



Commission for  
**Communications Regulation**

## Consultation Paper and Draft Decision

### **Market Review: Broadcasting Transmission Services in Ireland**

<b>Document No:</b>	<b>12/77</b>
<b>Date:</b>	<b>13/07/2012</b>

All responses to this consultation should be clearly marked:-  
“Reference: Submission re Market Review: Broadcasting Transmission Services in Ireland ComReg 12/77” as indicated above, and sent by post, facsimile, e-mail or on-line at [www.comreg.ie](http://www.comreg.ie)

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## 1 Introduction

- 1.1 The aim of this consultation is to determine whether *ex ante* regulation remains appropriate in relevant broadcasting transmission market(s) and, if so, to identify and propose proportionate remedies to be applied.
- 1.2 Broadcasting transmission services were formerly included in the European Commission's Recommendation on Relevant Product and Service Markets in 2003<sup>1</sup> (2003 Recommendation), as a market which may warrant *ex ante* regulation. The Commission for Communications Regulation (ComReg) was therefore required to carry out an analysis of that market in Ireland. Following that analysis in 2003-2004, ComReg identified RTÉ Transmission Network Limited (RTÉNL) as having Significant Market Power (SMP) on (a) the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks, and on (b) the wholesale market for television broadcasting services on analogue terrestrial networks. ComReg subsequently imposed regulatory remedies as outlined in ComReg Decision Notice (D16/04)<sup>2</sup>.
- 1.3 In 2007, the European Commission revised its Recommendation on Relevant Product and Service Markets<sup>3</sup> (2007 Recommendation). The EU Commission concluded that, on an EU wide basis, broadcasting transmission services are no longer considered to have characteristics that warrant *ex ante* regulation. However, national regulatory authorities (NRAs) still have the power to apply the three criteria test to any electronic communications market in order to assess whether, on the basis of national circumstances, a market removed in the 2007 Recommendation might nonetheless still be susceptible to *ex ante* regulation in a particular Member State.
- 1.4 In light of the European Commission's revised position, and developments such as the move to digital terrestrial television (DTT) broadcasting in Ireland (DTT was launched in May 2011),<sup>4</sup> ComReg undertook a preliminary three criteria test consultation in late 2010, and published a response to consultation

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<sup>1</sup> EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=L:2003:114:0045:0045:EN:PDF>

<sup>2</sup> Decision Notice D16/04 – Wholesale Broadcasting Transmission Services Markets – SMP Obligations, Document Number 04/122.

[http://www.comreg.ie/publications/decision\\_notice\\_d16\\_04-wholesale\\_broadcasting\\_transmission\\_services\\_markets\\_smp\\_obligations.507.101910.p.html](http://www.comreg.ie/publications/decision_notice_d16_04-wholesale_broadcasting_transmission_services_markets_smp_obligations.507.101910.p.html)

<sup>3</sup> EU Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (second edition)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=L:2007:344:0065:0069:en:PDF>

<sup>4</sup> <http://www.saorview.ie/channels-services/television-channels-and-services/>

in early 2011<sup>5</sup>. ComReg is now undertaking a full market analysis of relevant broadcasting transmission market(s) in Ireland to establish whether *ex ante* regulation remains appropriate, and if so, what form that regulation should take.

1.5 This paper is structured as follows:

- Section 2 of this consultation paper provides an executive summary;
- Section 3 describes the background to this review;
- Section 4 discusses trends in the retail and broadcasting transmission markets in Ireland since ComReg's last market review in 2003/2004; and,
- Section 5 defines markets for application of the three criteria test.

The two markets for application of the three criteria test are:

*The market for wholesale access to national terrestrial broadcast transmission services (market A)*

- Section 6 applies the three criteria test to market A;
- Section 7 assesses SMP in market A;
- Section 8 discusses the range of potential competition problems that may arise in market A;
- Section 9 discusses potential regulatory options for market A;
- Section 10 contains the draft regulatory impact assessment (RIA) for market A; and,
- Section 11 contains a draft Decision Instrument for market A.

*The market for wholesale access to DTT multiplexing services (market B)*

- Section 12 applies the three criteria test to market B;

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<sup>5</sup> Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 10/98.

<http://www.comreg.ie/fileupload/publications/ComReg1098.pdf>

Response to Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 11/24.

[http://www.comreg.ie/publications/response\\_to\\_consultation\\_-\\_three\\_criteria\\_test\\_on\\_the\\_broadcasting\\_transmission\\_market.583.103837.p.html](http://www.comreg.ie/publications/response_to_consultation_-_three_criteria_test_on_the_broadcasting_transmission_market.583.103837.p.html)

- Section 13 assess SMP in market B;
- Section 14 discusses the range of potential competition problems that may arise in market B;
- Section 15 discusses potential regulatory options in market B;
- Section 16 contains the draft RIA for market B; and,
- Section 17 contains a draft Decision Instrument for market B.

1.6 Thereafter, a list of appendices is provided:

- Appendix A provides a list of parameters for inclusion for the proposed SLA obligation in market A;
- Appendix B provides a list of parameters for inclusion for the proposed SLA obligation in market B;
- Appendix C provides the detail of the proposed Accounting Separation obligation in market A;
- Appendix D provides the detail of the proposed Accounting Separation obligation in market B;
- Appendix E summarizes the process ComReg has undertaken to date as part of this review;
- Appendix F details the roles of the BAI and the Minister for Communications, Energy and Natural Resources as well as the legislative provisions relevant to this analysis;
- Appendix G lists all of the consultation questions in this consultation paper; and,
- Appendix H provides a glossary of terms and definitions.

1.7 For definitions and meanings of terms referring to the relevant market(s) used in this consultation paper see the draft Decision Instrument(s) for detail.

## 2 Executive Summary

### 2.1. Background

- 2.1 This consultation paper reviews relevant Irish broadcasting transmission market(s) to determine whether they might have characteristics that requires *ex ante* regulation.
- 2.2 As noted in section 1, in its 2007 Recommendation, the European Commission concluded that, on an EU wide basis, broadcasting transmission services are no longer considered to have characteristics that warrant *ex ante* regulation.
- 2.3 However, NRAs still have the power to apply what is known as “the three criteria test” to any electronic communications market in order to assess whether, on the basis of national circumstances, a market removed in the 2007 Recommendation might nonetheless still be susceptible to *ex ante* regulation in a particular Member State. Due to varying characteristics of broadcasting transmission services across different EU Member States, NRAs have adopted different approaches and regulation has been applied in many cases.<sup>6</sup>
- 2.4 A market may have characteristics that warrant *ex ante* regulation if it is found to cumulatively satisfy the three criteria test. The three criteria are:
- 1) The presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
  - 2) A market structure that does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry; and,
  - 3) The insufficiency of *ex post* competition law alone to adequately address the market failure(s) concerned.
- 2.5 ComReg previously reviewed broadcasting transmission services in Ireland between 2003 and 2004 taking utmost account of the European Commission’s 2003 Recommendation.
- 2.6 ComReg designated RTÉNL as having SMP in two wholesale markets. That is, the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks and the wholesale market for television broadcasting transmission services on analogue terrestrial networks.
- 2.7 By Decision Notice D04/122 dated 22 December 2004, ComReg imposed SMP obligations on RTÉNL related to transparency, and non-discrimination.

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[http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/eu\\_consultation\\_procedures/working\\_doc\\_comm\\_art7\\_en.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/eu_consultation_procedures/working_doc_comm_art7_en.pdf)

- 2.8 In light of the European Commission's revised position, and developments such as the move to DTT broadcasting in Ireland, ComReg is now undertaking a full market review of broadcasting transmission services in Ireland to establish whether *ex ante* regulation remains appropriate, and if so, what form that regulation should take.
- 2.9 In a European Commission Communication on market reviews under the EU regulatory framework<sup>7</sup> (2010 Communication), the Commission noted that due to a large number of diverging technical, economic and regulatory obstacles to the development of direct competition between different transmission platforms, both at retail and wholesale level, competition in the market for broadcasting transmission services, to deliver content to end-users has not yet developed to its full potential across the EU and therefore, national regulators may still conclude on the fulfilment of the three criteria test in certain parts of the market.
- 2.10 Analogue terrestrial television switch-off (ASO) will occur on the 24 October 2012 in light of the move to DTT. The conditions for the establishment of DTT have been introduced by the Broadcasting Act 2009<sup>8</sup> (the 2009 Act)<sup>9</sup>, which under section 132, provides that ComReg, at the request of RTÉ and separately at the request the BAI, shall issue licence(s) in respect of the establishment, maintenance and operation of television DTT multiplex(es), including two public sector broadcasting multiplexes for RTÉ. The 2009 Act provides the legislation relevant to Irish broadcasting matters such as the establishment of the BAI, broadcaster's duties, codes and rules as well as digital broadcasting and ASO among others.
- 2.11 The 2009 Act sets out a licensing process and conditions to facilitate the provision of television multiplex services by RTÉ on up to two multiplexes. RTÉ must provide for the broadcasting of its existing analogue television channels and can broadcast additional RTÉ content. Under the Act RTÉ is specifically obliged, under the detail of section 130, to provide on its multiplexes for the broadcasting of the TG4, TV3, Film Channel, Oireachtas TV and other channels of a public service nature which have received the necessary Ministerial consents. Section 130 the 2009 Act also provides that RTÉ may (subject to its public service broadcasting ("PSB") obligations, upon consent of the Minister and having met all other obligations) use any spare capacity on one of its two multiplexes to broadcast commercial programme material. In addition, section 132 provides that ComReg issue, at the request of the BAI, up to four television multiplex licences. Multiplex contracts may

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<sup>7</sup> European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGION on market reviews under the EU Regulatory Framework (3rd report), Brussels, 1.06.2010 SEC(2010) 659.

<sup>8</sup> Broadcasting Act, 2009.

<sup>9</sup> From here on referred to as the 2009 Act.

be issued by the BAI to potential (commercial) multiplex operators in relation to these licences. Currently two RTÉ PSB DTT multiplexes have been established.

2.12 In a similar fashion, section 133 of the 2009 Act sets out the licensing process and conditions to facilitate the provision of two sound broadcasting multiplex licences directly to RTÉ and one or more sound broadcasting multiplex licences to the BAI. There is currently one sound broadcasting multiplex in operation by RTÉ which provides digital radio services to a portion (<http://www.rte.ie/digitalradio/faq.html>) of the population.

2.13 When the European Commission concluded that, on an EU wide basis, broadcasting transmission services are no longer considered to have characteristics that warrant *ex ante* regulation, in addition to considering whether competition law (as part of the three criteria test assessment) the European Commission also looked at the effect that other legislation may have on broadcasting transmission markets. Therefore, an NRA should consider as part of its analysis the effect that other legislation may have on broadcasting transmission market(s). Therefore, the provisions of the 2009 Act are taken into consideration as part of this market review process.

2.14 In this market review, as summarised below, two distinct markets are defined:

- 1) **Market A:** *the market for wholesale access to national terrestrial broadcast transmission services*
- 2) **Market B:** *the market for wholesale access to DTT multiplexing services*

A competition assessment has been carried out on each market and ComReg's preliminary conclusion suggests that both markets warrant *ex ante* regulation. The 2009 Act takes prominence and ComReg proposes that the measures outlined in this consultation paper should complement the 2009 Act. ComReg proposes that in the upstream market, market A, access to the terrestrial transmission network should be provided by the SMP operator to national analogue radio broadcasters and multiplex operators (both terrestrial radio and television). Market B as defined, includes the provision of multiplex services over all potential DTT (i.e. television) multiplex platforms. Given the current market structure where RTÉ is the sole provider in market B; ComReg proposes measures which allow access to RTE's DTT multiplexing services by DTT broadcasters who are to be designated under section 130 of the Broadcasting Act 2009.

## **2.2. Trends in broadcasting since ComReg's previous market review**

2.15 There are a number of platforms providing broadcasting transmission services in Ireland. These include satellite, cable, internet, and terrestrial platforms.



- 2.16 In terms of television broadcasting, pay television subscriptions over cable and satellite have been increasing in popularity over the last eight years. Approximately 69% of television homes now use this means of television access. Nevertheless, though free to air (FTA) only households have declined over the same period, there remains a substantial portion of television households dependent on FTA broadcast transmission (circa 31%). Furthermore, as some television homes may have more than one reception method, it is estimated that approximately 50% of television homes have a FTA television reception method. However, even in homes with pay television services, Irish FTA television broadcasters still enjoy relatively strong retail market audience share.<sup>10</sup>
- 2.17 In terms of radio, content deployed over the terrestrial network is most widely used. The most popular means of access is the fixed radio set and in car radio. Access over other means does not appear to be very popular in comparison. Mobility of services is an important aspect of radio broadcasting services. Radio broadcasting from platforms other than terrestrial provision does not allow comparable mobility to end-users and in this regard there is a lack of receivers for other platforms services e.g. satellite.
- 2.18 At the network broadcast transmission level the main change since ComReg's last market review in 2003/2004 has been the upgrading of RTÉNL's broadcast transmission and broadcast distribution network to facilitate the introduction of DTT services in light of ASO on 24 October 2012. The 2009 Act details legislative provisions in Irish broadcasting which include other matters related to digital broadcasting.

### **2.3. Market Definition**

- 2.19 With the move to DTT it is appropriate for ComReg to assess whether regulation remains appropriate in this context. This requires an assessment of the scope of the market(s) and subsequently undertaking a three criteria test and, if warranted, an SMP analysis. The scope of the market(s) is discussed in section 5 of this consultation paper.
- 2.20 This is done by first looking at the scope of the retail market absent regulation to understand the nature of retail, and consequently wholesale demand. ComReg then assesses any direct demand and/or supply-side substitutes for the wholesale services in question, as well as taking account of the extent to which there is any indirect constraint (from the retail market) on said wholesale services.
- 2.21 As regulation was applied to analogue terrestrial television and national analogue radio terrestrial transmission markets in ComReg's market review in 2003/2004, terrestrial broadcast transmission forms the starting point of the analysis to determine if regulation is still appropriate. Since ComReg's

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<sup>10</sup> TAM Ireland Ltd/Nielsen TAM, Consolidated Data.

previous review in 2003/2004 obligations of transparency and non-discrimination have been applied to national analogue terrestrial radio and analogue terrestrial television broadcasting markets.

- 2.22 On 24 October 2012 analogue terrestrial television switch off will occur so that the transmission of analogue terrestrial television will cease. Terrestrial analogue radio services will continue to be supplied. Access for the purposes of terrestrial television broadcasting will be delivered through more spectrally efficient digital terrestrial television (DTT) signals, which can only be broadcast after going through a multiplexing process.<sup>11</sup> This represents a significant change in the provision of access and of managed services of terrestrial broadcasting. This has prompted ComReg to review the market(s) and carry out a three criteria test, where competitive dynamics indicate unique, identifiable services and characteristics.
- 2.23 Multiplex licences are required for spectrum rights to provide multiplex services and such licences are provided by ComReg to the BAI, who award contracts to multiplex operators through a tendering process. Terrestrial (formally analogue) broadcasters would need to purchase multiplexing services from a multiplex operator, as broadcast content contracts, which allow for the broadcast of services on networks generally, do not permit these broadcasters to undertake multiplexing services.
- 2.24 The spectrum RTÉ requires for the purposes of its DTT multiplex service is licensed to it by ComReg under the 2009 Act and the spectrum required by any future (commercial) DTT multiplex operator who has successfully acquired a contract through a BAI contract award process, is also licensed by ComReg under the 2009 Act. Carriage of programme services on RTÉ's PSB DTT multiplexes requires the consent of the Minister and this includes any use of residual spare capacity for commercial purposes.<sup>12</sup>
- 2.25 Similarly, the spectrum RTÉ requires for a sound multiplex service is licensed to it by ComReg under the 2009 Act and the spectrum required for any other, future sound multiplex operator who has successfully acquired a contract through a BAI contract award process, is also licensed by ComReg under the 2009 Act.
- 2.26 In assessing the broadcasting transmission services supply chain and in light of the move to DTT, it is therefore necessary to consider two discrete forms of wholesale demand:
- The upstream wholesale demand from national analogue radio broadcasters and multiplex operators (which they combine with their

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<sup>11</sup> Digital terrestrial broadcast services are transmitted on multiplexes. A multiplex is a collection of television programme, radio and data services that are broadcast together in a digital signal that occupies less spectrum than analogue transmission, and therefore, is more efficient as it allows for greater network capacity which enables more channels to be broadcast to end-users.

<sup>12</sup> Section 130 of the 2009 Act.

own multiplex infrastructure to subsequently provide transmission solutions to digital broadcasters) for access to the terrestrial transmission infrastructure; and,

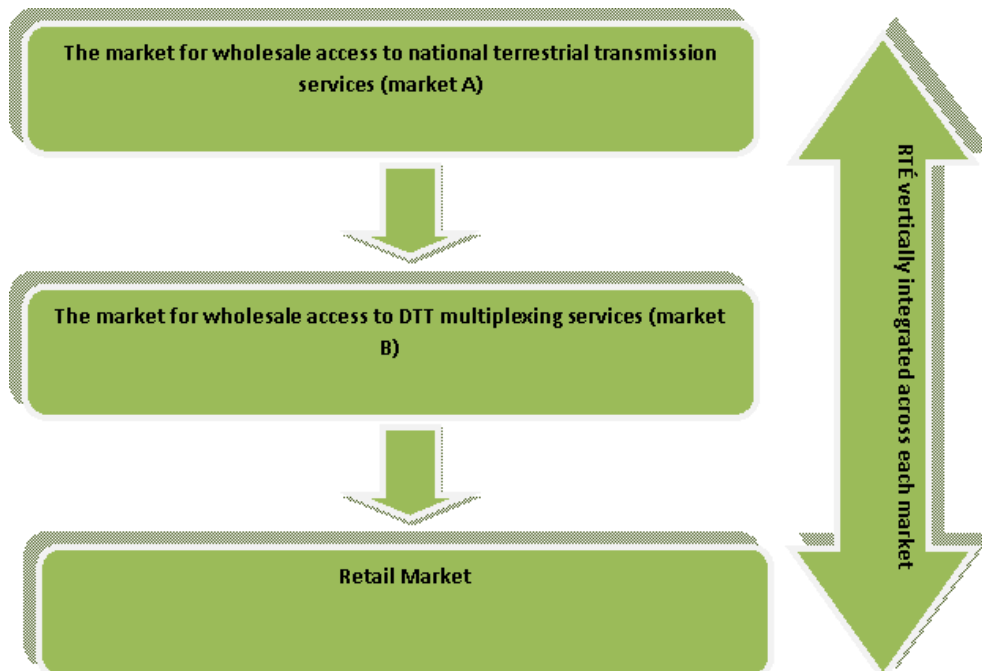
- The downstream wholesale demand from DTT broadcasters (who do not have any physical infrastructure or equipment installed on the terrestrial broadcast transmission network) for access to DTT multiplexing services (which in turn consumes terrestrial broadcast transmission services).

2.27 ComReg is of the preliminary opinion that there are two distinct applicable markets for the purposes of this review:

- 3) **Market A:** *the market for wholesale access to national terrestrial broadcast transmission services*
- 4) **Market B:** *the market for wholesale access to DTT multiplexing services*

2.28 Figure 1 below provides an illustration of these related wholesale markets. RTE’s presence as a vertically integrated entity has a presence in each market.

**Figure 1: RTE presence in each of the retail and terrestrial wholesale markets**



2.29 This market definition is based on further consideration by ComReg, following its preliminary consultation and response to consultation papers on the “Three Criteria Test on the Broadcasting Transmission Market”<sup>13</sup> having

regard to demand and supply substitution and subsequent assessment of differences in the nature of the entry barriers to these markets.

- 2.30 Having defined two applicable wholesale markets, ComReg applies the three criteria test. This is discussed in sections 6 and 12 of this consultation paper.
- 2.31 In light of the relationship between both of these wholesale markets, ComReg conducts its analysis of market A first, and thereafter conducts its analysis of market B, thereby taking into account any impact of its findings in market A on market B.

