the main types of problems identified by ComReg in 12/77 are:

- **Foreclosing/excluding competitors** - we believe that this has occurred to a significant degree in this market (see our response to question 6)

The BAI has already stated in its review of potential non RTÉ applicants seeking capacity on the RTÉ Multiplex that prices were (and continue to be) non-sustainable (see footnote 3-question 6).

- For example we include a quotation from a letter dated 7th October 2010 from RTÉ to TV3 which went on to state that unless binding agreements were in place by 29th October 2010 that RTÉ would not carry TV3 nor any other non RTÉ service:

"When the RTÉ PSB DTT MUX test commences with a switch-on in late October 2010 it is intended that the MUX will only carry non-RTÉ services in respect of which legally binding commitments for carriage have been entered to. Can you therefore please confirm your intent in this regard and also identify the appropriate person or persons with whom the necessary contracts can be discussed and executed.

Clearly we would appreciate if this matter could be expedited at the earliest possible juncture so that TV3 and / or 3e will be included in the MUX and in all public awareness and other information interactions at the earliest juncture subject also to all necessary consents being in place."

- **Exploiting customers by virtue of its SMP position.** As ComReg is aware from our historic pricing competition complaint S5 01/10 and our detailed submission dated 15th of April 2011, TV3 have been charged three times more on an absolute basis than TG4 and approximately 27 more times more on a like-for-like/per transmitter basis for what we understand to be similar transmission services.
- **Leveraging/refusing to deal** – TV3 has long asked for details on RTÉ tariffs and has been refused. ComReg are clearly aware of these concerns (paragraphs 10.25 - 10.27 of ComReg 12/77).

TV3 provides factual evidence, for the purposes of ComReg 12/77, in a Confidential schedule (Schedule A) which refer to specific questions as appropriate.

This is clear evidence of RTÉ attempting to leverage its position to ensure that it could force non-RTÉ services to pay whatever tariff RTÉ wished to impose. This clearly illustrates that this is a market which must be closely regulated through the use of the full suite of *ex ante* regulatory powers available to ComReg under European and Irish law and subsequently monitored and regulated with relevant *ex post* regulatory powers.

Question 6

Do you have evidence/examples of competitive problems in your market? Please provide evidence supporting your position

Answer 6

There has been a long history of competitive problems in this market and it should be noted that this consultation process is the first major consultation process which divides the market into two separate markets. Consequently, the information TV3 has provided has also been divided as to cover Markets A and B respectively.

It should also be noted that such is the extent of the competitive problems that prevail in this market that TV3 has felt it appropriate to divide the competitive problems into those which independent third parties have identified and those which TV3 are in a position to raise from our own direct experience.

Independent Reports

The following reports have all identified key competitive problems which have arisen in the market for broadcasting transmission services:

1. *Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland – Athena Media* (August 2010). This document makes it clear that there will be no development of DTT while RTÉ were still in control of the network. One of its main recommendations was that RTÉ be removed from ownership of the DTT network¹;
2. The BAI press release in August 2010 outlining to the inability of any of the multiplex consortia to conclude a deal with RTÉ with a view to providing a commercial multiplex²;
3. BAI released a press release in August 2011 regarding the provision of other services on the RTÉ multiplex. They found that RTÉ's pricing strategy was unsustainable for any party apart from than RTÉ³. (ComReg refers to this at paragraph 14.23). This pricing behaviour effectively acts as a roadblock to the development of any non RTÉ services on the National Digital Multiplex, effectively stopping any competition in respect of the availability of indigenous broadcast services within the state.

TV3's own experience

4. TV3 Complaint S5 01-10 which remains unresolved (referred to at Answer 5). Given that ComReg has opened this case after a screening process, it is clear that there is at least a *prima facie* case relating to issues of abuse within this market. There is also a long list of correspondence between RTÉ and TV3 from 2002 onwards which clearly shows that RTÉ has never co-operated or acknowledged any suggestion that it had SMP or that it was under any obligations at all to any party, in respect of the market dominance. ComReg is in possession of all relevant correspondence in relation to this matter. A list of this material is provided as part of our submissions on the complaint S5 01/10, as referenced in Answer 5 above (see Confidential Schedule A - Appendix 2).
5. RTÉ's attempt to force TV3 to conclude a long term transmission deal in October 2010 (see response to question 5 above)
6. RTÉ simply proposed doubling the tariff in March 2011, when the Department of Communication insisted on a second Multiplex being provided.
7. TV3 understands that RTÉNL have not made any allowance in their tariff model for disallowed costs (e.g. redundancy costs) and excess capacity.