## **The market for wholesale access to national terrestrial broadcast transmission services (market A)**

### **2.4. Three Criteria Test – Market A**

- 2.32 In addition to considering whether competition law (as part of the three criteria test assessment) is substitutable for *ex ante* regulation, ComReg considers whether other legislation<sup>14</sup> could have an impact on this market, but considers that provisions provided for in other legislation such as the 2009 Act do not remove the requirement for independent *ex ante* regulation of the market, under the 2003 electronic communications framework.
- 2.33 This is discussed further in section 6 of this consultation paper.

#### **High and non-transitory barriers to entry**

- 2.34 Market A is characterised by high and non-transitory entry barriers for reasons which include the high (potentially sunk) cost of entry, in particular the substantial cost of establishing a network of high masts/towers to broadcast terrestrial programme services, as well as possible site location and planning issues, and other potential barriers, as discussed in section 6, to attaining a critical mass of customers.

#### **No tendency towards effective competition over relevant time horizon**

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Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 10/98.

<http://www.comreg.ie/fileupload/publications/ComReg1098.pdf>

Response to Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 11/24.

[http://www.comreg.ie/publications/response\\_to\\_consultation\\_-\\_three\\_criteria\\_test\\_on\\_the\\_broadcasting\\_transmission\\_market.583.103837.p.html](http://www.comreg.ie/publications/response_to_consultation_-_three_criteria_test_on_the_broadcasting_transmission_market.583.103837.p.html)

<sup>14</sup>

For example, the Universal Services Directive 2002/22/EC as amended, the Framework Directive 2002/21/EC as amended, the Access Directive 2002/19/EC as amended and the Broadcasting Act 2009.

- 2.35 RTÉ provides both the most viewed television programme services and the most listened to national radio programme services in the State. Its wholly-owned subsidiary, RTÉNL, owns the tower/mast network structures and therefore, provides a key wholesale input for national terrestrial FTA broadcasting for RTÉ and other terrestrial programme services for most viewers/listeners. As noted above, there are clear structural barriers limiting the scope for any tendency towards effective competition in the provision of terrestrial transmission services over time.
- 2.36 As a vertically integrated operator it is also not in RTÉ's interests to facilitate competition which could result in a loss of market share of viewers/listeners to other broadcasters. Therefore, absent regulation a vertically integrated entity, such as RTÉ, might try to exclude potential terrestrial competitors via strategic barriers to entry.

### **Insufficiency of competition law alone**

- 2.37 ComReg considers that competition law alone is insufficient to address potential failures in the market. RTÉ, as a vertically integrated operator, through RTÉNL, with effective control (protected by high barriers to entry) over the supply of a key wholesale input to broadcasting services, has both the ability and incentives to engage in anti-competitive conduct in market A. Competition law is *ex post* and such investigations can take considerable time to complete and may not provide sufficient certainty to market participants regarding the terms and conditions of access to key wholesale inputs. For example, competition law does not normally mandate that specific prices or pricing methodologies be used, or involve policing the evolution of prices or ongoing market monitoring of potential strategic decisions which may limit the possibility of new terrestrial programme services entering the market.
- 2.38 It is ComReg's preliminary view that the three criteria test is satisfied in market A.

## **2.5. Competition analysis and assessment of SMP – Market A**

- 2.39 The next step is to determine if the relevant market(s) is effectively competitive or if SMP exists.
- 2.40 ComReg's preliminary conclusions are that:
- RTÉNL has 100% share of the relevant market and this has remained stable over time;
  - RTÉNL services operate from an extensive range of high tower/mast sites located throughout Ireland, many in strategically located high-sites, which enable almost complete coverage of the population of Ireland. There is no alternative terrestrial network capable of ensuring

the same level of services in Ireland for national terrestrial broadcasters and multiplex operators;

- Barriers to entry/expansion exist such as high financial (sunk) costs, control of infrastructure not easily replicated, economies of scale and scope, and vertical integration; and,
- Insufficient countervailing buying power exists in this market such that broadcasters and multiplex operators do not have the ability to exert significant constraint on their cost or other terms and conditions of supply from RTÉNL.

2.41 Therefore, ComReg is of the preliminary view that RTÉNL, the wholly owned subsidiary of RTÉ, should be designated as having SMP in market A.

## **2.6. Competition problems – Market A**

2.42 In ComReg's preliminary view there are a number of competition problems which may arise in this market which requires regulatory intervention.

2.43 Given the barriers to effective competition discussed above and in the absence of *ex ante* regulation in this market, RTÉ, as a vertically integrated entity, through RTÉNL, has significant market power in market A and potential competition concerns may manifest. Competition problems could emerge through:

- Refusal of access to national analogue radio broadcasters and multiplex operators either outright or constructively, for example through delays in the provision of wholesale services where request have been made, through protracted negotiations, or stipulating unreasonable terms and conditions of entry;
- Discrimination between the price, and non-price terms of its wholesale services such as the quality of services and information supplied to RTÉ and, other broadcasters and multiplex operators;
- Reduced transparency for the terms and conditions of access it provides, for example, by not providing clarity to broadcasters and multiplex operators on how their costs relate to the services they use;
- Pricing excessively and/or margin squeeze to dis-incentivise market entry and/or reduce the ability of competitors to compete with RTÉ's own broadcasting activities.

2.44 This may in turn lead to reduced quality and choice for consumers in the retail market. It is therefore, important to ensure that there is no distortion of competition in this market.

## 2.7. Proposed Remedies – Market A

2.45 In light of the potential competition problems discussed above arising from the preliminary conclusion of SMP in market A, ComReg proposes that imposition of the following regulatory obligations, as set out in Regulations 9 to 13 of the Access Regulations 2011,<sup>15</sup> is justified and proportionate:

- Obligations for access to and use of specific network facilities by national analogue radio broadcasters and multiplex operators consistent with the provisions of the Broadcasting Act 2009;<sup>16</sup>
- Transparency;
- Non-discrimination;
- Accounting separation and
- Price control and cost accounting obligations.

2.46 ComReg proposes to closely monitor relevant developments (if any) in the market over the period of the current review, to assess whether these remedies remain appropriate.

## The market for wholesale access to DTT multiplexing services (market B)

2.47 Following the analysis of market A the competitive conditions of (downstream) market B are assessed to determine whether or not it is susceptible to *ex ante* regulation. This assessment assumes the presence of the full suite of regulatory obligations proposed for (upstream) market A to identify whether or not these obligations are sufficient to facilitate competition throughout the value chain into this downstream wholesale market or if additional remedies are needed.

2.48 In addition to considering whether competition law is sufficient the European Commission has also looked at the effect that other legislation may have on broadcasting transmission markets. The 2009 Act takes prominence and ComReg proposes that remedies imposed as a result of this market review should complement the provisions of the 2009 Act. Therefore, before considering the three criteria test itself ComReg considers the effect other legislation may have on wholesale market B.

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<sup>15</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 ([S.I. No 334 of 2011](#)).

<sup>16</sup> In accordance with Section 115(1) of the 2009 Act (with respect to radio).

- 2.49 ComReg's preliminary view is that in the context of a vertically integrated national broadcaster that provides broadcasting transmission facilities to actual or potential competitors, the provisions of other legislation such as the 2009 Act does not necessarily remove the requirement for *ex ante* regulation, which has the aim of fostering a competitive market dynamic, through efficient access. *Ex ante* regulation has the benefit of well defined characteristics under the regulatory framework and can provide stability and assurance to a market characterised by high and non-transitory entry barriers through using a variety of approaches that are methodical, and well understood. This is discussed further in section 12 of this consultation paper.
- 2.50 There are particular features which merit examination of Market B. Currently there is a vertically integrated sole supplier of wholesale DTT multiplex services and it is expected, based on evidence to date, that it is likely to be the case that the competitive conditions of this market are unlikely to change in this market as effective entry is unlikely to occur in the period of this review. The contestable market for downstream broadcasting and advertising revenues is relatively small, particularly given that RTÉ had approximately 70% of the terrestrial retail television market share in 2010<sup>17</sup>. The business case for provision of competing wholesale DTT multiplex services may be limited or may be slow to evolve, meaning that DTT broadcasters may not effectively have a choice of an alternative provider for their multiplexing services in the timeframe of this review.

## **2.8. Three Criteria Test – Market B**

### **High and non-transitory barriers to entry**

- 2.51 The defined market includes the provision of multiplex services over all potential DTT multiplex platforms, both PSB and commercial. There has not yet been any allocation of DTT multiplex contracts to commercial DTT operators in Ireland.
- 2.52 Noting a failed entry attempt into market A following a BAI commercial DTT contract negotiation process between 2008 and 2010,<sup>18</sup> and the absence of a timeline for the initiation of a new commercial DTT tender process, effective entry by commercial DTT multiplex operators capable of constraining RTÉ, based on the evidence to date, is unlikely to emerge in the period of this review.
- 2.53 The licensing commitments of terrestrial broadcasters such as TG4 and TV3 (to provide national population coverage and broadcast on a FTA basis) increase the costs and time involved for effective entry into market B. At present and prospectively, it is not clear that commercial DTT operators will

<sup>17</sup> Irish Broadcasting Landscape: Economic and Environmental Review for the BAI, Athena Media, 2010.

<sup>18</sup> It should be noted however that the proposed regulatory obligations for market A should lower the barriers involved in negotiating effective access to RTÉNL's network process following any future commercial DTT licensing award process.



enter the market to service FTA PSB operators – their business model may instead be for an encrypted service with a more limited coverage target. A consideration therefore would be the cost of upstream entry related to the transmission coverage requirements of public service broadcasters. To meet these requirements, multiplex services would require access to all the 51 DTT sites from which RTÉ currently operates its DTT service to in order to provide comparable coverage, the costs of which would correspondingly increase.

- 2.54 A multiplex licence is required from ComReg to provide spectrum rights of use which entitle the holder to provide DTT multiplexing services for the transmission of DTT. Under the 2009 Act, ComReg can only issue a multiplex licence to provide spectrum rights of use to RTÉ and the BAI. In the case of multiplex licences issued by ComReg to the BAI, the benefit of the spectrum rights of use is passed onto a DTT multiplex operator via a contract from the BAI following a tender process.
- 2.55 As the business model of a broadcaster such as TG4 and TV3 is very different to that of a DTT multiplex operator, the case for self-supply is unclear. Furthermore, potential alliances or partnerships to overcome the costs of entry may be difficult to form and would take time to implement. Although it could be expected that entry into this market should be more easily facilitated where *ex ante* regulation was applied to upstream market A, there remain barriers to entry which make effective entry unlikely in the timeframe of this review.

**No tendency towards effective competition over relevant time horizon**

- 2.56 This is not a market where competition could be expected to tend towards competition over a foreseeable time period unless there is a significant step change in the market conditions i.e. launch of commercial DTT multiplex(es) which offer wholesale access to DTT multiplexing services capable of constraining RTÉ.
- 2.57 As noted above, it does not seem likely that commercial DTT wholesale multiplexing services capable of constraining RTÉ will be established in the timeframe of this review. ComReg is not aware of any substantial representations made for commercial DTT multiplex contracts since the BAI's last negotiation process between 2008 and 2010.
- 2.58 While there is capacity on RTÉ's second DTT multiplex capable of providing for more non-RTÉ digital terrestrial television services under section 130 of the 2009 Act, as a vertically integrated operator, it may not be in RTÉ's interests to facilitate more competition which would result in a potential loss of downstream market share and subsequent loss of advertising revenues. Therefore, the market structure is such that it would not be likely to tend towards effective competition overtime.

2.59 However, if commercial DTT becomes established and operational in the timeframe of this market review, i.e. three years from the final Decision date, ComReg will reassess whether the three criteria remains satisfied in this market.

### **Insufficiency of competition law alone**

2.60 ComReg considers that even assuming the presence of *ex ante* regulation in market A, competition law alone is insufficient to address failures in market B. Competition law is *ex post* and such investigations can take considerable time to complete.

2.61 In ComReg's preliminary view, irrespective of whether access to market A is provided on the regulated terms the foregoing assessment indicates that the competitive conditions of market B would not necessarily improve in tandem. This is because RTÉ is still the sole provider of end-to-end terrestrial transmission services including multiplexing, and new entrants would likely face time delays and costs associated with a number of the licensing, structural and strategic barriers before they could gain a foothold in this market.

2.62 It is, therefore, ComReg's preliminary view that the three criteria test is satisfied in market B.

## **2.9. Competition analysis and assessment of SMP– Market B**

2.63 The next step is to determine if the relevant market(s) is/are effectively competitive or if SMP exists.

2.64 In presence of a full suite of regulatory obligations in market A, the structural barriers to entry in market B appear somewhat lower in market B than in market A, however legal and regulatory barriers are present in market B. The time and costs involved in attaining a DTT multiplex contract and implementing necessary coverage to meet broadcasters' demand are still significant. The competitive conditions of this market are thus unlikely to materially change during the period covered by this review.

2.65 ComReg has considered this market in terms of existing competition, potential competition and countervailing buying power to determine whether there is SMP in the market. In summary, ComReg's preliminary conclusions are that:

- RTÉ has 100% market share of the market;
- RTÉ has acquired the licenses for the operation of two PSB DTT multiplexes. There are no alternative commercial DTT multiplex operators in this market capable of providing comparable services to

RTÉ and due to licensing and other barriers to entry this does not seem likely to materially change during the period covered by this review;

- As RTÉ is a vertically integrated entity in the absence of regulation competition problems may arise by strategic behavior aimed at weakening perceived competitive threats to RTÉ at the retail level; and,
- Insufficient countervailing buying power exists in the market and so DTT broadcasters do not have the ability to exert significant constraint on their cost or other terms and conditions of supply from RTÉ.

2.66 Having regard to the preliminary conclusions of the above market analysis, ComReg is of the preliminary view that RTÉ should be designated as having SMP in market B.<sup>19</sup>

## **2.10. Competition problems – Market B**

2.67 In ComReg's preliminary view there are a number of competition problems which may arise in this market which requires regulatory intervention.

2.68 Given the barriers to effective competition discussed above, the potential exists for a vertically integrated entity, which has significant market power and which competes with broadcasters in the retail market for audience share and advertising revenues to use its market power to:

- Limit access by television broadcasters through tactical behaviour aimed at dissuading interest in access. For example through imposing unreasonable terms and conditions of access;
- Discriminate between the price, and non-price terms of its wholesale services such as the quality of services and information supplied to RTÉ and other broadcasters;
- Provide no visibility of the terms and conditions of access it provides to broadcasters, for example, by not providing clarity to broadcasters on how their costs relate to the services they use;
- Price excessively to discourage market entry and expansion and/or reduce the ability of broadcasting competitors to compete with RTÉ's own broadcasting activities.

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It should be noted that ComReg is not proposing to regulate all activities of RTÉ, only those relating to market B.

2.69 This may in turn lead to reduced quality and choice for consumers in the retail market. It is therefore, important to ensure that there is no distortion of competition in this market.

### **2.11. Proposed Remedies – Market B**

2.70 In light of the potential competition problems discussed above, arising from the preliminary conclusion of SMP in market B, ComReg proposes that, subject to the provisions of section 130 of the 2009 Act<sup>20</sup> imposition of the following regulatory obligations on RTÉ as set out in Regulations 9 to 13 of the Access Regulations, is justified and proportionate:

- Obligations for access to and use of specific network facilities subject to and consistent with the PSB obligations of section 130 of the 2009 Act, excluding section 130(1)(e) of the 2009 Act;
- Transparency;
- Non-discrimination;
- Accounting separation; and,
- Price control and cost accounting obligations.

2.71 For the avoidance of doubt, where there are any conflicts between the provisions and/or definitions of the Decision Instrument and the 2009 Act, the provisions of the 2009 Act will prevail.

ComReg proposes to closely monitor relevant developments (if any) in the market over the period of the current review, to assess whether these remedies remain appropriate.

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Under section 130 of the 2009 Act, programme services carriage on RTÉ's PSB DTT multiplexes requires Minister consent.

## 3 Background

### 3.1 Previous Review in 2003/2004

- 3.1 Broadcasting transmission services, used to deliver broadcasting content to retail end-users (television viewers and radio listeners), were formerly identified in the European Commission's 2003 Recommendation as a market with characteristics which may warrant *ex ante* regulation (formerly listed as Market 18).
- 3.2 ComReg reviewed the broadcasting transmission market in Ireland between 2003 and 2004 taking utmost account of the European Commission's 2003 Recommendation. On foot of its review, ComReg defined four separate wholesale broadcasting markets in the State:
- The wholesale market for radio broadcasting transmission services on national analogue terrestrial networks;
  - The wholesale market for television broadcasting transmission services on analogue terrestrial networks;
  - The wholesale market for radio broadcasting transmission services on local/regional analogue terrestrial networks; and,
  - The wholesale market for broadcasting transmission services on cable and satellite networks.
- 3.3 ComReg designated RTÉNL as having SMP in the first two markets above. By means of Decision Notice D04/122 dated 22 December 2004, ComReg imposed a number of SMP obligations on RTÉNL related to transparency, and non-discrimination.

### 3.2 Current Review

- 3.4 In the European Commission's revised 2007 Recommendation, Market 18 was removed from its list of recommended markets. This was mainly on the basis that, on an EU-wide basis, although barriers to entry may still exist, market dynamics are such that the second criterion (i.e. no tendency towards effective competition in the relevant time horizon) of the three criteria test was no longer considered satisfied at that time. In its Explanatory Note to the 2007 Recommendation<sup>21</sup> (the Explanatory Note), the European Commission expressed its view that the move from analogue to digital transmission should result in fewer capacity constraints and more platforms to compete with, while remaining problems of market power could be addressed by *ex post*

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<sup>21</sup> Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC (2007) 1483, dated 13/11/2007 (the Explanatory Note).

application of competition law or by other regulatory measures that may be in place. However, NRAs can use the three criteria test to determine whether, on the basis of national circumstances, broadcasting transmission services still warrant *ex ante* regulation.

3.5 The 2007 Recommendation defines markets as having characteristics that may warrant *ex ante* regulation if they are found to cumulatively satisfy the three criteria test. The three criteria are:

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

3.6 In light of the European Commission's revision of its 2003 Recommendation, and the transition from analogue to digital terrestrial broadcasting transmission in Ireland, ComReg undertook a preliminary three criteria test consultation in 2010 (and published a response to that consultation in 2011).<sup>22</sup> Having considered its analysis further, ComReg is now undertaking a preliminary full market review including an amended market definition and three criteria test analysis.

3.7 As the markets for broadcasting transmission services on cable and satellite networks were excluded from *ex ante* regulation at the time of the previous market review, and taking account of the European Commission's observation in its Explanatory Note, ComReg is not formally obliged to conduct a three criteria test to these alternative platforms. ComReg's starting point for its market definition and three criteria assessment in this consultation paper is the terrestrial network for which SMP concerns were traditionally identified.

3.8 Due to varying characteristics of broadcasting transmission markets across different Member States, a number of NRAs concluded that the three criteria test remains fulfilled in a market in their jurisdictions. In many of these cases

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<sup>22</sup> Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 10/98.

<http://www.comreg.ie/fileupload/publications/ComReg1098.pdf>

Response to Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 11/24.

[http://www.comreg.ie/publications/response\\_to\\_consultation\\_-\\_three\\_criteria\\_test\\_on\\_the\\_broadcasting\\_transmission\\_market.583.103837.p.html](http://www.comreg.ie/publications/response_to_consultation_-_three_criteria_test_on_the_broadcasting_transmission_market.583.103837.p.html)

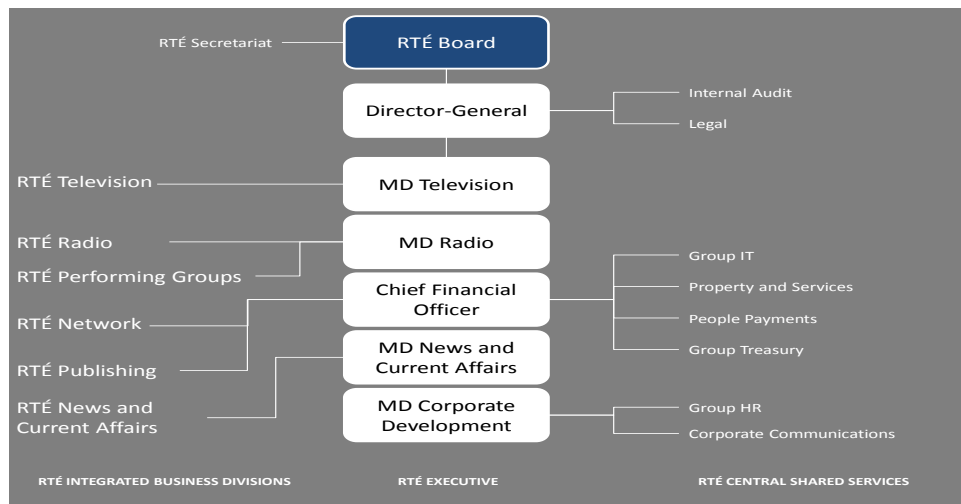
the European Commission agreed that the possibility of *ex ante* regulation remained appropriate.<sup>23</sup>

### 3.3 National Terrestrial Transmission Services

3.9 As part of this market review, in the context of determining whether *ex ante* regulation continues to be required, it is appropriate to discuss the nature of national terrestrial transmission services in Ireland.

3.10 RTÉ is the national public service broadcaster in Ireland; the principal objects and associated powers of RTÉ are described in section 114 of the 2009 Act.<sup>24</sup> Historically, RTÉ has provided broadcast contribution, distribution and transmission services as a service to itself, i.e. it is a vertically integrated entity and therefore self-supplies terrestrial network services via its wholly owned subsidiary RTÉNL. Broadcasting began in the Republic of Ireland in 1926 with a single AM site in Dublin, named ‘2RN’. It became ‘Radio Éireann’ in the late 1930’s with three AM transmitters, one each in Dublin, Cork and Athlone. The next key milestone for broadcasting in the Republic of Ireland was the Broadcasting Authority Act, 1960 which established RTÉ and television transmission began in 1961. In 2004 RTÉ set up six independent business divisions (IBDs) including RTÉNL.

3.11 The internal structure of RTÉ is depicted below.



Source: RTÉ 2010 annual report.

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[http://ec.europa.eu/information\\_society/policy/ecom/doc/implementation\\_enforcement/eu\\_consultation\\_procedures/working\\_doc\\_comm\\_art7\\_en.pdf](http://ec.europa.eu/information_society/policy/ecom/doc/implementation_enforcement/eu_consultation_procedures/working_doc_comm_art7_en.pdf)

24

<http://www.irishstatutebook.ie/2009/en/act/pub/0018/index.html>

- 3.12 RTÉNL currently operates a network of over 150 transmission sites providing broadcast contribution, distribution and transmission services<sup>25</sup> to national terrestrial television and radio broadcasters. It also provides hosting facilities and engineering services to quasi-national, regional and local and community broadcasters and telecommunications companies.
- 3.13 RTÉNL distributes programming signals from RTÉ's headquarters in Donnybrook to its main transmission sites via a fixed microwave link network. Relay stations receive signals from the nearest main site and re-broadcast these on different frequencies.
- 3.14 RTÉNL owns all the distribution and transmission equipment used to provide services to national broadcasters. RTÉNL owns many of the 150 transmission sites from which it operates while others are held by way of lease or licence.
- 3.15 RTÉ launched its DTT platform, 'Saorview' in May 2011<sup>26</sup>. The spectrum used by RTÉ is licensed by ComReg in accordance with section 132 of the 2009 Act. ComReg issued RTÉ with its first DTT multiplex licence in December 2007 and the second DTT multiplex licence was issued in May 2011. The infrastructure necessary enabling the transmission of RTÉ's two PSB DTT multiplexes has been built by RTÉNL at 51 broadcast transmission sites around Ireland. As a consequence, the Minister for Communications, Energy and Natural Resources has announced that on 24 October 2012, analogue terrestrial television services in Ireland will be switched off<sup>27</sup>. It is RTÉ, not RTÉNL, who holds the spectrum licences for the two PSB DTT multiplexes.
- 3.16 Currently RTÉ is the only licensed DTT multiplex operator in the State. Section 130 of the 2009 Act sets specific conditions of access for certain broadcasters to RTÉ's DTT multiplexes. Were other national multiplex operators to be established they would require access to national broadcast transmission infrastructure, and therefore would need to enter into a contract arrangement directly with RTÉNL.

### 3.4 Regulatory Framework

- 3.17 Throughout this consultation, ComReg takes full account of its statutory functions and objectives under the Communications Regulation Acts 2002-

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<sup>25</sup> Broadcast contribution services from regional broadcast centres are provided to RTÉ television and TG4. RTÉNL distributes programming signals from headquarters in Donnybrook to its main transmission sites via a fixed microwave link network. Broadcast transmission services are then provided from RTÉNL's network of transmission sites. Broadcast contribution services from regional broadcast centres are provided to RTÉ radio. A broadcast contribution service is also provided to Today FM. RTÉNL distributes broadcast programming signals from Donnybrook to its main transmission sites via a fixed microwave link network. Broadcast transmission services are then provided from RTÉNL's network of transmission sites. RTÉNL also provide site hosting and engineering services to some quasi-national, regional/local and community radio broadcasters.

<sup>26</sup> [/www.saorview.ie/news/free-to-air-digital-television-now-available-via-saorview/](http://www.saorview.ie/news/free-to-air-digital-television-now-available-via-saorview/)

<sup>27</sup> [www.dcenr.gov.ie/Press+Releases/2011/MINISTER+RABBITTE+ANNOUNCES+DATE+FOR+DIGITAL+T+V+SWITCHOVER.htm](http://www.dcenr.gov.ie/Press+Releases/2011/MINISTER+RABBITTE+ANNOUNCES+DATE+FOR+DIGITAL+T+V+SWITCHOVER.htm)



2011, as amended,<sup>28</sup> together with its duties under the 2011 Regulatory Framework and its relevant functions in the 2009 Act.

- 3.18 Regulation 26 of the Framework Regulations<sup>29</sup> requires ComReg to define relevant markets appropriate to national circumstances, in accordance with the market definition procedure set out in the Framework Regulations, and to take utmost account of the European Commission's Recommendation on Relevant Product and Service Markets and its SMP Guidelines.<sup>30</sup> Where ComReg determines as a result of its market analysis that a given market is not effectively competitive, ComReg is then required, under Regulation 27(4) of the Framework Regulations, to designate one or more undertakings in that market as having SMP and to impose on such undertaking(s) such specific obligations as ComReg considers appropriate which include any (or all) of the wholesale access obligations set out in Regulations 9 to 13 of the Access Regulations.<sup>31</sup>
- 3.19 ComReg has taken the utmost account of the 2007 Recommendation and its accompanying Explanatory Note, as well as the SMP Guidelines. ComReg has also taken account of the European Commission's Notice on the definition of relevant market for the purposes of Community Competition Law.<sup>32</sup>
- 3.20 *Ex ante* regulation under the Electronic Communications Framework may not be necessary if other forms of regulation are available. Therefore, in undertaking this market analysis, ComReg considers other legislation that may apply to the broadcasting transmission market. In particular, broadcasting services are subject to the provisions of the 2009 Act.
- 3.21 The role of the Broadcasting Authority of Ireland ("BAI"), and the Minister for Communications, Energy and Natural Resources are discussed in Appendix F of this consultation paper, as well as a description of the legislative provisions relevant to this analysis, which are found in, amongst other enactments:
- The Communications Regulation Acts 2002 - 2011;
  - The Wireless Telegraphy Acts 1926 - 2009;

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<sup>28</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act of 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (no. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

<sup>29</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, (S.I. 333 of 2011) ("The Framework Regulations").

<sup>30</sup> Commission guidelines on market analysis and the assessment of SMP under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

<sup>31</sup> The SMP Guidelines also state at paragraph 17 that "NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP".

<sup>32</sup> European Commission, Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5 (Commission Notice on Market Definition).

- The Broadcasting Act, 2009;
- The Framework Regulations 2011; and,
- The Access Regulations 2011.

### 3.5 Role of ComReg

3.22 One of ComReg’s statutory functions, under section 10 of the Communications Regulation Acts 2002-2011, as amended, is to ensure the efficient management and use of all radio frequency spectrum (a State-owned and controlled resource). In regard to the broadcasting sector, ComReg also grants licences under the Wireless Telegraphy Acts 1926 – 2009. Such licences permit the possession and use of “apparatus for wireless telegraphy” and this definition encapsulates any broadcasting transmission equipment. All spectrum is allocated to third parties through licences granted by ComReg under the Wireless Telegraphy Acts 1926 – 2009. ComReg can attach certain conditions to such licences relating to technical and operational issues surrounding the use of spectrum and use of the particular types of apparatus.<sup>33</sup>

3.23 Section 132 of the 2009 Act sets out ComReg’s main duties in respect of licensing of DTT multiplexes. ComReg, at the request of RTÉ, shall grant a licence to RTÉ which will permit RTÉ to establish, maintain and operate a national television multiplex (NTM<sup>33</sup>). In addition, at the request of RTÉ and having consulted with the Minister and the BAI on the digital capacity requirements of TG4 and any other designated users of the RTÉ DTT multiplex, ComReg shall grant RTÉ a licence to establish, maintain and operate “one further” NTM. At the request of the BAI, ComReg shall issue to the BAI licences for up to four NTMs to facilitate commercial DTT. The 2009 Act also provides for ComReg to consult with the BAI regarding the desirability of granting further NTM licences to the BAI.<sup>34</sup> Similarly, section 133 of the 2009 Act sets out ComReg’s main duties in respect of licensing sound broadcasting multiplexes. ComReg at the request of RTÉ, shall issue to RTÉ a licence in respect of a single sound broadcasting multiplex which shall, in so far as reasonably practicable, be capable of being transmitted by digital terrestrial means to the whole community in the State. At the request of RTÉ and after consultation with the Minister and the BAI, ComReg shall issue one further sound broadcasting multiplex licence to RTÉ. Furthermore, at the request of the BAI, ComReg shall issue one or more sound broadcasting multiplex licences.

3.24 ComReg has regulatory powers in respect of all electronic communications networks (“ECNs”) and electronic communication services (“ECS”) including

<sup>33</sup> The range of conditions that may be attached to licences is set out in Part B of the Schedule to the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011) (the Authorisation Regulations).

<sup>34</sup> ComReg issued a second multiplex licence to RTÉ in May 2011. ComReg has not issued multiplex licences to the BAI as ComReg has not received a request for these licences to date.

those used for television and radio broadcasting purposes. Authorisation must be obtained by any party intending to operate an ECN, in accordance with regulation of the Authorisation Regulations, and authorised entities are then subject to such conditions as ComReg may attach to the “General Authorisation”<sup>35</sup>.

### 3.6 Market Review Procedure

3.25 Following publication of this consultation paper and draft Decision, interested parties are given an opportunity to submit their views. ComReg, will then take account of these views and publish a response to consultation. Prior to issuing a final Decision, ComReg will discuss its preliminary findings with the Competition Authority; and notify the European Commission and the body of European Regulators, BEREC, in accordance with Regulations 13 and 14 of the Framework Regulations. ComReg will then take utmost account of any comments they provide before issuing a final Decision.<sup>36</sup>

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<sup>35</sup> See Regulation 8 of the Authorisation Regulations.

<http://www.comreg.ie/fileupload/File/S.I.%20No.%20335%20of%202011%20Authorisation%20Regs%20Final.pdf>

<sup>36</sup> For more detail on the EU notification procedure see [http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/eu\\_consultation\\_procedures/working\\_doc\\_comm\\_art7\\_en.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/eu_consultation_procedures/working_doc_comm_art7_en.pdf)

## **4 Retail and Wholesale Broadcasting Transmission Trends<sup>37</sup>**

- 4.1 While the focus of this paper is on wholesale broadcasting transmission services, it is important to consider retail behaviour in tandem, as the ultimate aim of this review is to ensure that there is a sustainable competitive broadcasting market which serves the public interest.
- 4.2 It is, therefore, of relevance to examine the behaviour of the retail consumers of broadcasting services, as their behaviour will ultimately influence the incentives of providers of wholesale broadcasting services and the demand for the wholesale services. In this context, it is necessary to examine the demand conditions for viewers and listeners to the extent that a significant number of retail end-users depend upon a particular transmission platform.
- 4.3 This section provides a summary of both the retail and broadcasting transmission services in Ireland highlighting the changes since ComReg's last market review in 2003/2004.

### **4.1 Broadcasting Structure is Vertically Integrated**

- 4.4 Figure 3 below provides a description of the interactions that occur in broadcasting, from content producers to programme service organisers, to packagers and network operators.<sup>38</sup>
- Network operator: manages the infrastructure that gives broadcasters access to audiences, such as that provided by RTÉNL for example;
  - Packager/aggregator: combines various programme streams into a 'turn-key' package offered to consumers e.g. multiplexes, satellite, and cable systems such as that provided by UPC for example;
  - The programme/schedule organiser: creates and provides programme services. A programme service organiser may create its own content but will often buy it. The programme service organiser such as TV3, TG4 and RTÉ for example, offers a programme service to packagers;
  - Content producers: provides content which may be broadcast on their own programme services or sold to other programme service organisers such as TV3, TG4 and RTÉ for example; and,

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<sup>37</sup> The purpose of Section 4 is to detail trends in the retail and transmission broadcasting services that inform the assessment of the wholesale market(s). Market definition is undertaken in section 5.

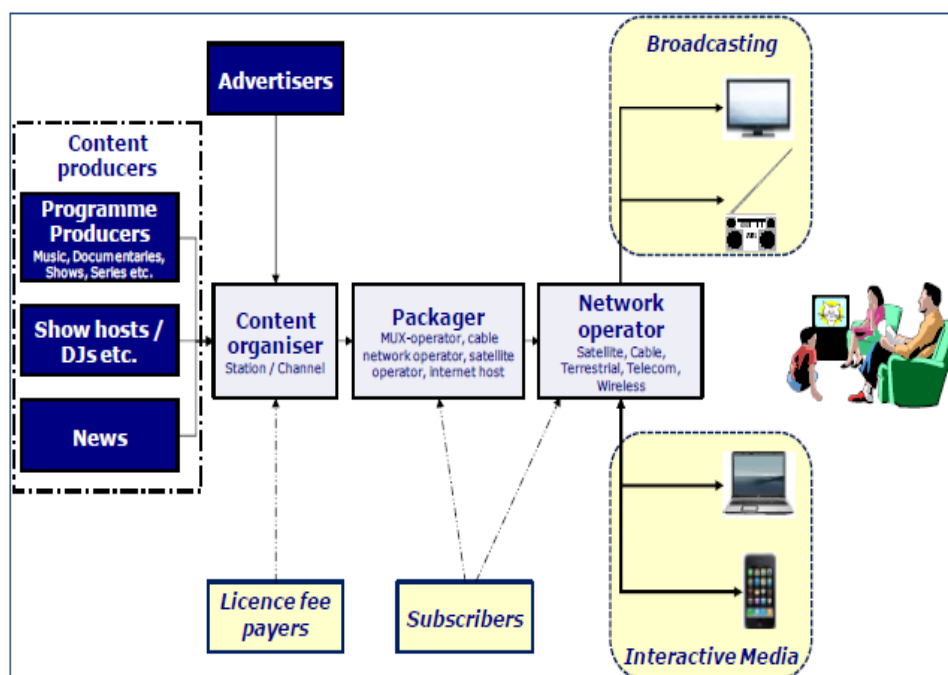
<sup>38</sup> Source: Athena Media, Irish Broadcasting Landscape: Economic and Environmental Review for the BAI, August 2010.

- Advertisers: use programmes to reach consumers and create content i.e. ads.

4.5 There are distinct stages of the supply chain of broadcasting. In Ireland there is extensive vertical integration across these stages in the case of RTÉ. RTÉ creates content, is a content organiser (i.e. provides television and radio programme services), is a packager (i.e. multiplex operator) and via its network subsidiary, RTÉNL, is a terrestrial network operator.

4.6 These stages are depicted in figure 3 below.

**Figure 3: Broadcasting Structure**



Source: *Irish Broadcasting Landscape: Economic and Environmental Review for the BAI*, Athena Media, August 2010

## 4.2 Retail Broadcasting Mainly Available Through Terrestrial, Satellite and Cable Platforms

4.7 Viewers/listeners may receive radio and/or television broadcasting via a number of means.<sup>39</sup> This can include provision mainly via terrestrial networks<sup>40</sup>, cable and MMDS<sup>41</sup>, direct to the home (DTH) satellite (as either

<sup>39</sup> There are “must carry” and “must offer” obligations relating to some of these platforms which are provided for under the 2009 Act. These are discussed in detail in Appendix F of this consultation paper.

<sup>40</sup> DTT was launched in May 2011 and analogue terrestrial television transmission will run in parallel until 24 October 2012. The launch of independent commercial national digital radio transmission services has no set timeline at present.

pay or free to view<sup>42</sup>), and less frequently via mobile handsets and through the internet. Some television households along the east coast of Ireland currently receive overspill of 'Freeview'<sup>43</sup>.

- 4.8 As the reach and coverage of a broadcaster's programme services (in terms of addressable television homes) has a significant impact on the value of advertising space that broadcaster can receive (two-sided market), broadcasters typically use several platforms to distribute their television programmes to end-users. Radio broadcasting, however, while available on multiple platforms, is still predominantly received by end users via terrestrial broadcast transmission.

### **4.3 Decline in Terrestrial Television Only Homes but Terrestrial Viewership Still Significant**

- 4.9 Television ownership in the home is almost universal in Ireland. Data from the Nielsen TV Audience Measurement (TAM) Establishment Survey<sup>44</sup> indicates that there were approximately 1,577,000 homes with a television in Ireland in May 2012 which represents approximately 96% television penetration rate based on the total household number (1,635,000) used by Nielsen TAM.
- 4.10 Figure 5 below shows total television homes classified by the reception type through which the highest number of television programme services was received in 2003 and May 2012. Though the proportion of homes which only receive terrestrial television programme services has declined by 32%, there remain a substantial proportion of television households whose only access is to terrestrial television programme services (circa 192,000 / 12% of total households).<sup>45</sup> In addition, it is estimated that there are approximately 103,000

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<sup>41</sup> MMDS is a wireless telecommunications technology, used as an alternative method of cable television programming reception. MMDS is usually used in less densely populated rural areas, where laying cables is not economically viable.

<sup>42</sup> This is an unencrypted satellite service which allows one to receive a number of programme services (e.g., television and radio) without a subscription.

<sup>43</sup> 'Freeview' is managed by DTV Services Ltd, a company owned and run by five shareholders - BBC, BSkyB, Channel 4, ITV and Arqiva. Launched in October 2002, the 'Freeview' service provides free-to-air digital television channels, radio stations and interactive services through an aerial in the UK. For more information, see [www.freeview.co.uk](http://www.freeview.co.uk)

<sup>44</sup> The Establishment Survey is a survey produced by Nielsen TV Audience Measurement (fieldwork is carried out by Behaviour and Attitudes) on behalf of Television Audience Measurement Ireland Ltd (a TV ratings body). The Establishment Survey covers areas such as ownership of TV related equipment, method of TV reception and demographics of TV household individuals such as age etc.

<sup>45</sup> DCENR published a broadcasting survey in 2011 which shows that (on the basis of reception type) there are approximately 151,000 terrestrial only TV homes, 103,000 multi terrestrial TV homes and 1,330,000 cable/satellite TV homes. This DCENR survey was conducted on a once off basis.