¹ Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland; Athena Media; 31 August 2010; p.64

² BAI Statement on Conclusion of Commercial DTT Multiplex Licensing Process; 5 August 2011; <http://www.bai.ie/?p=1469>

³ Report and Recommendations by the Broadcasting Authority of Ireland on the exercise of its functions under Statutory Instrument No. 67 of 2011; August 2011; <http://www.bai.ie/?p=1426>

Question 7

Do you agree with to ComReg’s proposals regarding the application of an access remedy and the conditions attached to the access remedy in Market A? Please explain the reasons for your answer, along with all relevant factual evidence supporting a position.

Answer 7

In general TV3 would note that the main obligations are:

- The obligation to negotiate in good faith;
- The obligation not to withdraw access to services and facilities already granted, without prior approval from ComReg;
- The obligation to grant access in a fair and reasonable manner (service level agreements).

Please note that TV3 agrees with all of the above. Given the opportunities for exclusionary practices and exploitative behaviour (as set out at paragraph 8.13 *et seq* of ComReg 12/77) and our responses to questions 5 and 6.

TV3 requests that the obligations and conditions attached to access remedies outlined above must be subject to transparent, published criteria, the approval and control of ComReg regarding RTÉ’s operation of the services.

Comreg must ensure that RTÉ cannot simply bypass regulation via arbitrary decisions/acts such as those described in our answer to question 6 above. We would note that, despite references to a 2004 decision notice, TV3 is unaware of any effective control on RTÉ’s activities to date by ComReg in relation to broadcast transmission charges. There are comments by ComReg which would tend to validate this in ComReg 12/77 at paragraphs 10.25-10.27 in particular.

It is imperative that once the aforementioned obligations are introduced that they are overseen by ComReg with a quarterly performance report published on the ComReg website (or something similar).

Question 8

ComReg has proposed an access remedy to RTÉNL transmission and distribution network including associated facilities. What services/facilities you consider should RTÉNL be obliged to provide in light of the considerations contained in regulation 12 (4) of the Access Regulations. In addition, what services/facilities due considered should be included as an associate facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 8

It should be noted that TV3 is effectively acquiring a fully managed service from RTÉ at this point in respect of both Markets A and B. TV3 requests a specific right of access to any co-location servers, racks or similar equipment that are owned or managed by TV3 within any point of the transmission/multiplexing chain (i.e. both Market A and Market B).

TV3 believes that an access remedy is critical. TV3 believes that all of the issue as highlighted by regulation 12 (4) must be taken into consideration

TV3 requests that the necessity to carry out maintenance on all associate facilities should be a legal requirement in the Access Regulations.

TV3 requests a specific right of access to any co-location servers, racks or similar equipment that are owned or managed by TV3 within any point of the transmission /multiplexing chain (i.e. both Market A and Market B).

Question 9

ComReg has proposed the imposition of service Credits as part of the SLA obligation. Do you consider that service credits should be a condition of the proposed SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 9

TV3 believes that service credits should be included in any SLA package. The service provided under Market A is absolutely mission-critical to TV3, without it we cannot survive as TV3 is a commercial broadcaster that must ensure advertisements are broadcast to an audience. We would point out that SLAs are standard within the broadcast industry.

As ComReg itself notes in paragraphs 9.41 - 9.42, a vertically integrated entity has the ability and incentive to discourage downstream market entry. TV3 has experienced this type of behaviour from RTÉ.

RTÉ has attempted, by virtue of control of the EPG (which it controls because of the fact it controls the transmission platform), to ensure that RTÉ services were given EPG positions more favourable than TV3 services. RTÉ has in the past attempted to avoid regulatory controls on its services.

In the summer of 2010 RTÉ attempted to avoid Sector Impact Assessment under the Broadcasting Act 2009 by suggesting its new services were not in fact new services. These services were later assessed as new services.

TV3 asks that at a minimum service credit levels ensure that customers' commercial loss is compensated in full should any SLA breach occur. TV3 also asks that the customers' reputational damage is also factored into the service credit calculation and ComReg should determine the service credit on a case by case basis should any SLA breach occur.

Question 10

ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg decision notice (D16/04) should be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligations or should it be amended? Please explain your answer, along with all relevant factual evidence supporting your position.

Answer 10

It has been our experience to date that generally the transmission network has been maintained and has operated appropriately with the rather egregious exception that there is no compensation mechanism for the loss of service.

TV3 is aware that ComReg have had difficulties with RTÉ publishing an SLA in the past, which led to ComReg initiating Compliance Notice 245 in February 2010.