<http://www.dcenr.gov.ie/NR/rdonlyres/D848763A-A69E-403F-AC2B-4F54A959DF5E/0/J2285DeptofCommTVViewingStudy8.pptx>

households who receive FTA UK terrestrial services in addition to Irish terrestrial services through their aerial (i.e. Irish terrestrial and UK terrestrial via spill over). This means that, in total, based on this measure, 19% of television homes are dependent on terrestrial services for television viewing. This number has remained relatively stable over the last number of years, averaging 20% since May 2010.

4.11 Figure 6<sup>46</sup> below shows another measure of television homes, this time by reception method. Approximately 69% of television homes have pay television via cable/satellite (mostly Sky and UPC).<sup>47</sup> Free to view satellite services<sup>48</sup> are received by approximately 12% of television homes. Free to view satellite programme services are available for reception unencrypted. Such free to view satellite programme services are generally intended for reception within the UK. Irish terrestrial programme services are not available as part of these free to view satellite programme services as the transponder footprint is wider than the Republic of Ireland only. This has implications regarding the viewing rights associated with the programme material available on Irish terrestrial programme services. Typically, the programme material available on Irish terrestrial programme services will have viewing rights agreed on the basis of reception and viewing within the Republic of Ireland only. If Irish terrestrial programme services were to be available for reception as part of a free to view satellite services on a satellite transponder whose footprint was outside the Republic of Ireland, this would have implications for viewing rights associated with the programme material and the associated costs of acquiring such rights.

4.12 RTÉ's and TG4 digital terrestrial programme services are now available via its 'Saorsat' service<sup>49</sup>. RTÉ intends that Saorsat will provide television services to the 1-2% of households who cannot be served via a terrestrial DTT network.

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The Nielsen TV Audience Measurement Survey is a recurring survey which uses a larger sample size and is used by the broadcasting industry in Ireland. Therefore, ComReg has used this data in this report for trends in the retail television broadcasting market. While there is some divergence in the numbers, both surveys indicated that there are a substantial number of households dependent on terrestrial reception for television access.

<sup>46</sup> This is determined by the method by which the homes receive their programme service. Each home can have more than one method of reception e.g. aerial and cable or digital satellite, digital satellite and cable, etc. The question is asked for their main and up to 9 TV sets. For this reason, the total for the reception methods adds up to more than 100%. e.g. one home could have an aerial and cable television connection. Therefore, the numbers reported here do not refer to homes dependent solely on one particular television platform i.e. while approximately 50% of television homes receive a FTA service, not all of these homes are solely dependent on a FTA service for television viewing.

<sup>47</sup> It should be noted that from September 2011 the reporting of the cable/satellite figure has changed. This is because up to September 2011, cable/satellite reception method included homes that had both cable and satellite twice (i.e. (1) cable, (1) satellite). Nielsen now publish homes with cable and satellite as one reception method - as cable or satellite (i.e. cable or satellite (1)).

<sup>48</sup> Other satellite service includes respondents who said "don't know", and satellites that receive foreign language stations free to air.

<sup>49</sup> 'Saorsat' is available on the EUTELSAT KA-SAT 9A. This satellite has a number of individual narrow, or spot, beams of which one is focused on Ireland. For more information, see <http://www.saorview.ie/news/saorsat/>



While this may overcome the potential rights issues described in the paragraph above, the satellite transponder from which Saorsat is available is in a different orbital position and frequency band to other satellite transponders which offer free to view and subscription satellite programme services. Therefore, an end-user currently receiving either existing free to view or subscription satellite programme services would need to modify their existing satellite reception method (including re-orienting their satellite dish towards the Saorsat service). An end-user with an existing satellite service would therefore be likely to lose its existing satellite services if they were to re-orient their satellite dish towards Saorsat. Aside from RTÉ's and TG4's own DTT programme services, it is unclear to what extent other broadcasting television programme services will be made available on this platform. Thus, if the satellite content is more restricted compared to other satellite broadcasting services its attractiveness even to households with a satellite dish (whether for pay television or free to view only) may be low.

- 4.13 Although figure 5 shows that 19% of television homes are dependent solely on terrestrial transmission for television viewing, figure 6 shows 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. 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). Although pay television services have gained in popularity overtime, 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%).

**Figure 5: Television Homes by Reception Type<sup>50</sup>**

	2012 (May)	2003	May 2012 as a % of Total TV Homes	% Change 2003 – 2012 (May)
Reception	(000s)	(000s)		
Irish Terrestrial	192	282	13.2%	-32.0%
Multi Terrestrial	103	236	6.3%	-56.4%
Analogue Cable/Sat	69	489	5.7%	-85.9%
Digital Cable/Sat	1,211	336	74.8%	+260.6%
Total Cable/Sat	1,281	825	80.5%	+55.3%
Multi Total	1,384	1,061	86.8%	+30.4%
<b>Total TV Homes</b>	<b>1,577</b>	<b>1,343</b>		<b>+17.4%</b>

<sup>50</sup>

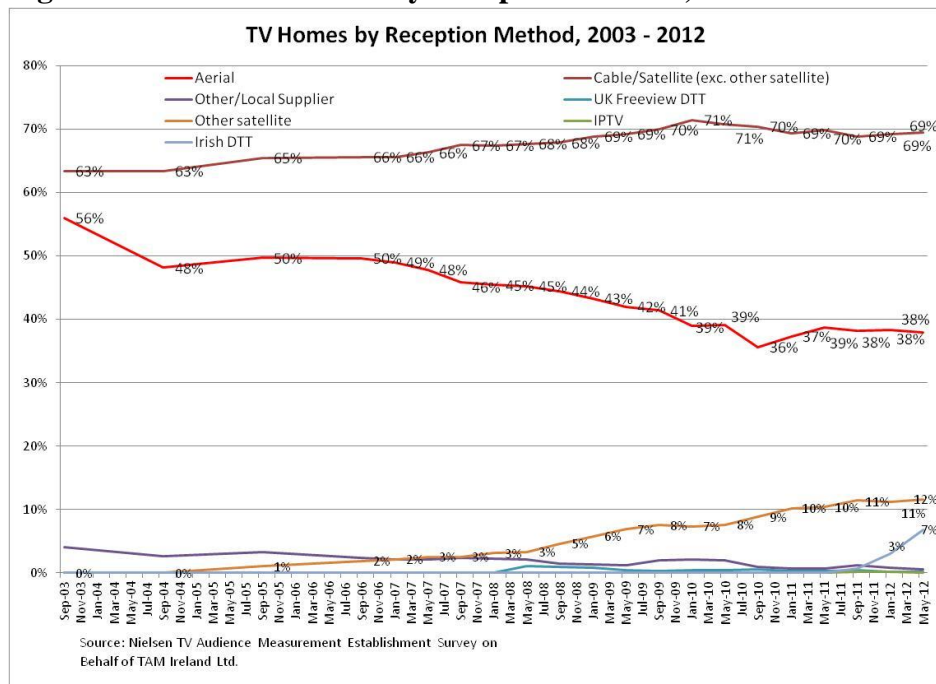
The number of terrestrial television homes includes both analogue and DTT homes.



<p><b>RECEPTION:</b> This is determined by the programme services the television home receives. Reception type categories are therefore hierarchically defined and are mutually exclusive.</p>
<p><b>Multi Total:</b> Made up of Multi Terrestrial homes plus Cable/Satellite homes and is therefore any home which receives more than just the four Irish terrestrial programme services (RTÉ One, RTÉ Two, TV3, TG4). Made up of Multi Terrestrial, UK DTT / free to view Satellite, Cable, and Sky</p>
<p><b>Irish Terrestrial Homes</b> which only receive the four Irish terrestrial programme services (RTÉ One, RTÉ Two, TV3, TG4) via an aerial or Irish DTT service.</p>
<p><b>Multi Terrestrial:</b> Homes which receive at least one of the UK programme services (BBC, UTV, Channel 4, HTV, S4C, Channel 5), via an aerial, but do not receive any Cable/Satellite programme services.</p>
<p><b>Cable/Satellite:</b> Homes which receive any Cable/Satellite programme services (Sky One, Sky News, Sports programme services, MTV, E4, Movie programme services, etc.). Sky numbers are based on the possession of a Sky box, and not based on being a Sky subscriber. Digital cable includes homes with IPTV. Digital and Total Cable/Satellite digital includes UK DTT.</p>

Source: Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd. May 2012

Figure 6: Television Homes by Reception Method, 2003 - 2012



#### 4.4 PSBs have FTA and Coverage Obligations

4.14 In terms of terrestrial television, there are three Irish broadcasters currently in operation.

4.15 The TV3 Group<sup>51</sup> includes television programmes TV3 and 3e, the latter of which is an entertainment programme service available over cable, satellite and DTT. As per figure 7 TV3 has a consolidated national audience market share of 10.5% and 3e has a viewing share of 1.6% of television households.

<sup>51</sup> TV3 Group, is owned by Doughty Hanson and Co. Doughty Hanson and Co, is a London based European private equity firm with investments in property, technology and media.

- 4.16 TG4 is an Irish television broadcaster with a PSB remit operating as an independent statutory Irish language broadcaster which is funded from a number of sources including grant aid from the Exchequer, commercial income and programming income from RTÉ. The principal objects and associated powers of TG4 are described in section 118 of the 2009 Act. TG4 has a consolidated national audience market share of 2.5%.
- 4.17 RTÉ is the national public service broadcaster and RTÉ television programme services (RTÉ One and RTÉ Two) have a 27.2% consolidated national audience market share as noted in figure 8. The principal objects and associated powers of RTÉ are described in section 114 of the 2009 Act. RTÉ currently has six television programme services available on the DTT platform.<sup>52</sup>
- 4.18 Under sections 114 and 118 of the 2009 Act, RTÉ and TG4 have a statutory obligation to operate a FTA national television service. The ‘television programme service contractor’ (i.e. TV3), contracted by the BAI also has a statutory obligation to make its television services available on a FTA basis under section 70 of the Act.
- 4.19 RTÉ’s television programme services are funded from commercial income and a television licence fee. TG4 also receives funding through a number of sources including grant aid and commercial income. TV3 receives the vast amount of its funding through commercial income. All of these broadcasters also receive programming funds disbursed by the BAI through its Sound and Vision scheme.<sup>53</sup>
- 4.20 Figure 7 below shows weekly television programme viewing share across all television homes. Despite an increase in the range of television programme services being available overtime across cable and satellite platforms, Irish FTA programme services continue to maintain a large viewing share relative to other commercial programme services – all commercial programme services (of which there are many) are those grouped under ‘other’.
- 4.21 A report conducted by Athena Media for the BAI in 2010 highlighted that while television audience share was becoming more fragmented, and a greater audience share was going to niche programme services such as Dave, Living TV etc. as a result of increased digital choice, Irish terrestrial broadcasters still enjoyed relatively strong audiences. The accumulated audience share of Irish based television broadcasters was 40% on cable and satellite platforms.<sup>54</sup>

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<sup>52</sup> See <http://www.saorview.ie/>

<sup>53</sup> [http://www.bai.ie/?page\\_id=92](http://www.bai.ie/?page_id=92)

<sup>54</sup> Source: Athena Media, Irish Broadcasting Landscape: Economic and Environmental Review for the BAI, August 2010.

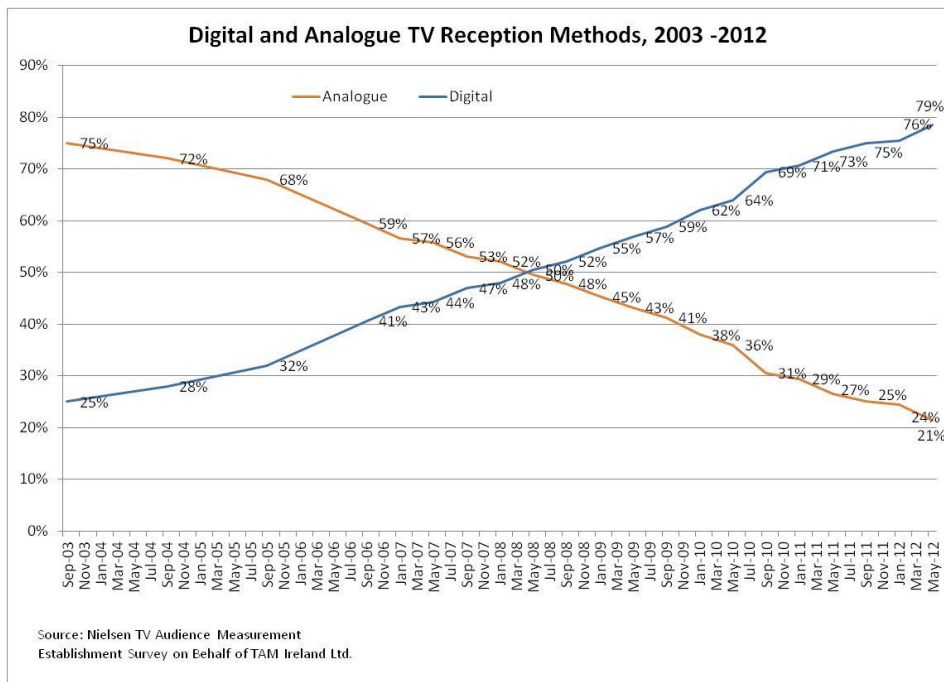
**Figure 7: National Weekly Consolidated Viewing Summary<sup>55</sup>**

Programmes	Viewing Share (%)
RTÉ One	19.5
RTÉ Two	7.7
TV3	10.5
TG4	2.5
3e	1.6
Other	58.1

Source: TAM Ireland Ltd/Nielsen TAM, Consolidated Data

4.22 Figure 8 shows the trend in uptake of digital television viewing at the expense of analogue television viewing between 2003 and 2012, as determined by programme service reception method. Between 2003 and 2012 digital television reception has increased from 25% to 79% while analogue television reception has fallen from 75% to 21%.

**Figure 8: Digital and Analogue Television Reception Methods, 2003 - 2012**



<sup>55</sup>

Reported dates: 09/04/2012 – 15/04/2012. 'Consolidated' data incorporates VCR, DVDR and PVR playback within 7 days of the original broadcast. This time shifted viewing is added to the live data to produce consolidated viewing data made available 8 days after the original transmission date. Consolidated data is the 'TAM Gold Standard' used by the industry to report and trade on. <http://www.tamireland.ie/>

## 4.5 Satellite Transmission

- 4.23 SES Astra and Eutelsat both operate satellites transponders, whose footprint includes Ireland, for the delivery of television and radio services and are wholesale suppliers of satellite services in Ireland.
- 4.24 End-users can receive broadcasting services via satellite as free to view or as a pay television service via BSkyB. Approximately 12% of television homes have a free to view satellite service while circa 44% of television homes have a pay satellite service.<sup>56</sup> Irish terrestrial programme services have not been available via free to view satellites due to content rights issues.
- 4.25 However, as noted earlier in section 4, RTÉ and TG4 have made their programme services available as a free to view satellite service marketed as Saorsat targeted at the Irish State. While RTÉ's DTT platform Saorview will have an estimated reach of 98% at ASO, Saorsat will provide television services to the 1-2% of households who cannot be served via Saorview DTT platform<sup>57</sup>. For the reasons already discussed in paragraph 4.12, if the satellite content is more restricted compared to other satellite broadcasting services its attractiveness even to households with a satellite dish (whether for pay television or free to view only) may be low. Furthermore, there are planning restrictions which limit the ability of end-users to take up satellite services.<sup>58</sup>
- 4.26 BSkyB is a vertically integrated pay television/radio provider as it produces and transmits content to end-users via satellite (Direct to Home). It leases transponder capacity from SES Astra and Eutelsat enabling it to broadcast its services to end-users. BSkyB's own programme services are uplinked to the Astra and Eutelsat satellites from the UK. However, BSkyB also sub-leases transponder capacity to RTÉ, TG4 and TV3 which is uplinked in Ireland. This means that these broadcasters' programme services are then included as part of

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<sup>56</sup> Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd., May 2012.

<sup>57</sup> 03/05/2012 "SAORSAT SATELLITE LIFTS IRELAND TO UNIVERSAL PUBLIC BROADCAST ACCESS" <http://www.saorview.ie/news/saorsat/>

<sup>58</sup> There are a number of various planning restrictions that apply for erecting satellite dishes on residential homes. Planning regulations do not allow the erection of two satellite dishes on one home, the dish must be no larger than 1 metre in size, and must not be placed on the front wall of the house. In addition, some properties like apartment blocks or rented accommodation might place restrictions on the erection of a satellite dish. S.I No. 600 of 2001. <http://www.irishstatutebook.ie/2001/en/si/0600.html#parti>

Dishes which allow a greater reception arc e.g. Toroidal satellite dishes can receive signals within a 40 degree arc. However, these dishes have some drawbacks. They cost multiple times the amount a standard satellite dish costs, and are currently not sold in Ireland though they can be purchased on the internet. They also have a higher wind load and therefore, require stronger bracketing when mounting them. As such this is not likely to be an option for a number of potential end users.

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

BSkyB's retail pay television service. BSkyB's services are encrypted and can only be accessed once subscribed to. BSkyB's retail customers also receive the programme services available via free to view satellite as well, as BSkyB operates from the same satellites from which these free to view programme services also broadcast from. Irish terrestrial television programme services are available to BSkyB's retail end-users of the Republic in Ireland only, due to content rights restrictions.

- 4.27 Additional retail satellite services may be made available in Ireland in the future. Real Digital TV Limited ('Real Digital TV') a retail satellite television provider may potentially enter the market at some point in the future possibly using the same satellites from which Sky and free to view satellite services like Freesat in the UK also operate.<sup>59</sup>
- 4.28 In addition, Solaris Mobile (a joint venture between Inmarsat and Astra) may, in the future, launch a mobile service intended to extend the capabilities of mobile devices through a hybrid satellite and terrestrial relay service to provide for outdoor and indoor services respectively.<sup>60</sup>
- 4.29 In summary, satellite services are provided to end-users in Ireland as free to view (12% of television homes) or as a pay service (BSkyB to 44% of television homes).<sup>61</sup> Irish terrestrial programme services are not available via free to view satellites due to broadcasting rights issues. They are only available to retail end-users via BSkyB's pay television service in Ireland. Although satellite services are national in scope, due to planning restrictions on reception methods not every television home in Ireland can access satellite television services.

## 4.6 Cable Transmission

- 4.30 Cable networks provide television and radio services to consumers through fixed optical fibres or coaxial cables, as opposed to the over-the-air method used in traditional television broadcasting (i.e. radio waves) where a television antenna is required. MMDS is a wireless telecommunications technology in the 2.6GHz spectrum band, used as an alternative method of cable television programming reception. MMDS is usually used in less densely populated rural areas.
- 4.31 There are a number of cable television/radio operators in Ireland. UPC is the largest cable network operator providing television/radio services over its hybrid fibre/coaxial cable network on a pay-television basis. UPC also extends its service to homes outside the reach of cable networks through MMDS.

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<sup>59</sup> <http://www.realdigitaltv.com/about.htm> 1

<sup>60</sup> <http://www.enterprise-ireland.com/en/Publications/Technology-Ireland/May-Jun-2011-Issue.pdf>

<sup>61</sup> Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd., May 2012.

Approximately, 26% of television homes subscribe to a cable pay television service as of May 2012.<sup>62</sup> Furthermore, it is estimated that approximately 54% of total households in Ireland were passed for television connection at the end of December 2011 by cable operators (i.e. just over half of all households could technically receive the service if they so wished).

- 4.32 There are a few smaller, geographically-specific operators. These cable networks were initially designed to provide television services, but some parts of the network have been upgraded to also provide broadband. All such providers have digital capabilities.