TV3 would ask that all of the remedies proposed, upon final publication, also include mechanisms to ensure that they are real, transparent and effective remedies and that they are strictly monitored by ComReg and reported on regularly and published.

In this context, Decision Notice D16/04 has not worked. TV3 would also make the point that due to RTÉ charging back all costs associated with its network, in the event of an SLA with financial compensation being provided for, RTÉNL would simply factor this into its cost base and subsequently recover these costs from its customers. Therefore we believe that that RTÉNL has no real financial incentive to ensure that its network operates efficiently and effectively.

TV3 asks that all current and prospective SLA's should be more readily accessible by customers and TV3 also asks that any SLA service credit costs incurred by RTÉNL be excluded from the RTÉNL DTT tariff model.

Question 11

Are there any additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reason, along with all relevant factual evidence supporting your position?

Answer 11

TV3 would refer ComReg to pages 269 and 270 of ComReg 12/77. All 44 elements proposed for inclusion in any SLA are essential. TV3 would highlight elements 3-6 on page 269 as critical, namely Fault Incident, Fault Management, Fault Response and Escalation Process.

TV3 would also state that there should be an additional point included, namely an Agreed Closing Out Process in respect of any fault incident.

TV3 requests that an additional factor should be added to those listed on pages 260-270 of ComReg 12/77, namely an Agreed Closing-Out Process, in respect of any fault incident reported.

Question 12

Do you agree with ComReg’s proposal regarding the application of the non-discrimination remedy? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 12

TV3 generally agrees with the imposition of a non-discrimination remedy on the basis that it encourages transparent and equitable conditions for all customers in the market. TV3 believe that non-discrimination is important in the dissemination of market information and provision of services. TV3 has long had concerns over RTÉ’s discriminatory pricing behaviour, and therefore TV3 requests further remedies such as access and transparency in relation to pricing.

TV3 believes that there is a requirement in Market A for discrimination in relation to pricing of Transmission and Distribution services. This is critical to ensure that only efficiently incurred operating costs and a regulatory asset base sufficient to meet customer demand (excess capacity removed) are charged to customers. Any other costs incurred by RTE should not be recovered from customers and should be costs that RTE have to incur themselves. Price discrimination would incentivise RTE to become a more efficient operator in the market.

ComReg is aware of TV3’s contention that it was overcharged during the contract period 1998 – 2008. This is TV3’s definitive view from the ComReg decision notice of 2004. ComReg itself acknowledges in sections 9.150- 9.159 of ComReg 12/77 that “the cost data for the tariff models tend to be derived from information solely from RTÉ and RTÉNL”. Further ComReg acknowledges that, currently “RTÉNL’s tariffs are not subject to regulation.” There is clearly a need for a non-discrimination remedy that can be monitored and verified.

In fact, TV3 was effectively left on the same charges from 1998 – 2008 (with CPI increases). This was permitted to occur despite RTÉ acknowledging in an Oireachtas Committee meeting in on 16/07/2003 that it did not even attempt to calculate cross-charging practices charges at the time (See Confidential Schedule A).

RTÉ also admitted to TV3 in the correspondence referred to in question 6 above, that it did not practice even notional charging for its own stations at the time (See Confidential Schedule A)

TV3 ask that the non –discrimination remedy be extended to those who want to compete as well as those who have accepted a Reference Offer. TV3 believes that in order to encourage entry into the broadcasting market, new market entrants need access to similar information to existing broadcasters to facilitate informed investment assessment and decision making. TV3 also ask that ComReg define specific areas where non-discrimination is appropriate (products, information, service etc) and areas where discrimination is acceptable (price).

Question 13

Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 13

TV3 does have concerns as to how the detail of the non-discrimination remedy will work. As ComReg states at paragraph 9.49 of ComReg 12/77 there are real concerns, not only about pricing but also over the nature of the services that are provided.

In a Departmental Memo dated 28th of August 2003 (Confidential Schedule A) the then Department of Communications, Marine and Natural resources (as it then was) stated that *“TG4 is at present an RTÉ service and that the amount invoiced to TG4 is not representative of the full capital and current cost.”* RTÉ and the Department therefore have clear and stated difficulties in understanding the principle of non-discrimination.

In a subsequent letter from RTÉ to TV3 dated 9th September 2008 it states that *“the tariff model has been discussed with and examined by... ComReg and BCI.”* (Confidential Schedule A). It is clearly evident from ComReg 12/77 at paragraph 10.25; this is not, in fact, the case.