#### 4.7 Internet/IPTV Transmission

- 4.33 Television broadcasters are also now using the internet as a means to provide access to programmes after live broadcast, in the form of non-linear television broadcasts. For example, TV3 launched its catch-up service in October 2008, RTÉ launched its catch up player service in April 2009 and TG4 launched an upgraded streaming and catch-up service in April 2010. All of these services allow consumers to view programmes over the internet after they have been aired on their respective programme services. These services are becoming a popular service in terms of visitors and the number of streams demanded particularly as broadband penetration increases.<sup>63</sup>
- 4.34 In addition, Magnet Networks also provides, in addition to its managed IPTV<sup>64</sup> service, “over the top” services providing several programme services including the Irish FTA programme services for free live streaming.<sup>65</sup> The BBC has launched an international web application for its ‘iPlayer’ service, initially launching on iPads in 11 EU countries including Ireland on a pay subscription basis. However, unlike the iPlayer service available in the UK, instead of offering content for up to 7 days after broadcast it will offer new and archived services.<sup>66</sup>
- 4.35 In Ireland, according to a ComReg survey in 2011, in an average week around 22% of those with an internet subscription at home stream movies or

<sup>62</sup> Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd., May 2012.

<sup>63</sup> Between April 2009 and the end of 2010 29.8 million programme streams were viewed on the RTÉ Player. In 2010, average streams per month grew to 1.8 million and there was an average of 406,000 unique browsers per month.

<http://www.rte.ie/about/pdfs/2010-rte-annual-report-for-the-web.pdf>

In January 2012 the RTÉ player recorded 3.8 million streams which was an annual increase of 50%. State of the Net, Quarterly bulletin, Issue 24, spring 2012, AMAS.

<sup>64</sup> The International Telecommunications Union define IPTV as multimedia services such as television/video/audio/text/graphics/data delivered over IP based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability. [http://www.itu.int/net/itu\\_search/index.aspx?cx=001276825495132238663%3Anqzm45z846q&cof=FORID%3A9&ie=UTF-8&q=IPTV+defintion](http://www.itu.int/net/itu_search/index.aspx?cx=001276825495132238663%3Anqzm45z846q&cof=FORID%3A9&ie=UTF-8&q=IPTV+defintion)

<sup>65</sup> <https://www.magnetwebtv.ie/web/login.jsp?sessionid=E29C519AA86773D289200C850E5A230D>

<sup>66</sup> <http://www.bbc.com/news/technology-14322604>



television shows, 15% download movies over the internet and 25% watch online videos.<sup>67</sup> The most recent Eurostat data (for 2010) indicates that 18% of individuals in Ireland aged 16 to 74 years old listened to web radio, and/or watched web television.<sup>68</sup> With the trend of an increase in broadband coverage and take-up<sup>69</sup>, coupled with improved speeds and better quality of service, this could be expected to increase the demand for internet television services in the future.

- 4.36 IPTV, as a managed internet television service, can be regarded as another transmission platform for broadcasting television services.<sup>70</sup> However, there are very few households in Ireland with a subscription to IPTV services. IPTV is a pay television service that is not widely available in Ireland as a network capable of catering for such a service is expensive to build and maintain such that it is limited to major urban areas. It is not currently a popular means of access by retail end-users (Informa Telecoms and Media estimates that circa 2% of television homes in Ireland have IPTV as of 2012).
- 4.37 IPTV has been increasing in popularity in Europe. However, according to data by Informa Telecoms and Media, in most European countries penetration of IPTV is still low despite relative success in some countries such as France and Slovenia (in which 15% and over 39% of households respectively are estimated to have IPTV subscriptions). IPTV is taken by approximately 5-6% of households in EU countries. Despite relatively poor take-up to date, Informa forecasts that television households with IPTV will represent approximately 11% of all Western European television households by 2016 and 10% of all television households in Ireland by 2015.<sup>71</sup> High definition video and multi-room viewing may present challenges for IPTV deployment as greater bandwidth is needed to support such services.

## 4.8 Mobile Television

- 4.38 Mobile television (television program services viewed on a mobile handset) is another means through which a television signal can be received. This covers a number of delivery methods: 3G/2G television based (streaming video and data over a 3G network) on cellular networks<sup>72</sup> or mobile broadcast television

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<sup>67</sup> <http://www.comreg.ie/fileupload/publications/ComReg1196a.pdf>

<sup>68</sup> Eurostat – Information Society Statistics – Internet Activities (Individuals)  
[http://epp.eurostat.ec.europa.eu/portal/page/portal/information\\_society/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/data/database)

<sup>69</sup> See ComReg Q1 2012 Quarterly Report.  
<http://www.comreg.ie/fileupload/publications/ComReg1220.pdf>

<sup>70</sup> Magnet currently provides IPTV services in Ireland. Eircom have announced plans to launch an IPTV service by the middle of 2012.

<sup>71</sup> Informa Telecoms and Media, Global IPTV Forecasts, 2005 – 2016.

<sup>72</sup> Unicast refers to a particular case of end-to-end, point-to-point communication between a server and a client (or receiver). Broadcast communication is typically end-to-end, point-to-multipoint communication between a server and multiple receivers.

(e.g., DVB-H or T-DMB standard) which involves distribution in broadcast mode (using specific frequencies). Data from the European Audiovisual Observatory<sup>73</sup> indicates that while the number of unicast television service subscribers had increased to 5.1 million at the end of 2009, in Ireland it remained low at around 16,000 which was approximately 0.3% of total mobile subscriptions (including mobile broadband). Mobile broadcast television subscribers fell in 2009 to just over 1 million users in Europe (approximately 558,000 of these in Italy). No new mobile broadcast television services were launched in 2010 and at the end of 2010 these services were only operational in seven European countries. Such services are currently not provided in Ireland and there has been no strong expression of interest by operators for mobile television in Ireland.<sup>74</sup>

- 4.39 Capacity constraints and technical limitations on mobile networks restrict the delivery of high-quality television broadcasting services. However, with potential future development of mobile technologies such as integrated mobile broadcast<sup>75</sup>, LTE<sup>76</sup> and with the increasing sophistication of smartphones such as the iPhone, these limitations may be reduced or overcome in the future.

#### **4.9 RTÉ's DTT Multiplex(es) Currently Sole Means of Delivering Digital Terrestrial Television Content in Ireland**

- 4.40 DTT is a broadcasting service which comprises of multiplexed programme material distributed and transmitted across a terrestrial network for direct reception by the general public. In Ireland, the 2009 Act sets out the legislative basis by which such DTT services can be established. Only two types of organizations can establish a DTT multiplex service. RTÉ or a contractor of the BAI who has a contract to permit such an activity.
- 4.41 Currently, only RTÉ provides a DTT multiplex service which operates on a FTA basis to retail end-users. Under the 2009 Act, only the BAI can offer the opportunity for commercial DTT, via a contract award process. A commercial DTT operator who has successfully acquired a contract through a BAI contract award process will then have to access a terrestrial network suitable for distribution and transmission services for direct reception by the general public; for example, on a national basis, such services would be demanded from RTÉNL.
- 4.42 The spectrum RTÉ requires for the purposes of its DTT multiplex service is licensed to it by ComReg under section 132 of the 2009 Act. The spectrum required by any future commercial DTT operator who has successfully

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<sup>73</sup> European Audiovisual Observatory Yearbook, Trends in European Television, 2010

<sup>74</sup> [http://www.comreg.ie/fileupload/publications/ComReg\\_1101.pdf](http://www.comreg.ie/fileupload/publications/ComReg_1101.pdf)

<sup>75</sup> <http://www.rethink-wireless.com/2010/06/24/uk-cellcos-team-mobile-tv-trial.htm>

<sup>76</sup> The current generation of mobile telecommunication networks is known as 3G. Long term Evolution (LTE) is a 4th generation standard of radio technologies designed to increase the capacity and speed of mobile telephone networks.



acquired a contract through a BAI contract award process is also licensed under section 132 of the 2009 Act. However, in the case of a commercial DTT operator, under the 2009 Act, spectrum can only be licensed to the BAI who in turn pass on the benefit of the licence (including rights and obligations) by means of its contract with the commercial DTT operator.

4.43 ComReg issued a DTT licence to RTÉ in 2007 in respect of a single digital multiplex. ComReg issued a second DTT multiplex licence to RTÉ in May 2011. ComReg is obliged to issue DTT multiplex licences to BAI in respect of up to four DTT multiplexes on receipt of a request for them. However, to date there has been no DTT multiplex contracts awarded by the BAI. Therefore, the BAI has not yet requested DTT multiplex licences from ComReg. In April 2008, the Broadcasting Commission of Ireland (now the BAI) received applications from three groups following a competitive application process and the BCI entered into contract negotiations with the first placed group Boxer DTT Limited in July 2008. In April 2009, Boxer DTT Limited withdrew from the process, citing a change in economic conditions as well as challenges in concluding a contract with RTÉNL to the satisfaction of both parties for transmission services. In May 2009, the BCI entered into contract negotiations with the second-placed applicant OneVision. This group was also unable to conclude a contract for transmission services with RTÉNL to the satisfaction of both parties. The BAI withdrew from contract negotiations with the consortium in April 2010 and contracts were then offered to the third applicant, Easy TV, in May 2010<sup>77</sup>. The BAI was subsequently advised by the Easy TV consortium that it had decided to decline the BAI's offer to pursue negotiations for the provision of three commercial DTT multiplex contracts<sup>78</sup>.

4.44 As a consequence, the DTT platform in Ireland is limited to the two DTT multiplexes licensed to RTÉ in 2007 and 2011, known as Saorview. In the absence of a BAI multiplex contractor, any broadcaster wishing to provide programme material on a DTT multiplex in Ireland can currently only do so through RTÉ's DTT multiplexes which are reserved for the specific programme services under section 130 of the 2009 Act. There are currently nine DTT programme services (including RTÉ Aertel) and a number of RTÉ digital radio programme services carried on one of RTÉ's two DTT multiplexes.<sup>79</sup>

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<sup>77</sup> [BAI Statement on Digital Terrestrial Television \("DTT"\) Contracts Awards Process](#)

<sup>78</sup> [BAI Statement on Conclusion of Commercial DTT Multiplex Licensing Process - 05/10/2010](#)

<sup>79</sup> <http://www.saorview.ie/channels-services/>

RTÉ's first multiplex now has no more capacity available for carriage of further programme services. The capacity of a DTT multiplex depends on the bit-rate of the programme services being carried. RTÉ's multiplex service is operating a DVB-T MPEG4 signal which has a capacity of around 8 to 9 standard definition (SD) television programme services. As high definition (HD) programme services requires more bit-rate than a SD programme service, less HD programme services will fit on a multiplex.

#### **4.10 Retail Radio Broadcasting Still Mainly Terrestrial and RTÉ Continues to Have the Highest National Listenership**

- 4.45 There are a number of ways in which radio services can be accessed by a retail end-user. Radio programme content is mostly deployed over terrestrial broadcasting networks transmitted to in-home sets or in-car radios, although cable and satellite subscription customers can also access some radio content from their television. In addition, radio services can be accessed over a device such as a laptop connected to the internet and through a mobile handset. While noting that this data is a number of years old, based on a ComReg consumer survey in Q4 2008, at 81%, accessing the radio over a conventional radio set was the most popular means of consuming radio content, followed by in the car (48%), over the mobile phone (7%), through the internet (5%), by satellite television (4%) and by cable/MMDS (which was negligible).<sup>80</sup>
- 4.46 Furthermore, a BAI report on digital radio for Ireland highlighted that listenership via devices other than fixed and car radio is low. However, while most receivers in Ireland are either via a fixed radio (88%) or car radio (87%), there is a growing diversity of platforms for listening to the radio such as on a PC or a mobile phone.<sup>81</sup>
- 4.47 Radio services can be accessed relatively easily over the mobile phone, by means of built in FM tuners which pick up terrestrial broadcasting signals. The internet can be considered another means of transmission for radio broadcasting, as services can be accessed easily over the internet by means of a computer, a smart-phone, or other internet-enabled device such as a gaming console. However ComReg consumer surveys and Eurostat data<sup>82</sup> indicate that this is not a frequently used access means in Ireland by radio listeners. Though use of such services may increase in the future, it is unlikely that such services will become a significant access means for radio services in Ireland compared to terrestrial radio broadcasting in the timeframe of this review in view of its current base size.
- 4.48 In terms of terrestrial radio there are two categories of national terrestrial radio services. These are the PSB services provided by RTÉ and national independent commercial radio services licensed under BAI contract. RTÉ has four radio services, with associated spectrum licences issued to it from ComReg, and Communicorp Group Ltd. has two contracts from the BAI for the provision of national radio services, also with attendant ComReg spectrum licences.

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<sup>80</sup> ComReg Consumer ICT Survey, Q4 2008 (Doc. 09/07).

<sup>81</sup> Broadcasting Commission of Ireland, (2009) Digital Radio for Ireland: Competing Options Public Expectations.

<sup>82</sup> ComReg Consumer ICT Survey, Q4 2008 (Doc. 09/07).

Eurostat – Information Society Statistics – Internet Activities (Individuals):  
[http://epp.eurostat.ec.europa.eu/portal/page/portal/information\\_society/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/data/database)

- 4.49 Communicorp Group Ltd. is an Irish based international radio and media business and is the largest commercial radio operator in Ireland. It holds two national contracts for Today FM and Newstalk (quasi national) as well as some local and regional contracts.
- 4.50 National analogue terrestrial radio services to retail end-users are thus provided by RTÉ, Today FM, and Newstalk and at a non-national level by independent broadcasters who have entered into contractual arrangements with the BAI. These broadcasters purchase transmission, along with other services (such as IT), via wholesale arrangements with RTÉNL and other third parties and or use self-owned equipment. Broadcast transmission services are provided from RTÉNL's network of 150 transmission sites although not all of these sites are used for national radio broadcast transmission.
- 4.51 Listenership figures from the latest Ipsos MRBI JNLR survey for April 2011 to March 2012 indicated that approximately 85% of the adult population was listening to a daily mix of national, regional, multi-city and local radio. Approximately, 47.2% of listeners (based on length of minutes) listened to a national radio service during the weekday, the majority (69.5%) of which was represented by RTÉ radio stations (i.e. RTÉ Radio 1, RTÉ 2 FM and RTÉ Lyric FM) and the remainder by independent radio stations Today FM (20.6%) and Newstalk (10.2%).<sup>83</sup>

Unlike the switchover from analogue terrestrial television to DTT, independent commercial national digital terrestrial radio services are not expected to be launched in the timeframe of this review. Radio broadcasting will continue to be carried primarily over FM for the foreseeable future. RTÉ does however provide some digital audio broadcasting (DAB) via its own sound broadcasting multiplex which in accordance with the 2009 Act would be able to allow for national coverage and is currently available to approximately 44% of the population.<sup>84</sup> The launch of commercial independent digital radio services is not expected at present.

- 4.52 RTÉ radio programme services are funded by a combination of commercial income (e.g. advertising) and grant aid. Commercial radio stations, as licensed by the BAI, are mainly funded through commercial incomes such as advertising.
- 4.53 The costs which these broadcasters incur for transmission will vary depending on their requirements for broadcast contribution, distribution and transmission<sup>85</sup> which include elements such as:
- Operating costs (costs associated with usage of the transmission network such as power costs as well as rents etc.);

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<sup>83</sup> <http://www.bai.ie/wordpress/wp-content/uploads/JNLR-Results-May-2012.pdf>

<sup>84</sup> <http://www.rte.ie/digitalradio/faq.html>

<sup>85</sup> <http://www.rtenl.ie/terms-and-conditions.html>

- Capital costs (equipment costs, and costs based on usage and occupancy of infrastructure such as masts, buildings etc.); and,
- Distribution (usage of distribution links etc.).

4.54 RTÉNL owns the network infrastructure of tower and masts and associated equipment which it uses to provide transmission services to its customers. These customers can be analogue broadcasters and programme service aggregators in the form of multiplex operators as well as telecommunications providers.

#### **4.11 Summary of Key Retail and Wholesale Trends**

- There is extensive vertical integration across the broadcasting supply chain with RTÉ active as terrestrial network operator, content aggregator/multiplexer and content organiser/broadcaster;
- The reach and coverage of a broadcaster's programme services has a significant impact on the value of the advertising space that a broadcaster can provide. Television broadcasters typically use several platforms to distribute their programmes to end users;
- The legal obligations for Irish terrestrial broadcasters (RTÉ, TV3, and TG4) include obligations on the population coverage that those broadcasters must achieve and they must also be available on an FTA basis;
- Terrestrial broadcast transmission achieves near universal coverage, is available on an FTA basis and terrestrial (only) services are still consumed by approximately 19% of television households while FTA television services (terrestrial and free to view satellite) are consumed in combination with pay television services by approximately 50% of television households;
- Satellite services can be received by the majority of households provided they have purchased and installed the necessary satellite dish (subject to planning restrictions) and set-top box. Satellite services are currently consumed by approximately 56% of television households of which 12% currently use free to view satellite services;
- Cable television (inc. MMDS) services pass 54% of Irish households and are currently consumed by 26% of television households (all of which are on a pay television basis);

- Programme services are available to a much lesser extent on the IPTV platform on a pay television basis (estimated at circa 2% of television homes);
- RTE's DTT multiplexes are currently the sole means of delivering digital terrestrial television content in Ireland; and,
- Radio broadcasting is still mainly received via terrestrial means.

## 5 Broadcasting Market Definition

### 5.1 The Relationship between the Retail and Wholesale Broadcasting Market

- 5.1 This consultation paper is focussed on the conditions of competition in the provision of broadcasting transmission services. In assessing the conditions of competition at the wholesale level, it is necessary to include a consideration of retail services provided using the wholesale broadcasting transmission services at issue. This is because demand for those wholesale services is derived from demand for retail broadcasting services and broadcasters' incentives to satisfy advertisers' demand for access to viewers or listeners.
- 5.2 The relevant features of retail demand for broadcasting services are set out in section 4. The relevant features of the retail services, insofar as they influence the conditions of wholesale demand and supply are summarised below, prior to a detailed examination of the boundaries of the applicable wholesale market(s).
- 5.3 A particular focus for ComReg's consideration is the broadcast of FTA services via the terrestrial platform as regulation was previously applied to wholesale terrestrial services following ComReg's previous market review in 2003/2004. It is therefore necessary to determine the extent of competitive constraints on terrestrial services from services broadcast over other platforms. However, it should also be noted that the two-sided nature of broadcasting, which results in broadcasters generally wanting to reach as many end-users as possible in order to maximise their advertising revenues, creates particular incentives for these broadcasters to be present on multiple transmission platforms to maximise access to end-users provided that their incremental costs are recoverable.
- 5.4 The European Commission's 2010 Communication<sup>86</sup> highlights the importance of the retail market assessment where it notes that, in particular, the assessment of the second criterion of the three criteria test should include an analysis of the status of competition on the broadcasting transmission market at retail level, together with the interrelationship of any relevant upstream and downstream markets, where applicable. The retail assessment should also provide evidence on any potential indirect pricing constraint, at wholesale level – taking into account of all those constraints derived from any of the transmission platforms - as one of the preconditions to demonstrate the three criteria test is fulfilled.

<sup>86</sup>

European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGION on market reviews under the EU Regulatory Framework (3rd report), Brussels, 1.06.2010 SEC(2010) 659

## 5.2 Retail Broadcasting – Salient features

### Retail Television Broadcasting

- 5.5 The key supply and demand characteristics of retail television services currently delivered in Ireland are set out in the summary of key retail and wholesale trends in section 4.
- 5.6 In terms of the demand and supply characteristics of retail television services, there are two main dimensions on which retail markets could potentially be subdivided: according to the transmission platform (terrestrial, cable, satellite and IPTV) and the nature of the services (FTA and pay television (basic and/or premium)). A retail end-users' over-riding desire is to watch content while the means (analogue / digital) by which that content is delivered is less important.
- 5.7 In line with the methodology recommended by the European Commission,<sup>87</sup> ComReg begins its analysis by considering a narrow set of retail television services consistent with the narrowest set of services identified as giving rise to competitive concerns at the time of the previous market review (FTA services delivered over a terrestrial platform) and examines whether the narrow product set should be broadened to include other products or services, taking account of demand- and supply-side substitutability considerations.
- 5.8 Potential substitutes are considered across the range of relevant substitutability criteria set out in the European Commission's Notice on Market Definition, according to which a relevant product market, "*comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*".<sup>88</sup>
- 5.9 In addition to the above demand-side analysis, supply-side considerations are taken into account in the following assessment where "*its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy*".<sup>89</sup>
- 5.10 As noted above, the retail market assessment is undertaken to the extent that it informs the wholesale market definition, although given the two-sided nature of broadcasting the precise boundaries of the retail market may not be directly mirrored at the wholesale level.
- 5.11 There are two points for consideration in terms of the scope of the retail television market:

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<sup>87</sup> See para 41 of the SMP Guidelines and para. 16 of the Commission's Notice on Market Definition.