TV3 believes it absolutely essential that, at a maximum, TV3 should be charged a fair, transparent and non-discriminatory tariff, which has been derived with full regulatory oversight and certainly not more than what RTÉ charges one of its own broadcast services.

TV3 would therefore ask for explicit clarity regarding the implementation and supervision of non-discrimination targets. TV3 can see no way for this to operate correctly other than the fees payable by all parties being made available in an open and transparent manner to all other contracting parties (published on ComReg website).

Question 14

Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer, along all relevant factual reporting your position.

Answer 14

TV3 notes that there will be a transparency obligation in place and while we welcome this, we have grave concerns that this will not work in practice. This is because at paragraph 9.61 there is a reference to transparency obligation that has been in place since ComReg Decision Notice 16/04. TV3 is unaware of any transparency in the areas identified at paragraph 9.63 of ComReg 12/77 since that date. The letter of 9th September 2008 (Confidential Schedule A) along with ComReg's own

comments at 10.25 of ComReg 12/77 make it very clear that the current transparency obligation has not worked effectively to date.

TV3 agrees with the transparency remedy in this market as set out in ComReg 12/77 but believes that it is the enforcement of this remedy which will be critical to ensuring appropriate regulation of the market.

In TV3's view it is imperative in order for there to be meaningful transparency, that each element of all charges on any broadcaster should be clearly explained and that each broadcaster should be made aware of the basis for the application or non-application of any charge when compared with the applicability of such charges to other broadcasters.

In the event that this is not possible, all of this information should be made available to ComReg.

Question 15

ComReg has proposed that it should be notified of any proposed changes to the reference offer at least three months in advance of such changes coming into effect. Do you consider this timeframe as appropriate? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 15

The three month notification period to ComReg is inappropriate given the duration of contracts of this nature generally and the long term commitment which TV3 would have entered into.

TV3 believes that a notice period of one year is more appropriate. This would allow adequate time for ComReg to review the proposed changes and the underlying pricing model and it would also offer broadcasters and other market players an appropriate time frame to review the proposed changes and voice any concerns they may have.

A three month time frame also makes it very difficult for broadcasters to budget effectively if price changes can be introduced at such short notice. TV3 also believes that because of the nature of the market, network infrastructure, and assuming appropriate regular third party review of the underlying pricing model, charges should be changing very regularly and therefore a longer notice period of one year would be appropriate.

TV3 also believes that ComReg should approve such charges, with full regulatory oversight by ComReg of the entire process.

ComReg is aware TV3 was provided with probable DTT tariffs in Autumn 2010 and advised that these would double in Q1 of 2011. This unilateral action must be prevented, it is clearly anti-competitive.

TV3 requests that ComReg should detail how it intends to monitor compliance in respect of the issuance of a Reference Offer (as provided for paragraph 9.74 of ComReg 12/77).

Paragraph 9.65 of ComReg 12/77 sets out RTÉNL's requirement to continue to publish a description of how their tariffs are derived. However, TV3 believes that this document is not sufficiently detailed to support an effective regulatory pricing model. Nor is it one which gives potential new entrants adequate detail on the supply characteristics, terms and conditions and prices of access required for business planning and decision making.

Question 16

Are there any additional issues or factors in relation to transparency which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

Answer 16

TV3 believes that this transparency requirement is essential. TV3 does have concerns, due to RTÉ's behaviour to date, about how this will be monitored effectively. TV3 would ask that ComReg insert a formal complaint/notification procedure of which any broadcaster could avail of to complain to ComReg.

TV3 believes that the transparency obligation should be extended to include relevant information on spare network capacity, network infrastructure not in use, network capacity consumed by each channel and applications from new services.

TV3 asks Comreg to formalise a complaint procedure in a written, published format and make it available on the ComReg website. This complaint procedure document should detail how exactly any user complaints related to RTÉ's Transmission Network will be responded to included a detailed list of the steps that will be taken and also the response time for a conclusive response. There should be a dedicated resource within ComReg to deal with this formal complaint procedure.

Question 17

Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 17

TV3 believes that an accounting separation remedy is very relevant in this market and an integral part of effective regulation of this market.

Paragraph 9.115 of ComReg 12/77 discusses the need to audit RTÉNL AFD used in the preparation of the regulated financial statements by a qualified independent body or a registered auditor.

TV3 believes that this is crucial because the information at this level determines cost drivers and these may be manipulated by RTÉNL to influence cost recovery and disclosures in the regulatory financial statements. TV3 believes that an AFD review should be a mandatory element of the accounting separation remedy.

Commercially sensitive information should not be used as a mechanism by RTÉNL for non-disclosure and TV3 believes that this information should be defined and agreed with all relevant market players to ensure the transparency requirement is adhered to fully.

TV3 does have serious concerns about the nature of the material ComReg is considering allowing RTÉ to treat as confidential. The primary sources of financial information that are termed Secondary Accounting Information and are more fully set out at paragraphs 9.142-9.145 form essential financial information to a customer like TV3. The detail of this type of financial information is essential to enable a customer, like TV3, to understand the Regulated Accounts as discussed at paragraph 9.104. The issue of confidentiality of information can also be linked to the issue of benchmarking. If RTÉ is allowed keep a large amount of information from its customers and there are no valid comparators, it will be extremely difficult to assess whether accounts are being prepared correctly or to even assess the basis on which they are being prepared.

Under the Accounting Separation remedy the following proposals are made by ComReg in paragraph 9.98:

- Presentation of accounts
- Transfer Charging Mechanism
- Allocation of costs
- Audit
- Documentation

Although TV3 have no visibility of the cost allocation, documentation and transfer charging mechanisms included in the existing RTÉNL tariff model, we are aware that account audits are currently not required. TV3 believe that ComReg should review international best practice for each of these proposals and implement and enforce them.

Although TV3 understands that not all European markets are the same and have different market dynamics, we believe that the market review and monitoring process in both Austria and Finland are considered to have been very thorough and well thought out.

Further, both territories are more comparable to Ireland than many others. Austria is a particularly relevant example i.e. a small country beside a large same language country, with a number of opt-out channels selling advertising into that market.

In respect of benchmarking ComReg should also be aware that the EU norm has been for transmission tariffs to decrease substantially with ASO. The EU norm has been that transmission tariffs have decreased (in the order of one half to two thirds their previous level) at ASO. For example, in the Czech Republic there was a reduction in transmission tariffs of two thirds. While each Member State differs in terms of size, population density and so on, the overall EU trend cannot be ignored.

This is in direct contrast to the view expressed in paragraph 5.108 of ComReg 12/77.

Paragraph 9.101 states that it does not want to unnecessarily burden RTÉNL with the accounting separation obligation. The level of burden should be dependent on what is needed for a sufficient level of detail in the financial statements that will meet generally accepted European regulatory principles and disclosure standards.

TV3 asks that ComReg reviews the Secondary Accounting Documentation and ensures that commercial sensitivity is not used by RTÉNL to avoid disclosing accounting/ financial information to the market.

TV3 also asks that ComReg ensures that Ireland adopts International best practice for each of the five Accounting Separation proposals listed above.

Question 18

Are there any other additional factors in relation to this accounting separation remedy ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 18

TV3 believes a strictly defined time-limited ComReg complaints process is essential. The complaints process that TV3 has experienced to date is so complex and time consuming as to be meaningless and utterly ineffectual. ComReg must be in a position to act expeditiously with RTÉ.

TV3 notes that this section of ComReg 12/77 discusses interaction between ComReg and RTÉ only. We are apprehensive that TV3 and other customers would have no role in this. TV3 has already indicated (in the answer to question 13 and 14 in particular) that it has grave concerns that RTÉ has acted to maximise its position in both Market A and Market B. TV3 would ask how ComReg intends to monitor compliance with this particular remedy.

TV3 asks that sanctions for non-compliance should be identified by ComReg as part of this process and that these measures should be identified and implemented to deter any non-compliance with the accounting separation requirement. This should be done in a timely and transparent manner.

Question 19

Do you agree with ComReg's proposals regarding the application of cost-accounting and price control remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 19

TV3 believes that the application of cost-accounting and price control is appropriate in the market and that the cost orientation recommendation is the most appropriate method of determining cost.

TV3 has concerns that ComReg are proposing the use of a Top Down model because this leaves the potential for over recovery of costs that are not efficient.

As ComReg confirm in paragraph 9.214, Bottom Up models reflect the choices of a hypothetical forward looking efficient operator from both a technical and operational point of view. TV3 believes that the use of a Top Down model will result in inefficiencies in the RTÉNL business continuing to be charged to customers.

At worst, we believe that if a Top Down model is used, an efficiency factor should be applied to the RTÉNL statutory operating cost base to reflect current inefficiencies. For example, TV3 understand that RTÉNL has invested in more network infrastructure than is likely to be required during the course of this review and a Top Down model may not take account of this excess capacity in the network.

Although TV3 agrees that it is unlikely that there will new entrants into this market during the timeframe of this review, we believe that a Top Down approach will not allow investment decisions for any new market entrants because the RTÉNL Top Down model will not reflect the costs of an efficient operator in the market.