<sup>88</sup> See para 7 of the Commission's Notice on Market Definition.

<sup>89</sup> See para. 20 of the Commission's Notice on Market Definition.

- For consumers of terrestrial FTA services, it would not be possible to switch to alternative pay television platforms to view terrestrial FTA content without necessarily incurring the ongoing monthly subscription charges to purchase even the lowest tier of services available on those alternative platforms. The potential dimensions of the retail markets are therefore related; and,
- From the viewing households' perspective, such a switch would only be rational if they perceived additional value in the pay television services that warranted incurring those monthly charges.

### **Demand Substitution - retail television broadcasting**

- 5.12 As noted in section 4, pay television services (analogue and digital) in Ireland have increased in popularity over time such that there are now an estimated 69% of television homes with a pay television service up from 63% in 2003.
- 5.13 Therefore, circa 31% of television homes have a FTA service only. Of this, 19% have terrestrial FTA services only and an estimated 12% have a free to view satellite services (which are not necessarily mutually exclusive). Despite the popularity of pay television services for most television homes, the proportion of FTA homes has remained relatively stable since 2008 (32% at the end of 2008 compared to 31% at the end of 2012).
- 5.14 It should also be noted that although 69% of television homes have a pay television service, many homes will have more than one television set and may use a combination of pay and FTA television services for their different television sets. On this basis, the data in section 4 indicated that 50% of television homes have some form of FTA service as these homes may use a combination of pay and FTA television services for one or more television sets they own.
- 5.15 In the case where a service has no ongoing monthly price the notion of applying a small but significant and non-transitory increase in price (SSNIP) test clearly becomes problematic. In such a case we have to proceed with outlining the relevant market by a process of elimination. If FTA and pay television are in the same relevant market then it would not be possible to sustain a definition of the market that is restricted to pay television alone.
- 5.16 In an analogue terrestrial context there are four terrestrial programme services available. With the transition from analogue terrestrial broadcast transmission to DTT, the content available via terrestrial broadcast transmission should increase (there are currently nine television programme services available via FTA DTT). From free to view satellite services such as Freesat there are over 140 television programme services. However, pay television services are far greater and diverse than those available on free to air platforms. There are potentially



hundreds of programme services available via cable and pay satellite.<sup>90</sup> Many of these programmes are likely to remain available only through a pay television subscription such as sporting events for example. As pay television satellite services operate from the same satellites that free to view channels are available from, satellite retail end-users subscribe to pay television satellites for the additional content that are not freely available.

- 5.17 The proportion of existing FTA end-user consumers has been relatively stable over the last number of years. While it is less likely that pay television end-users would switch from pay television services to FTA television services in significant numbers which is discussed below, FTA end-users may switch from FTA to pay television if the perceived benefits of additional functionality (e.g. additional content and interactivities of the service) were deemed worth the associated costs in switching to a pay television service (e.g. monthly fee, equipment costs). To date, existing FTA end-users have shown an unwillingness to switch to even a basic pay television service which would indicate that for them, the perceived benefits of additional content from pay television services do not outweigh the switching costs associated with a pay television service.
- 5.18 A retail end-user's decision to choose FTA or pay television services will be affected by the differences of the product/service characteristics of each service. Aside from the fact that pay television services require a recurring subscription fee whereas free to air services do not, there would be switching costs for any viewer who wished to move from FTA services to pay television services. This is because the equipment used for FTA viewing is currently relatively minimal compared equipment needed to view pay television services though it should be noted that FTA viewers will require a set top box and possibly in some cases a new dish to view digital terrestrial FTA services.
- 5.19 Furthermore, pay television subscriptions entail a minimum contract commitment for retail end-users (e.g. 12 months for BSkyB satellite television services and UPC cable television services) and so retail end-users would incur a cancellation fee should they terminate their subscription before this contract period is completed. This is also likely to reduce the incentive of end-users to switch between FTA television services and pay television services.
- 5.20 Basic television services with the largest cable company start from €25.40 per month including VAT. This package includes all the terrestrial free to air channels, the basic UK terrestrial channels, Setanta Ireland, 3e etc. The basic package on satellite which offers the same basic channels (but with more channels than cable) has a monthly subscription fee of €25 per month including VAT. IPTV is also available as a pay basis as part of a telecoms bundled package, and starts at €57.99 per month. This is shown in figure 9 below.

<sup>90</sup>

IPTV is available to a very limited number of homes, mainly in urban locations, and provides a pay television service as part of a bundled package.

**Figure 9: Broadcasting Programme Services by Platform**

Platform	Approximate number of programme services (basic service) <sup>91</sup>	Price per month
Terrestrial (analogue and DTT)	9 television (including Aertel) and 10 radio	Nil
Satellite (FTA) <sup>92</sup>	146 television and 39 radio	Nil
Satellite (BSkyB pay television) <sup>93</sup>	191 television and 60 radio (free to view) and 36 television (Sky entertainment package)	€25
Cable (UPC) <sup>94</sup>	52 television and 39 radio	€25.40
IPTV (Magnet) <sup>95</sup>	56 television and radio	€57.99 (triple play bundled product)

5.21 Given the continued popularity of content available through pay television subscriptions in Ireland despite increases in prices for subscription packages over time, which have not resulted in any significant transition of viewers to FTA television, it is highly unlikely that a significant number of such a number of households would opt out of pay television services in response to a SSNIP. In a sense, given the larger volume and diversity of content available to retail end-users through pay television subscriptions compared to FTA content, pay television services could be viewed as an ‘experience good’<sup>96</sup>; once subscribed, there is likely to be less propensity among pay television retail end-users to terminate their subscription in favour of FTA television.<sup>97</sup>

5.22 Approximately 12% of television homes have a free to view satellite service. ComReg is of the preliminary view that these services can be regarded as a complement to terrestrial FTA services as they are free to view once the initial purchase of equipment is made. As has been mentioned in section 4, due to rights issues, Irish terrestrial programme services such as RTÉ, TG4 and TV3 are not available on these free to view satellites. However, retail end-users can

<sup>91</sup> Please note that this information was taken as of June 2012 and may be subject to change.

<sup>92</sup> [http://www.freesat.ie/index.php?cat=What\\_is\\_Freesat](http://www.freesat.ie/index.php?cat=What_is_Freesat)

<sup>93</sup> <http://www.sky.com/ireland/tv/non-subscription-channels/>

<sup>94</sup> <http://www.upc.ie/television/>

<sup>95</sup> <https://www.magnet.ie/ftth>

<sup>96</sup> An experience good is a product or service where product characteristics such as quality or price are difficult to observe in advance, but these characteristics can be ascertained upon consumption. Experience goods generally have lower price elasticity than search goods (products and services which have characteristics easily evaluated before purchase), as consumers fear that lower prices may be due to unobservable problems or quality issues.

<sup>97</sup> Although more targeted at showing general consumer behaviour in response to spending cutbacks, a recent survey by Ofcom suggests that if forced to cut spending only 17% of consumers would be willing to cut back on spending in relation to pay TV subscriptions unlike other items such as night/meals out (53% of respondents) or holiday/weekends away (41%). <http://www.ofcom.org.uk/static/cmr-10/UKCM-1.57.html>

receive the programme services from both of these platforms from one receiver provided they purchase a combo set top box, satellite dish and terrestrial aerial.

- 5.23 As already discussed in section 4, RTÉ and TG4 have also placed the programme services they broadcast on DTT on a new satellite transponder that is focused on the Irish State. This enables these services to be available on satellite without charge (marketed as Saorsat). The question is whether the expected offerings on this free to view satellite service might change market dynamics at the retail level.
- 5.24 A significant number of households seem to have been unable or unwilling to erect a satellite dish such that the impact of this free to view satellite service would not be such that the dynamic towards potential competition would be expected to change.<sup>98</sup>
- 5.25 As households with existing satellite dishes are pointing towards satellites that operate in a different orbital position to the free to view satellite service from which RTÉ (Saorsat) may operate, households are generally unlikely to adjust their satellite dishes towards the satellite from which Saorsat may operate as they would potentially lose out on all the other services that they currently receive. Aside from RTÉ and TG4 programme services it is currently unclear what other broadcasting programme services may be available via this satellite. Thus, if the satellite content is more restricted compared to other satellite broadcasting services its attractiveness even to households with a satellite dish (whether for pay television or free to view only) may be low. Furthermore, there are planning restrictions which limit the ability of end-users to take up satellite services.<sup>99</sup>
- 5.26 Hence, a preliminary conclusion would be that a free to view satellite service targeted at the Irish State would be unlikely to bring about a significant change in market dynamics at the retail level in the period of this review.
- 5.27 Based on the above, ComReg is of the preliminary view that from a demand perspective, television services provided over other platforms (satellite, cable and IPTV) are not effectively substitutable for consumers of FTA terrestrial television services.

### **Supply Substitution - retail television broadcasting**

- 5.28 ComReg is of the preliminary view that prompt or effective supply-side substitution is highly unlikely due to the high costs involved in building such networks most of which would be sunk in the case of market exit where suppliers of alternative transmission platforms could credibly switch to supply

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<sup>98</sup> Nielsen TV Audience Establishment Measurement Survey on behalf of TAM Ireland Ltd. shows that approximately 56% of households with a TV have a satellite dish.

<sup>99</sup> As discussed in section 4.5.

on a FTA basis and with comparable coverage levels to terrestrial broadcast transmission (sufficient to meet broadcasters' legal requirements) without incurring significant additional costs.

- 5.29 Cable does not provide the same level of coverage as terrestrial broadcast transmission (cable services cover approximately 54% of the population while terrestrial transmission covers 98% of the population), and IPTV coverage is very limited to mainly urban areas. The costs of building a network capable of providing similar coverage to terrestrial broadcast transmission would be high and mostly sunk. While satellite services are national in scope, there are planning restrictions (on apartment blocks for example) which limit the ability of end-users to take up such services.
- 5.30 These issues will be further discussed as part of ComReg's wholesale market assessment later in section 5.

### **Geographic scope - retail television broadcasting**

- 5.31 As noted in the European Commission's Explanatory Note, a relevant geographic market *"comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different."*
- 5.32 Retail end-users access television programme services for a range of different content which is generally of a national and international nature. The content available on these programme services does not differ geographically.
- 5.33 As discussed earlier there are a number of ways television viewers can access television programme services via terrestrial, cable, satellite and IPTV. While there is limitation in the coverage/availability of cable and IPTV, the content and pricing of these pay television services does not differ geographically. Satellite transmission coverage is national in scope and the content or pricing (for pay television services) are nationally uniform.
- 5.34 Terrestrial television services are provided on a national basis. At ASO, DTT signals will be broadcast from 51 broadcast transmission sites to approximately 98% of the population. The DTT programme service line up currently consists of RTÉ, TG4, TV3 and 3e programme services. These programme services will be available to 98% of the population. Irish terrestrial broadcasters RTÉ, TG4 and TV3 have specific legal coverage requirements to be broadcast on a national basis.
- 5.35 Therefore, ComReg is of the preliminary view that retail television broadcasting services have a national geographic scope.

### **Preliminary conclusion - retail television broadcasting**

- 5.36 At present it would seem that for most Irish households that only have access to the Irish channels on a FTA terrestrial basis, pay television subscription services are in a separate retail market. Furthermore, free to view satellite services targeted at the Irish State are unlikely to materially change the competitive dynamics of the market. ComReg is of the preliminary opinion that the market is national in scope.
- 5.37 As markets should be defined from a forward-looking perspective, it could be that the underlying retail market will tend towards the inclusion of both free to air and pay television over time. ComReg will continue to monitor market developments in this regard over the timeframe of this review.
- 5.38 However, in this retail market assessment it is important to note the two-sided nature of broadcasting<sup>100</sup>, whereby two retail markets (the markets for viewers/listeners on the one hand and for advertising time on the other) are effectively interlinked and the value to one customer group depends on the number of participants from the other. The value of advertising attained by a broadcaster is determined by the number and type of viewers/listeners addressed by that particular broadcaster. Hence, as noted earlier in this section, broadcasters typically use several platforms to distribute their programmes to end-users. For this reason the precise boundaries of the retail market might not be directly mirrored at wholesale level. For example, even if a broader retail market (incorporating FTA and pay television) is identified, it is possible that wholesale demand might still be driven by the need for broadcasters to have maximum coverage of television households and thus be present on each individual transmission platform which could limit their sensitivity to small wholesale price changes in the terrestrial transmission platform.
- 5.39 Notwithstanding the above, ComReg is of the preliminary view that retail substitution away from the FTA terrestrial platform to pay television platforms is not likely to be sufficiently effective as to warrant a broader retail market for the purposes of this market review. As viewers of terrestrial FTA services face no direct pricing signals that would induce a response to higher broadcast transmission costs for broadcasters, it is unlikely that any associated change in content/talent or advertising patterns that the broadcasters might need to make to cover transmission charge increases of the order of 5-10% would induce viewers to switch to one of the pay television platforms. This is discussed further in the indirect constraints section of the wholesale market definition later in section 5.

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<sup>100</sup> This was noted in the European Commission's Explanatory Note. The nature of two-sided markets has been discussed in various pieces of literature. For example, Tilburg Law and Economics Centre Discussion Paper, Identifying Two-Sided Markets, Tilburg University, February 2012 and Mobile Call Termination: a Tale of Two-Sided Markets, Imperial College London, University of Rome "Tor Vergata" and CEPR, Tommaso Valletti, Communications Strategies, no. 61, 1<sup>st</sup> quarter 2006.

### **Retail Radio Broadcasting**

- 5.40 Radio broadcasting services can be accessed by listeners via a variety of means which include dedicated fixed/portable/mobile radio sets, mobile phones, via television sets and over the internet via a computer or other internet enabled devices such as gaming consoles. The main means of delivery is terrestrial FTA.
- 5.41 The retail radio market is highly segmented. Radio broadcasters are primarily funded through advertising revenues though some broadcasters may also be in receipt of public funding. Radio stations compete directly for audience market share to boost their advertising revenues. To maximise profit, a radio broadcaster will weigh the costs of broadcasting on any given broadcast transmission platform against the potential advertising revenues it can achieve by using that platform.

### **Demand substitution- retail radio broadcasting**

- 5.42 All radio broadcasters primarily use terrestrial transmission to broadcast their services. The vast majority of people listen to the radio through terrestrial means and this has not changed overtime. Retail end-users do not have to pay to access any radio content by terrestrial transmission means. They can receive all radio broadcast content either at a fixed location such as the home or while mobile (e.g. in car radio) and at an acceptable quality.<sup>101</sup> Therefore, retail end-users would not be expected to switch to alternative platforms in the timeframe of this review.

### **Supply substitution- retail radio broadcasting**

- 5.43 In line with ComReg's previous market analysis findings, ComReg is of the preliminary view that broadcasting radio content over either satellite or cable television platforms is not an effective substitute to terrestrial broadcasting given the limited selection of devices and user demand for radio mobility over which listeners can receive audio content via cable or satellite platforms. Therefore satellite and cable television platforms do not form part of the market in which terrestrial radio broadcasting belongs.
- 5.44 Radio services could technically be delivered by a broadcaster over satellite to a radio set. However a retail end-user would need a special receiver to get a signal and as there is a lack of such receivers in Ireland, this factor limits its viability as an alternative means of supply to terrestrial radio broadcasting. Though use of such services may increase in the future, such services will not become a

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<sup>101</sup> Although a number of years old, a ComReg Consumer Survey in Q4 2008 (Doc. 09/07) found that 81% of respondents listen to the radio through the radio set and 48% in the car. Survey data by JNLR/TNS MRBI in 2009 found that fixed radio was most prevalent among Irish households (88%) followed by the car radio (87%).

significant access means for radio services in Ireland in the timeframe of this review.

- 5.45 Unlike the switchover from analogue terrestrial television to DTT, commercial independent national digital terrestrial radio services are not expected to be launched at present. Radio broadcasting will continue to be carried primarily over FM for the foreseeable future. RTÉ does provide some DAB but due to a number of reasons such as, uncertainty regarding technology ( DAB or DAB+ for example) among others, the launch of commercial independent digital radio broadcasting services is not expected to occur at present.

### **Geographic scope - retail radio broadcasting**

- 5.46 At a geographic level, radio broadcasting licences/contracts in Ireland are delineated by local/regional and national based services. Local/regional radio services are mainly a source of local/regional content whereas national radio services are a major source of national and international content and therefore they serve different demands in the market. There are five national and one quasi-national, 3 regional, 2 multi-city, 56 local, community, community of interest, special interest and institutional based radio stations in Ireland. In addition, RTÉ has some digital radio programme services that cover approximately 44% of the population.<sup>102</sup>
- 5.47 As a radio broadcaster's broadcasting licence/contract is delineated on a national or local/regional coverage basis this determines the nature of programme services provided by that radio broadcaster. Retail end-users typically listen to national radio services for a source of national and international news and other content, while local and regional radio stations are a source of local news and other content.
- 5.48 Therefore, the geographic scope of retail radio broadcasting services can be distinguished on a national and local/regional basis from both a demand and supply perspective. Demand from retail end-users is distinguished by demand for national versus local/regional news and other content, and supply of radio broadcasting services is restricted to the coverage area permitted by the broadcasting licence/contract a radio broadcaster holds which is national or local/regional in nature.

### **Preliminary conclusion- retail radio broadcasting**

- 5.49 For the reasons discussed above it is ComReg's preliminary view that terrestrial radio services are distinct to radio services transmitted over other platforms and

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

the geographic scope of radio broadcasting services can be delineated on a national and local/regional basis. ComReg will continue to monitor market developments in this regard over the timeframe of this review.

**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.**



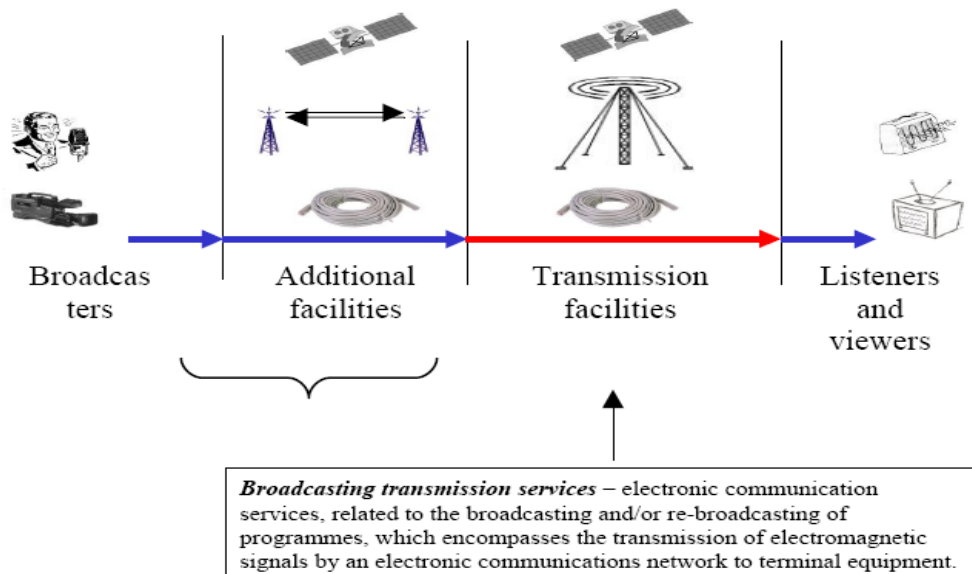
### 5.3 Wholesale Broadcasting Market Definition

#### Introduction

5.50 The services under examination in this consultation paper are those for transmission of broadcasting content to viewers/listeners. As per the European Commission’s Explanatory Note to the 2007 Recommendation, electronic communications services exclude services providing or exercising control over content transmitted using electronic communications networks and services.