TV3 also believes that a Top-Down model will not completely eradicate the possibility of RTÉNL to cross charge costs from other areas because of its vertical integration in order to over recover costs. A Bottom Up model would ensure only relevant and efficient costs were included in the tariff model.

ComReg itself states in 9.202 that a lack of granularity can be an issue. ComReg is aware that a large number of entities (including other broadcasters and State Authorities such as the BAI) have long had grave concerns over RTÉ's purchase of assets and the pricing of these assets. There has been no visibility of methodologies used. This is exacerbated by the fact that the information disclosed to third parties is so limited (see answers to questions 17 and 18) and ComReg admits that more information is required for regulatory purposes (paragraph 9.202).

Further, this issue is we believe compounded by the use of an FDC approach. TV3 does not see how the mirroring of the costs incurred by RTÉNL is at all appropriate, particularly given that it is an SMP operator in a market which has no prospect of effective competition over a reasonably foreseeable time frame.

Further given the EU's concerns over RTÉ's costs (as set out in answer 17) it is essential that all of RTÉ's costs to date are looked at critically and in detail. The basis upon which RTÉ and RTÉNL acquired the assets in 2003/2004 has never been explained [See TV3's original historical complaint S5 01/10].

In respect of the disadvantages of a LRIC model and that it may not allow for the recovery of common cost it should be noted that RTÉ has to roll out a DTT network under S.114 of the Broadcasting Act 2009 and it can use state funds for this purpose. Therefore, as the network can be state funded, TV3 believe that LRIC is the most appropriate cost accounting mechanism to use.

TV3 note that LRIC is the most appropriate cost accounting methodology because RTÉ has had to invest in the Transmission and Distribution network for their own use and to carry state broadcasters and therefore other broadcasters and new services should only be charged the incremental costs of adding their services to the existing network. TV3 believe that in line with other infrastructure companies, where cost accounting and price control remedies have been enforced on the SMP operator (e.g. Eircom).

LRIC should be specified in the Decision Notice as the appropriate cost accounting methodology.

Paragraph 9.230 confirms ComReg's view that FDC is the preferred cost accounting methodology for setting tariffs for Market A because it mirrors the price that RTÉNL incurred in rolling out its network. TV3 believe that this is **not** acceptable because it makes no allowance for any inefficient spend RTÉNL incurred (excess capacity, borrowing costs etc).

TV3 asks that ComReg recommend a Bottom-Up LRIC model be used to determine the RTÉNL cost base and tariffs charged to customers.

Question 20

What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along all relevant factual evidence supporting your position.

Answer 20

TV3 believes that tariffs should be set for a minimum of three years with an annual review. The annual review should result in a reduction in the tariffs, on the basis that RTÉNL continually achieves operating efficiency targets.

Although this term is not as long as the licence period, we believe that this period is equitable for the SMP operator and customers. If the review period is as long as the license period, overcharging may result for efficiencies that the SMP operator achieves during the period. Shorter review periods will affect the customers' ability to accurately forecast their short term transmission charges.

TV3 notes that ComReg accepts that the current tariffs have not been subject to external regulatory review, nor have they been subject to any other independent assessment. We also note that there is

an ongoing review by ComReg under Section 130 of the Broadcasting Act 2009. TV3 must stress the need for regulatory certainty by the time of analogue switch off and that any tariff must be subject to a review on an annual basis.

TV3 also notes that ComReg has indicated in paragraph 9.169 of ComReg 12/77 that a separate consultation process may be required for the determination of cost oriented tariffs. TV3 believes that as we are nearly at ASO, that this would delay the setting of reasonable and regulated DTT transmission tariffs even further and we do not believe this is acceptable.

TV3 asks that broadcasting transmission tariffs should be set every three years with an annual review, after which tariffs are adjusted downwardly, if RTÉNL achieves some efficiency savings in that period.

Question 21

Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe their amendments to this obligation which ComReg should consider? Please explain the reasons for your answer along with all relevant factual evidence supporting your position.

Answer 21

TV3 believes that benchmarking and comparison to other European countries is an important element of the regulation to ensure that the cost base is similar to efficient operators.

TV3 understands that not all countries will be similar in either geography or population density, but we believe that the experience in other countries where broadcasting transmission costs have reduced significantly at ASO need to be similarly reflected in the Irish market. (EU experience is one third to half reduction in DTT transmission fees when compared to ATT transmission fees).

TV3 believes that the vertical integration of RTÉNL needs to be fully considered when looking at appropriate cost accounting models. In TV3's view, the use of benchmarks and a Bottom Up model will offer further comfort to customers that all appropriate and reasonable cost accounting principles are being employed and that the consequent tariffs to be applied to customers will have been achieved in a fair, reasonable and non discriminatory manner.

Although we agree that it is unlikely that there will be new market entrants in the short term, TV3 believe that the cost accounting and price control remedy should not dismiss this and all efforts should be taken in the regulation of RTÉNL, to ensure that future market entrants are accommodated from the introduction of the outlined remedies.

Although not explicitly referred to, TV3 believe that the rate of return should be set by the regulator and disclosed in RTE's financial statements as it is in other regulated entities financial statements (eircom regulatory financial statements). We believe that this rate of return should be consistent with that of other utility companies currently regulated in Ireland.

Question 22

Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer along with all relevant factual evidence supporting your position.

Answer 22

TV3 agrees with the regulatory impact assessment in general, however we believe it is appropriate to make the following general comments;

Access obligations: TV3 has been concerned (see answers to questions 14 and 17 etc) about RTE's behaviour to date and hence any activities by RTE that might be suggested to be in good faith are still of serious concern to TV3 and must be fully monitored. We note that ComReg has similar concerns due to RTE being vertically integrated.

Non-discrimination obligations: For the reasons outlined above, TV3 asks that ComReg detail clearly how non discriminatory obligations will be monitored and enforced. In TV3's view, the only effective means of monitoring and enforcing such non discriminatory obligations is for RTE to publish (or ComReg to publish in a quarterly monitor) the actual charges that RTE imposes on itself.

Accounting obligations: TV3 must question how ComReg intends to review and monitor this. We note that ComReg accepts that there are currently questions around RTE's behaviour in this market.

Question 23

Do you agree with ComReg's draft decision instrument set out above? Do you agree with ComReg's definitions and interpretation as set out in part 2. Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comment further.

Answer 23

Outside of the various concerns that TV3 has raised in the responses to ComReg 12/77, TV3 is generally in agreement with the draft decision instrument set out in the consultation document. We do want to make the following observations however:

Section 7.3 (ii) TV3 believes that a specific definition of negotiate in good faith should be included and a process document for dispute resolution should also be put in place;

Section 8.2 (ii) TV3 believes that a time frame / process for involvement of ComReg for resolving service credit issues needs to be defined;

Section 10.3 – See question 15 on changes to the Reference Offer publishing timeline of 12 months that TV3 is recommending;

Appendix C - This recommends a Fully Allocated Cost (FAC) but TV3 believes a Long Run Incremental Cost (LRIC) Model is more appropriate. See response to question 19 for details.

It is imperative that secondary accounting documentation can be reviewed to ensure all relevant information is disclosed and this is not used as a mechanism for RTÉNL to keep certain relevant cost allocation or network information private.

There is no requirement in Appendix C in relation to eliminating inefficient operating costs or capital investment, excess network capacity and any other non-relevant costs. Such a requirement should be included.

There is no requirement in Appendix C in relation to the rate of return, how it is calculated, reviewed and how any changes are dealt with. Such a requirement should be included and the rate of return should be publicly disclosed in RTE's financial accounts.

Question 24

Do you agree with ComReg's preliminary finding that each of the criteria of the three criteria test is satisfied in Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 24

See answer to Question 3 in the response to Market A. TV3 believes that this is also applicable for Market B.

Although this is a relatively new market in Ireland, TV3 believes that there have already been serious barriers to entry in this market. Most notably, both Boxer and the One Vision consortia failed in their bids to enter and compete in the multiplexing market.

At the time RTÉ sought a bond of €20m, which was deemed by the consortia to be a significant barrier to entering the market. These consortia consisted of major International entities with experience in broadcasting and transmission and the failure of such consortia signifies a significant market failure.

Although not in the short term, TV3 does believe that there is more potential for competition in Market B than in Market A as the capital costs of Multiplex equipment are not as significant as those of the Transmission and Distribution market. Therefore we believe that the regulation in this market needs to be cognisant of the importance of encouraging new entrants into the market.

Although TV3 understand that each multiplex (Market B) requires related transmission and distribution equipment (Market A), the likelihood of competition in Market B is strengthened by the fact that the Transmission and Distribution network has had significant excess capacity already in place. This should allow new market entrants to invest in Multiplexing infrastructure without having to invest heavily in the Transmission and Distribution Market (Market A), assuming wholesale pricing of Market A infrastructure is set at a level that encourages new entrants.