5.51 Figure 10 presents the broadcasting market value chain. On the far left are the “broadcasters” who make (or acquire) content which they believe listeners and viewers want (and which in turn will attract advertising revenues for these broadcasters). The “listeners and viewers” are presented on the far right. In the middle are the “networks” which deliver the content to the retail “viewers and listeners”.

**Figure 10: Broadcasting Transmission Services**



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

## Description of the Broadcasting Transmission Market Products/Services

5.52 There are a number of broadcast transmission platforms over which broadcasting programme services can be delivered, that is terrestrial, cable (and MMDS), satellite and internet platforms. The terrestrial platform currently provides analogue and digital FTA broadcast transmission services. Cable provides analogue and digital broadcast transmission for pay television/radio services. Satellite broadcast transmission is sub-leased and provides for digital pay television/radio services, but it is also possible to receive FTA television/radio by satellite means. The internet can also be regarded as another broadcast transmission means for managed television (i.e. IPTV), and radio services.

### Approach to market definition<sup>103</sup>

5.53 Defining a market<sup>104</sup> begins by establishing the closest substitutes to the product(s) of investigation. To establish which products are close enough substitutes to be in the market, a conceptual framework called the hypothetical monopolist (HM) test is usually employed. However, it should be noted that this test is only a conceptual framework for the analysis to help define the scope of a market(s). The test seeks to establish the smallest product group (and area) such that a hypothetical monopolist controlling that product group (in that area) could profitably sustain prices that are at least a small but significant amount (i.e. 5 to 10%) above competitive levels. If the answer is yes then that product group and area can be regarded as the applicable market. This process is described in section 2 of the SMP Guidelines.

*“One possible way of assessing the existence of any demand and supply-side substitution is to apply the so-called ‘hypothetical monopolist test’. Under this test, an NRA should ask what would happen if there were a small but significant, lasting increase in the price of a given product or service, assuming that the prices of all other products or services remain constant.” ...*

*... “If an NRA chooses to have recourse to the hypothetical monopolist test, it should then apply this test up to the point where it can be established that a relative price increase ... will not lead consumers to switch to readily available substitutes or to suppliers located in other areas.”*

5.54 Market definition usually starts by looking at the narrowest set of products that could form the applicable market. As regulation was applied to analogue terrestrial television and national analogue radio terrestrial broadcast

<sup>103</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, (S.I. 333 of 2011) (“The Framework Regulations”).

<sup>104</sup> Where there is evidence that the relevant market is one of a few plausible market definitions, and the competitive assessment is shown to be largely unaltered by which one of these market definitions is adopted, it may not be necessary to define the market uniquely.

transmission markets in ComReg's last market review in 2003/2004, ComReg has focused on terrestrial broadcast transmission as its starting point for the market definition exercise. With the move to digital terrestrial broadcasting it is appropriate for ComReg to assess whether regulation remains appropriate in this context. This requires an assessment of the scope of the market(s) and subsequently undertaking a three criteria test, and depending on the conclusions of the three criteria test, if warranted, an SMP analysis.

- 5.55 Market assessment should be forward looking. The known change in the broadcasting transmission market over the timeframe of this review is the transition from analogue terrestrial to digital terrestrial broadcasting. Therefore, ComReg uses this as its starting point for defining the market(s). This is discussed below.
- 5.56 In this section, ComReg defines television and radio broadcasting market(s) on the basis of any direct demand and supply substitution constraints. ComReg also considers the extent to which (if any) there may be a sufficiently strong indirect constraint from the retail market which may affect the scope of ComReg's wholesale market definition.

#### **Terrestrial broadcasting transmission supply chain**

- 5.57 Traditionally both national analogue terrestrial radio broadcasters and analogue terrestrial television broadcasters acquired a broadcasting contract from the BAI or had rights under primary legislation which allowed them the right to use broadcasting equipment which is connected to the national terrestrial transmission network (this may be done in some cases by the broadcast transmission provider itself). This terrestrial broadcast transmission network comprises of high towers and masts and associated equipment located at high altitude sites which enable national population coverage.
- 5.58 The broadcast transmission of analogue terrestrial television will, however, cease on the 24 October 2012 with ASO,<sup>105</sup> although as noted in section 4, transmission of analogue radio will continue for the foreseeable future.
- 5.59 A DTT service is broadcast for reception by the public as a consequence of the program material having been aggregated or 'multiplexed' using DTT multiplex infrastructure.<sup>106</sup> This process involves compressing a broadcaster's studio signals into digital format. In the case of DTT, a multiplex licence is required from ComReg to provide spectrum rights of use which entitle the holder to

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<sup>105</sup> In the move to DTT, capacity for further television broadcasting programme services is increased and therefore, more terrestrial broadcasting programme services can be transmitted.

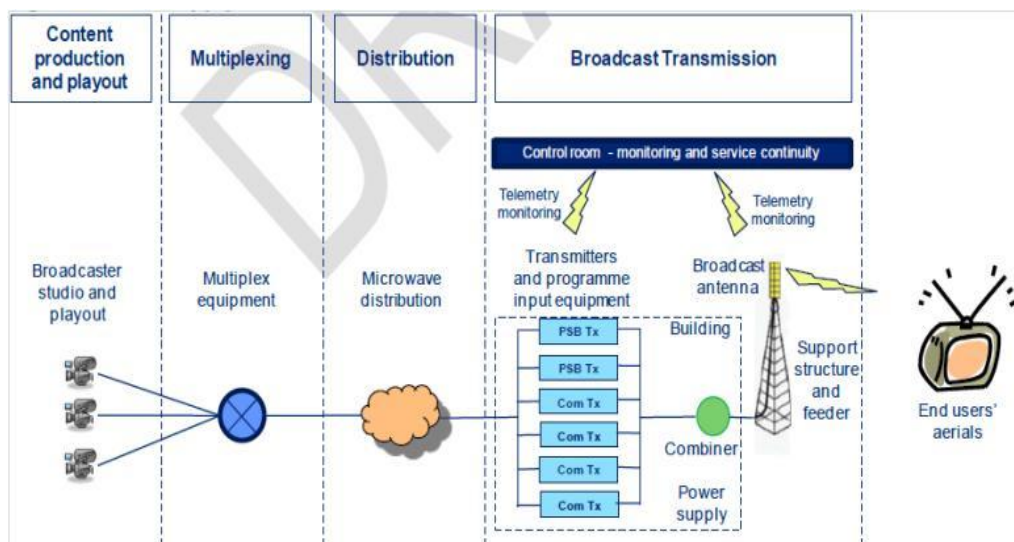
<sup>106</sup> Digital terrestrial broadcast services are transmitted on multiplexes. A multiplex is a collection of television programme, radio and data services that are broadcast together in a digital signal that occupies less spectrum than analogue transmission, and therefore, is more efficient as it allows for greater network capacity which enables more channels to be broadcast to end-users.

provide DTT multiplexing services for the transmission of DTT. Under the 2009 Act, ComReg can only issue a multiplex licence to provide spectrum rights of use to RTÉ and the BAI. In the case of multiplex licences issued by ComReg to the BAI, the benefit of the spectrum rights of use is passed onto a DTT multiplex operator via a contract from the BAI.

- 5.60 Although analogue terrestrial radio transmission will continue, the 2009 Act provides for the establishment of digital radio services via sound broadcasting multiplexes which have a similar licensing process to DTT multiplexes discussed above. This was discussed in section 3.5 of this consultation paper.
- 5.61 In assessing the broadcasting transmission services supply chain, it is therefore necessary to consider both demand from national analogue radio and multiplex operators (sound and television multiplex operators) for wholesale access to terrestrial broadcast transmission services and demand from digital broadcasters (who do not have any physical infrastructure or equipment installed on the terrestrial broadcast transmission network) for multiplexing services. Under section 129 of the 2009 Act a “multiplex” means an electronic system which combines programme material and related and other data in a digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public”. For the purposes of this consultation paper multiplexing services are taken to have the same meaning.
- 5.62 There is provision in section 132 of the 2009 Act for two PSB DTT multiplex licences and the potential for four other, commercial, DTT multiplex licences. Currently only the PSB DTT multiplexes are in operation. Although there is no timeline for independent commercial digital sound broadcasting multiplex services at present RTÉ does offer some DAB content to circa 44% of the population via its own sound broadcasting multiplex. As per section 133 of the 2009 Act this multiplex service would be capable of providing for national radio broadcasting services.
- 5.63 Digital broadcasters get their wholesale broadcast services from multiplex operators. The multiplex operator in turn, requires access to a terrestrial broadcast transmission network provider’s towers and masts and associated broadcast transmission equipment in order to transmit the broadcasting programme services they carry. Without such access multiplex operators would not otherwise be able to provide broadcasters with a wholesale broadcast service nor, in turn, offer their own aggregate broadcasting package to retail end-users.
- 5.64 Figure 11 below shows the structure of the national terrestrial transmission services in a digital context and the relationship between multiplexing on the left hand side of the diagram and distribution and broadcast transmission towards the right hand side of the diagram.
- 5.65 The national analogue radio broadcaster and multiplex operator demand access to the broadcast distribution and broadcast transmission elements of figure 11,

while the digital broadcaster demands access to the multiplexing service which in turn consumes terrestrial broadcast transmission services.

**Figure 11: Structure of the National Terrestrial Transmission Network**



Source: Deloitte, based on original stylised representation of broadcast supply chain by Ofcom

**Starting point for the market definition exercise – are radio and television terrestrial broadcasting in the same or separate product market(s)?**

5.66 A product set that could represent an applicable starting point for the market definition exercise is the provision of national terrestrial broadcast transmission services.<sup>107</sup> These services are purchased by national analogue radio operators, and multiplex operator(s) who in turn provide digital broadcasters with multiplexing services for terrestrial broadcasting.

<sup>107</sup> ComReg is of the view that, in line with findings in its previous broadcasting market review (see Doc. 04/06), non-national terrestrial radio broadcasting transmission services which are provided on a local or regional basis are in a separate market, but it is one which does not satisfy the three criteria test (due to low barriers to entry) and therefore, this is not considered further in this paper. Radio broadcasters enter into a contract with the BAI for the supply of a defined radio service area which can be local/regional or national, and radio broadcasters purchase local/regional or national transmission services on the basis of this contract. Although national radio broadcasters may broadcast their programme services from a number of third party transmission sites in addition to those service they receive from the national network provider ComReg is of the preliminary view that these services are not sufficient to constrain the national terrestrial network operator. The national terrestrial network has masts located in key high altitude sites around Ireland which enable large population coverage areas which are not capable of being easily replicated in a relevant time period, without which national coverage would be infeasible to address. Due to differences between local and national transmission networks (including area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters at co-located at sites) there are complex technical barriers which would have to be overcome by local terrestrial network operators before they could collectively provide a substitutable service to the national terrestrial network.

- 5.67 In ComReg's original analysis of the broadcasting transmission market (ComReg Document No. D04/06) it was found that analogue terrestrial television and radio broadcasting were in separate markets. This was due to the view that there was insufficient supply substitution between them as new transmitters and antenna systems would need to be fitted.
- 5.68 However, while a terrestrial broadcast transmission network designed for radio would be unable to convey television signals efficiently, due in particular to insufficient height of its towers, a terrestrial broadcast transmission network designed for television would also be able to deliver radio broadcasting. Television networks, with their high tower, high power networks, are well positioned to offer terrestrial radio broadcasting transmission services.
- 5.69 Given that most high-tower, high-power broadcast transmission networks are designed for the delivery of television and have additional capacity built into them to also be able to deliver radio, a HM for national radio broadcasting transmission could not raise its prices above the competitive level as a television broadcasting transmission company could enter within a reasonable time period and compete for radio customers. Furthermore, as the supply of both services share similar structural characteristics, in terms of an underlying network of towers and masts and transmission sites, a combined competitive assessment would appear more appropriate. To the extent that any competitive nuances need to be taken into account this will be reflected in the subsequent analysis notwithstanding a combined market definition.
- 5.70 Therefore, it seems reasonable to conclude that terrestrial television and radio broadcasting transmission services should be considered as part of the same market and that no further narrowing of the market definition is needed.<sup>108</sup>
- 5.71 The potential for demand and supply-side substitution for national terrestrial broadcast transmission services is examined below to assess whether access to these services represents an applicable market or whether a broadening of the market definition is appropriate. In addition, the question of whether any, sufficiently strong, indirect constraints on a HM provider of these services is considered.

**Possible direct constraints – are other platforms effective substitutes for the FTA terrestrial platform?**

- 5.72 As mentioned earlier, from a market definition perspective the question to ask is whether in response to a 5 – 10% price rise, the volumes of purchases by the

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

broadcasting customers of a HM broadcast transmission provider, are likely to switch to an extent that is large enough to prevent a HM transmission provider from profitably sustaining those prices above competitive levels.

- 5.73 In this case, that means assessing whether a national analogue terrestrial radio broadcaster or a multiplex operator would switch to alternative broadcast transmission platforms (cable including MMDS, satellite and internet) in response to small price changes. As a multiplex operator's demand for broadcast transmission and distribution services is derived from digital broadcasters' demand for access to viewers, this question must be posed in the context of the underlying customer i.e. a DTT broadcaster.
- 5.74 Advertising funded broadcasters' demand for broadcast transmission services is driven by the incremental value that access to each broadcast transmission network's customer base can add to the value of the advertising that the broadcasters can sell.
- 5.75 As noted previously, a key characteristic of wholesale demand is the two-sided nature of broadcasting which means that broadcasters generally want to reach as many end-users as possible to maximise potential advertising revenues. Therefore, broadcasters will generally seek to be present on as many platforms as possible which can deliver even a small but significant number of end-users, provided that their incremental costs are recoverable.
- 5.76 Notwithstanding, Irish terrestrial broadcasters legal obligations (FTA and national coverage obligations), alternative broadcast transmission platforms are likely to be complementary to the terrestrial broadcast transmission platform, rather than substitutable to it. Broadcasters seek to reach as many households as possible to maximise their potential advertising revenues provided that their incremental costs are recoverable and contribute to the overall costs of their programming services.
- 5.77 Were a HM to raise its broadcast transmission prices in the order of 5 - 10% above competitive levels, and if this price increase was passed through to television broadcasters by the multiplex operator, a broadcaster would be unlikely to switch transmitting from the broadcasting transmission platform for another. To do so would mean that they would lose out on access to the retail end-users who receive their broadcasting services via this platform and this would reduce their related attainable commercial revenues.
- 5.78 There are a number of specific considerations that constrain the ability of national terrestrial radio broadcasters and digital terrestrial FTA television broadcasters from switching their wholesale demand for broadcasting transmission services on terrestrial networks to other transmission platforms only.
- 5.79 This is of particular relevance to digital terrestrial FTA television broadcasters, RTÉ, TG4 and TV3, as they have legal obligations which would prevent them from switching to other means of transmission platforms (i.e. cable, satellite and

internet). That is, RTÉ and TG4 must be available, as much as reasonably is possible, to the whole community of Ireland on a FTA basis while TV3 must be available on a FTA basis to a large percentage of the population (circa 90%).

- 5.80 The ability of national terrestrial radio broadcasters to switch from terrestrial transmission to alternative platforms, is constrained by the popularity of terrestrial radio access at the retail level (i.e. as it is freely available nationally, of good quality, and offers end-user mobility, most end-users access radio via terrestrial means primarily through a radio set or in car radio). Given the importance of mobility for radio broadcasting and the limited availability of portable devices using platforms other than terrestrial broadcast transmission, it is unlikely that national radio broadcasters would switch from terrestrial broadcast transmission. To do so would mean that they would no longer reach a significant proportion of radio listeners and therefore would lose the majority of their listenership audience and consequently lose their advertising revenues. If these radio broadcasters did switch from terrestrial broadcast transmission, this would have a very large, negative impact on their attainable revenues as terrestrial transmission is of most material commercial value to radio broadcasters.
- 5.81 Therefore it seems unlikely that either television or radio broadcasters would be likely to switch to other platforms, when faced with a SNNIP. However, this is examined further below.

#### **Possible direct constraints - demand substitution**

##### **(a) Is satellite transmission an effective substitute for terrestrial transmission?**

###### *Digital terrestrial FTA television broadcasters*

- 5.82 Services broadcast over satellite, are, where they are included in a subscription service, subject to conditional access; content is protected (encrypted) by requiring certain criteria to be met (such as the purchase of a subscription) before granting access to this content to the end-user. However, broadcasting via pay satellite television would not address these broadcasters' legal obligations (i.e. TV3, TG4 and RTÉ).
- 5.83 Subject to obtaining rights, broadcasters can make their programming available by unencrypted free to view satellite services (for example Freesat in the UK). These services offer a number of programme services for one off equipment payment with no ongoing subscription fee required. Customers require a satellite dish receiver (aimed in the direction of the required satellite service) and a set top box. These services are potentially national in scope and can be regarded as a complement to terrestrial broadcasting services as they are FTA (once equipment such as a dish and a set-top box, or a suitable integrated digital television set, have been purchased). It would appear from Nielsen data that



around 12% of television homes receive some form of free to view satellite service.<sup>109</sup> Therefore, advertising-funded broadcasters would, where relevant, be likely to consider purchasing access to satellite transmission in addition to access to national terrestrial services, rather than as an alternative to those services.

- 5.84 As discussed in section 4, although UK programme services, among others, can be viewed via these free to view satellite services, Irish terrestrial programme services cannot. These satellite services are not a viable substitute for TG4, TV3 and RTÉ, as such unencrypted satellite broadcast transmission is generally not restricted to Ireland and therefore broadcasting rights issues would arise for these broadcasters which would be infeasible for them to address (that is, to pay for the rights to broadcast content to a much larger viewership audience). Irish terrestrial programme services are available via BSkyB's pay television service in Ireland only, but are part of its encrypted pay television service.
- 5.85 As noted in section 4, one satellite service with a specific spot beam focused on Ireland (primarily to cater for internet services) is now available which could potentially overcome such rights issues. This is the satellite from RTÉ and TG4 broadcast their DTT programme services as part of the 'Saorsat' service in order to reach the 1-2% of the Irish population who will not be able to receive DTT.
- 5.86 However, a significant number of Irish households seem to have been unable (due to planning restrictions) or unwilling to erect a satellite dish. Also, as households with existing satellite dishes are pointing towards satellites that operate in a different orbital position to this free to view satellite service, households are generally unlikely to adjust their satellite dishes towards this satellite as they would potentially lose out on the other services that they currently receive. Although this satellite may be able to cater for broader a range of programme services than DTT, as non Irish terrestrial broadcasters (e.g. BBC, channel 4 etc.) are already available via free to view satellites which can be viewed across many countries including Ireland it would not make commercial sense for them to broadcast from a satellite which has a spot beam restricted to Ireland alone. Aside from RTÉ and TG4, it is unclear what programme services may be available via this satellite. Thus, if the satellite content is more restricted compared to other satellite broadcasting services its attractiveness even to households with a satellite dish (whether for pay television or free to view only) may be low.
- 5.87 Given the considerations above, including the licensing obligations (e.g. coverage) of TG4, TV3 and RTÉ, ComReg's preliminary view is that, digital terrestrial television broadcasters would be unlikely to switch from terrestrial broadcast transmission to satellite broadcast transmission, to a sufficient degree as to constrain small but significant price increases.

#### *National terrestrial radio broadcasters*

<sup>109</sup>

Nielsen TV Audience Establishment Measurement Survey on behalf of TAM Ireland Ltd. shows that approximately 56% of households with a television have a satellite dish.