TV3 believe that as a retail customer of both Market A and Market B, the observations and requirements we have set out in responses to Questions 3 through 23 also apply to Market B. Therefore our responses to questions 24 through to 44 refer back to our responses for Market A.

Question 25

Do you agree with ComReg's preliminary conclusions and competition analysis and assessment of SMP in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 25

See answer to Question 4 in the response to Market A. TV3 believes that this is also applicable for Market B.

As RTÉNL is the only operator and likely to be the only operator in the foreseeable future of multiplexing equipment in Ireland, TV3 agrees with ComReg's assessment of SMP in Market B.

Question26

Do you agree with ComReg's preliminary assessment of potential competition problems in Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 26

See answer to Question 5 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 27

Do you have evidence/examples of competition problems in Market B? Please provide all relevant factual evidence supporting your position.

Answer 27

See answer to Question 6 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 28

Do you agree with ComReg's proposals regarding the application of an access remedy and the conditions attached to the access remedy in market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

Answer 28

See answer to Question 7 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 29

ComReg has proposed an access remedy to RTÉ's multiplexes including associated facilities. What services/facilities do you consider should RTÉ be obliged to provide in light of the considerations contained in Regulation 12 (4) of the Access Regulations. In addition, what services/facilities do you consider should be included as an associated facility? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 29

See answer to Question 8 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 30

ComReg has proposed the imposition of service credits as part of this SLA obligation. Do you consider the service credits should be a condition of the SLA? A service credit is a level of compensation that adequately compensates the customer for any breach of the SLA. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 30

See answer to Question 9 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 31

ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTÉNL as part of ComReg decision notice D16/04 should also be included as part of the SLA proposed in this market. Are you of the view that this list should be or should not be included as part of the proposed SLA obligation or should be amended? Please explain the reasons for your answer along with all relevant factual evidence supporting your position.

Answer 31

See answer to Question 10 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 32

Are there additional issues or factors in relation to this access remedy which ComReg has not considered? Do you believe that there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 31

See answer to Question 11 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 33

Do you agree with ComReg proposals regarding the application of the non-discrimination remedy. Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

Answer 33

See answer to Question 12 in the response to Market A. TV3 believes that this is also applicable for Market B.

We believe that there is also a requirement in Market B for discrimination in relation to pricing of Multiplexing services. In line with Section 114 1 (i) of the Broadcasting 2009, RTÉNL is required to “establish, operate and maintain” up to four multiplexes. Consequently TV3 believes that LRIC costing is the most appropriate cost model in this market and customers should only be charged the additional charges of multiplexing their signals.

Question 34

Are there any additional issues or factors in relation to non-discrimination which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

Answer 34

See answer to Question 13 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 35

Do you agree with ComReg's proposals regarding the application of transparency remedy in this market? Please explain the reasons for your answer along with all relevant factual evidence supporting your position.

Answer 35

See answer to Question 14 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 36

ComReg has proposed that it should be notified of any proposed changes to the reference offer at least three months in advance of such changes coming into effect. Do you consider this time frame as appropriate? Please explain their reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 36

See answer to Question 15 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 37

Are there any other additional issues or factors in relation to transparency which ComReg has not considered? Do you believe that there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 37

See answer to Question 16 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 38

Do you agree with ComReg's proposals regarding the application of accounting separation remedy in this market? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

Answer 38

See answer to Question 17 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 39

Are there any additional issues or factors in relation to accounting separation remedy which ComReg has not considered? Do believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

Answer 39

See answer to Question 18 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 40

Do you agree with ComReg's proposal regarding the application of cost accounting and price control remedy in this market? Please explain the reasons the answers for your answer, along with all relevant factual evidence supporting your position.

Answer 40

See answer to Question 19 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 41

What do you consider an appropriate timeframe should be for the setting of tariffs? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Answer 41

See answer to Question 20 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 42

Are there any additional issues or factors in relation to this cost accounting and price control remedy which ComReg has not considered? Do you believe there are amendments to this obligation which ComReg should consider? Please explain the reasons for your answer along with all relevant factual evidence supporting your position.

Answer 42

See answer to Question 21 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 43

Do you agree with ComReg's preliminary conclusion on the Regulatory Impact Assessment? Please explain the reasons for your answer along with all relevant factual evidence supporting your position.

Answer 43

See answer to Question 22 in the response to Market A. TV3 believes that this is also applicable for Market B.

Question 44

Do you agree with ComReg's draft Decision Instrument set out above? Do you agree with ComReg's definitions and interpretation as set out in part 2? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Answer 44

See answer to Question 23 in the response to Market A. TV3 believes that this is also applicable for Market B.