- 5.88 While satellite services technically supply radio broadcasting services and therefore offer an alternative broadcast transmission means for radio broadcasters, a listener would be required to purchase a satellite receiver to receive a radio signal by this means. There has been limited demand for such receivers in Ireland to date and this situation is unlikely to change within the timeframe of this review. Furthermore, it is unclear how the demand for radio services consumed by listeners on the move (e.g. in their vehicles) could be met by satellite services.
- 5.89 There has been the suggestion that, at some point in the future, Solaris Mobile may offer a satellite (for outdoors) terrestrial (for indoors) hybrid service that could allow for radio broadcasting.
- 5.90 However, even if demand for satellite services were to increase, and a significant number of radio listeners switched to satellite receivers, radio broadcasters would still need to sign a contract with a terrestrial broadcasting transmission company in order to reach the majority of retail end-users who would continue to access radio services over terrestrial means. Hence, radio broadcasters are not likely to switch to satellite broadcast transmission in sufficient volumes as to offset a 5-10% increase in the price of terrestrial broadcast transmission services.

**(b) Is cable transmission an effective substitute for terrestrial transmission?**

*Digital terrestrial FTA television broadcasters*

- 5.91 Cable broadcast transmission services are currently retailed to end-users on a pay basis and are limited in coverage compared to terrestrial broadcast transmission. Approximately 26% of television homes subscribe to a cable television service.<sup>110</sup> Furthermore, it is estimated that approximately 54% of total households in Ireland were passed by cable operators<sup>111</sup> for a television connection by December 2011 (i.e. a household could technically receive the service if they so wished).
- 5.92 Therefore, for terrestrial digital FTA television broadcasters such as TV3, RTÉ and TG4 cable broadcast transmission is not a viable alternative as otherwise they would not be able to meet their legal commitments as cable networks cannot provide for their legal coverage requirements.

*National terrestrial radio broadcasters*

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<sup>110</sup> Nielsen TV Audience Establishment Measurement Survey on behalf of TAM Ireland Ltd.

<sup>111</sup> Note that included in this number are homes who have installed equipment capable of receiving MMDS signals.

5.93 From a radio perspective, a national terrestrial radio broadcaster would not switch terrestrial broadcast transmission for cable in response to small but significant price increases in the former. Given the limitations of radio access over the cable platform (subscription costs, need for additional equipment such as a set top box, lack of mobility, and coverage limitations compared to terrestrial broadcast transmission etc.) retail demand for cable broadcasting services is predominantly driven by the demand for television broadcasting content such that listenership of radio via cable is low and therefore, in line with ComReg's previous market analysis findings, radio broadcasting services supplied over this platform are not considered an effective substitute to national terrestrial radio broadcasting transmission services such as to constrain a HM of terrestrial transmission. As most end-users listen to the radio via terrestrial means, terrestrial broadcast transmission is the most significant commercially relevant platform for radio broadcasters.

**(c) Is internet transmission an effective substitute for terrestrial transmission?**

*Digital terrestrial FTA television broadcasters*

5.94 Although broadcasting programme content can be viewed via the internet in a non-linear format this is not comparable to linear television services. Unlike other broadcast transmission means it is a non managed service which can suffer from degradation, due to internet quality issues. ComReg does not view this as an effective substitute to terrestrial broadcast transmission. However, IPTV services can be regarded as another transmission platform for broadcasting television services. However, there are very few households in Ireland with a subscription to IPTV services and it is unlikely that national coverage will be attained within the timeframe of this review. Due to supply side issues (e.g. high cost of network roll out, lack of adequate coverage etc.) and given that this is not currently a popular means of access by retail end-users (Informa Telecoms and Media estimate that circa 2% of television homes in Ireland have IPTV), it is unlikely that it will be a sufficiently attractive alternative broadcast transmission proposition for terrestrial broadcasters in the timeframe of this review. In any event, IPTV currently operates on a pay basis which would prevent RTÉ, TV3 and TG4 from switching to this means of broadcast transmission.

5.95 Therefore it is ComReg's preliminary view that internet broadcast transmission (IPTV) is not an effective substitute for terrestrial broadcast transmission.

*National terrestrial radio broadcasters*

5.96 The internet can be considered another means of broadcast transmission for radio broadcasting to the extent that it represents another means of retail end-user consumption, as services can be accessed easily over the internet by means of a computer or other internet-enabled device such as a gaming console. However, given the lack of comparable mobility of radio broadcasting over the internet and quality issues limiting the number of simultaneous streams that can

be downloaded, it is not likely to be regarded as an effective substitute to terrestrial supply by listeners and in turn an attractive substitute supply platform by broadcasters. ComReg consumer surveys (while noting this data is a number of years old) and more recent Eurostat data<sup>112</sup> indicate that this is not a frequently used access means (particularly compared to terrestrial listenership) in Ireland by radio listeners. Though use of such services may increase in the future, it is unlikely that such services will become a significant alternative access means to terrestrial radio services in the timeframe of this review.

- 5.97 Hence it is ComReg's preliminary view that radio broadcasters are unlikely to switch from terrestrial broadcast transmission to internet broadcast transmission to a sufficient extent as to constrain small but significant price increases in terrestrial broadcast transmission over the period of this review.

### **Possible direct constraints - supply substitution**

- 5.98 Supply in a broadcasting context cannot be taken into account irrespective of the two-sided nature of broadcasting services. For cable, satellite and internet broadcast transmission to be an effective alternative for terrestrial broadcast transmission; terrestrial retail end-users would have to move to such platforms; this would involve the cost of purchasing and installing equipment necessary to receive their broadcasts, to an extent whereby it no longer becomes materially significant for terrestrial broadcasters to want to be transmitted via terrestrial means.
- 5.99 Cable does not provide the same level of coverage as terrestrial broadcast transmission, and IPTV coverage is very limited. The costs of building a network capable of providing similar coverage to terrestrial transmission would be high and mostly sunk. In terms of satellite supply, as has already been mentioned, there are planning restrictions which would limit the ability of end-users to take up such services.
- 5.100 Furthermore, such networks (which operate under a pay subscription basis in the case of cable, IPTV and some satellite services) would have to be willing to supply broadcasters on a FTA basis to retail end-users as is required by TV3 and TG4 legal commitments and in the context of national terrestrial radio programmes services which are already freely available to end-users via terrestrial means.
- 5.101 The question then arises whether, in response to a 5 – 10% increase in the price of terrestrial broadcast transmission services, potential suppliers could reasonably be expected to switch to supply competing terrestrial services relatively promptly (e.g. within a one year timeframe) and without incurring any

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<sup>112</sup> ComReg Consumer ICT Survey, Q4 2008 (Doc. 09/07).

Eurostat – Information Society Statistics – Internet Activities (Individuals):  
[http://epp.eurostat.ec.europa.eu/portal/page/portal/information\\_society/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/data/database)

significant costs or risks such as to be credible and capable of preventing this price increase from being sustained.

5.102 It is unlikely that suppliers of alternative broadcast transmission platforms could credibly switch to supplying broadcasters on a FTA basis and with comparable coverage levels to terrestrial broadcast transmission (sufficient to meet these broadcasters' legal requirements) without incurring significant additional costs, risks and time delays. Prompt or effective supply-side substitution is highly unlikely due to the high entry costs associated with building such networks most of which would be sunk in the case of market exit. Other barriers to entry include difficulty in finding suitable sites for broadcast transmission on a national scale, and the likely difficulty of getting planning permission. Therefore ComReg's preliminary view is that effective supply-side substitution is unlikely.

**Possible indirect constraints – is retail substitution sufficiently effective to constrain wholesale price-setting behaviour?**

5.103 The notion of indirect pricing constraints is that even when there are no close product substitutes in an upstream market, the retail price elasticity of demand can still be sufficiently high to constrain market power. This would be the case if an increase in the wholesale price caused downstream customers to switch to another product, so that not only demand for the downstream product fell, but also demand for the wholesale input. Therefore, downstream demand includes not only retail end-users' demand but also national terrestrial broadcasters and multiplex operators' demand.

5.104 There is a risk that the market may be defined too narrowly, and hence market power being overstated if indirect constraints are not considered when defining the market. Conversely, however, if indirect constraints are incorrectly taken into account at the market definition stage, this might result in an unjustified broadening of the wholesale market boundaries.

5.105 The European Commission<sup>113</sup> has suggested that the strength of any constraint imposed by a vertically integrated operator should be carefully estimated, and that it should be analysed whether in response to a small but significant and non-transitory increase in price:

- A downstream operator would be forced to pass on any increase in their wholesale price, and if so, what proportion of the increase would be passed on (taking account of the wholesale/retail price ratio and any competitive drivers for pass-through);<sup>114</sup>

<sup>113</sup> This has been suggested in the European Commission's comments on a number of Article 7 cases, for example, NL/2005/281, UK/2007/733, ES/2008/805, PT/2008/851.

<sup>114</sup> As there is no retail price for terrestrial FTA services it is not possible to estimate such an effect on retail end-users.

- There would be sufficient demand substitution at a retail level to render the wholesale price increase unprofitable; and,
- Would retail customers of a vertically integrated HM be able to switch to the integrated operator's retail arm, particularly if it did not raise its retail prices?

5.106 In ComReg's preliminary opinion there is no sufficiently strong indirect constraint on a HM over the national terrestrial transmission network because national analogue terrestrial radio and digital terrestrial broadcasters do not directly sell (that is, charge a price) a service to retail end-users. Depending on the type of television broadcaster, the broadcaster will generally rely on either a mixture of public funding and commercial advertising revenues or commercial advertising revenues only.

5.107 However, if broadcast transmission prices were raised above competitive levels (not discounting the possibility that a broadcaster may try to negotiate higher advertising rates to offset this price increase) this could potentially affect a broadcaster's ability to attract end-users to its programme services. That is, by increasing a broadcaster's costs and thereby reducing its revenues, this could impact its ability to attract talent and content to its programme service and could impact its viewer/listenership base and in turn its position in negotiating for advertising revenues. In such a case, this would likely benefit a vertically integrated HM as more viewers/listeners may now watch/listen to its own programme services at the expense of these competing customers' programme services.

5.108 However, the extent to which a 5-10% wholesale price increase for terrestrial broadcast transmission services is, in reality, likely to materially impact a broadcaster's ability to attract talent and content is questionable, particularly in view of the fact that this input forms just one element of its overall cost base as well as the magnitude of the price increase involved. For example, the annual charge to TV3 for analogue transmission and distribution by RTÉNL from July 2011 was circa €1.5 million.<sup>115</sup> According to their accounts, in 2010 TV3 earned circa €53 million in revenue turnover and had €50 million in operating expenses. At the extreme, a 10% rise in its transmission and distribution costs would translate to a €150,000 increase in its cost base which is approximately 0.3% of its total turnover and operating expenses in 2010.

5.109 It is considered unlikely that a sufficient number of retail end-users would move from terrestrial transmission to another platform in response to such a scenario which would constrain the behaviour of a HM of a national terrestrial transmission network. A particular programme service will have a relative proportion of viewing audience related to that platform and the programme service would not be differentiated on other platforms.

<sup>115</sup> <http://www.rtenl.ie/wp-content/uploads/2011/07/RTE-NL-changes-13-July-2011.pdf>

5.110 Therefore, there would be no sufficiently strong indirect effect which would constrain a HM from profitably sustaining a 5 -10% wholesale price increase above competitive levels.

### **Geographic scope**

5.111 A multiplex operator's demand for broadcast transmission services relates to the demand from broadcasters for digital terrestrial transmission services and its desire to provide an end-user retail service.

5.112 National terrestrial radio broadcasters get their remit in statute or their contract from the BAI for the provision of services on a national coverage basis. These broadcasters in turn demand national terrestrial broadcast transmission services in order to reach as many retail end-users as possible and provide for retail end-users demand for a source of national and international news and content which is not differentiated by region. As national terrestrial radio broadcasters acquire broadcast transmission services for a national coverage basis ComReg is of the preliminary view that the geographic market is national in scope.

5.113 DTT broadcasters demand access to national terrestrial broadcast transmission services in order to reach as many end users as possible. Furthermore, RTÉ, TV3 and TG4 have legal obligations which mean that they must be broadcast on a national basis. DTT services are currently provided on a national basis from circa 51 broadcast transmission sites covering 98% of the population. Terrestrial television broadcasting content is broadcast uniformly to a national coverage population.

5.114 Based on the market evidence to date, it is reasonable to conclude that DTT broadcasters are likely to continue to acquire broadcast transmission services on a national coverage (or close to national coverage) basis over the timeframe of this review.

### **Summary of the preceding market definition analysis – Market A**

5.115 In the light of the above analysis, ComReg is of the preliminary opinion that there is a distinct market for access to national terrestrial broadcast transmission services demanded by radio and television multiplex operator(s) and national analogue radio broadcasters. This market can be termed as *the market for wholesale access to national terrestrial broadcast transmission services (market A)*. ComReg is of the preliminary view that:

- From a demand perspective, satellite, cable and internet platforms are not an effective substitute to the national terrestrial broadcast transmission services provided in this market;

- From a supply perspective, potential suppliers are not able to effectively constrain a HM operator of the national terrestrial broadcast transmission network in this market; and,
- There is no sufficiently strong indirect constraint on a HM operator of the national terrestrial broadcast transmission network in this market.

5.116 An outline of market A is provided below. In the context of the examination of this market A in subsequent sections of this consultation paper the relevant direct customers of concern include national analogue radio broadcasters and radio and television multiplex operators (multiplex operators) who require access to national terrestrial broadcast transmission services.

**Outline of Market A:**

**Market:** the market for wholesale access to national terrestrial broadcast transmission services (**market A**)  
**Network platform:** terrestrial  
**Service provided:** managed and/or unmanaged transmission and distribution service via towers/masts and relevant associated transmission and distribution equipment to enable the broadcasting of national analogue radio and multiplex operator broadcasting signals to retail end users  
**Supplier:** network operator of tower/mast and associated network facilities  
**Direct customers:** access by national analogue radio broadcasters and sound and DTT multiplex operators  
**Geographic scope:** national

**Does demand for access to a multiplexing service fall in a distinct relevant market to market A?**

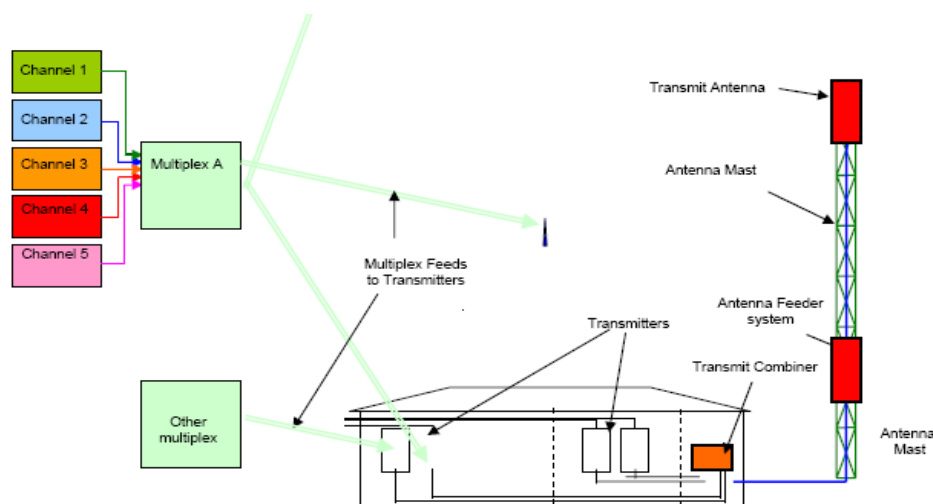
**Possible direct constraints - demand substitution**

5.117 As outlined in section 4, in the digital environment broadcasting signals are combined into digital form through multiplex infrastructure. Therefore, in light of the move from analogue terrestrial television to DTT, ComReg believes that a distinct demand arises for a product market downstream from market A analysed above. This downstream demand comprises the demand from DTT broadcasters for access to multiplexing services. For the purposes of this analysis, it is termed the wholesale demand for access to DTT multiplexing services. While there are provisions for the establishment of sound broadcasting multiplex services in the 2009 Act there is no clear timeline for establishment independent commercial digital radio services at present. ComReg is of the preliminary view that, at this point in time, sound broadcasting multiplexing services do not require further consideration in this regard.



5.118 Figure 12 below provides a representation of this. The demand for wholesale access from DTT broadcasters is represented on the left hand side of the diagram where the multiplex operator provides access to its DTT multiplex to the DTT broadcaster.

**Figure 12: DTT Value Chain**



*Source: Cullen International (DTT network graphic courtesy of Ofcom)*

5.119 Under the 2009 Act, sections 131 and 132 provide for the establishment, maintenance and operation of multiplex equipment for the purposes of transmitting digital terrestrial signals to end-users. Therefore, the move to DTT creates the environment for the establishment of a terrestrial television multiplex service. It is only through multiplexes that digital broadcasting signals can be carried, because in contrast to analogue broadcasters and DTT multiplex operators themselves, who are issued with spectrum licences/contracts to use the equipment necessary to broadcast their services, such spectrum rights are not granted to digital broadcasters.

5.120 Therefore, there arises a specific demand from digital television broadcasters (who do not have any physical infrastructure or equipment installed on the terrestrial transmission network) for access to a multiplexing service, which is distinct from the demand by DTT multiplex operators for transmission services in market A.

5.121 In the assessment of market A, ComReg has already considered why a digital television broadcaster would not switch terrestrial broadcast transmission for alternative broadcast transmission platforms (i.e. satellite, cable and the internet) in response to small but significant price changes.

5.122 Therefore, for the purposes of assessing whether this distinct demand for a DTT multiplex service is in a separate market to market A above, the additional issue to consider is whether, in response to a 5 -10% price increase by a HM (DTT multiplex operator) over this set of services, a DTT broadcaster would switch to self supply in respect of multiplexing services. For such substitution to be

effective in exerting a constraint on the HM it would have to be sufficiently prompt and likely as to render the price increase unprofitable.

- 5.123 A DTT multiplex licence/contract is required to use the DTT multiplex related equipment necessary in order to be able to deliver broadcasting services to the retail end-users. The 2009 Act provides for two PSB DTT multiplex licences to RTÉ and the potential for up to four commercial DTT multiplex licences to the BAI. A (commercial) DTT multiplex contract is awarded by the BAI following a competitive tender process. As part of a tender submission the applicant must demonstrate that it can meet the requirements of the contract (e.g. proposed coverage area, technical specifications etc.). Once a bid is submitted the applicant must await the result of the competitive tender process and therefore entry will be contingent on the timings involved in the tendering process. Therefore, market entry is contingent on when such a process begins, how long it takes to complete and whether or not bids are successful. There is a limit on DTT multiplex licence availability i.e. there is potential for up to four commercial DTT multiplex licences.
- 5.124 The business model of a DTT broadcaster compared to a DTT multiplex operator is also very different. A DTT broadcaster is interested in providing its own programme services to end-users in the downstream retail market. A commercial DTT multiplex operator, who also has a digital television broadcasting contract, could transmit its own programme services but it would also likely be operating as a wholesale supplier for other programme services. It is likely to be looking to sell an end-user package in the retail market as was the case for those involved in the failed commercial DTT negotiation process between 2008 and 2010.
- 5.125 The costs involved in establishing, maintaining and operating a multiplexing service would limit the likelihood of self-supply from a broadcaster in response to a price increase by a HM of the order of 5-10%. This is especially true for TG4 and TV3, as TG4 must be available to the whole community of Ireland and TV3 to circa 90% of the population. Furthermore, becoming a DTT multiplex operator would involve complexity, and possible coordination issues in the event of entry via a business partnership (i.e. as part of a consortium), which would further limit prompt or immediate switching to self-supply.
- 5.126 Furthermore, broadcasters may face switching costs due to contractual agreements between a HM and broadcaster customers (e.g. TV3/TG4) by the time the possibility of commercial DTT manifests post ASO. Therefore, such self supply for these broadcasters may not be a realistic option, in the short to medium term at least, without incurring switching costs, which may act as a deterrent to switching.
- 5.127 Therefore, from a demand-side perspective ComReg considers it unlikely that DTT broadcasters would promptly switch to self supply such as to constrain small but significant price increases by a HM of the multiplexing service.

### **Possible direct constraints - supply substitution**

- 5.128 ComReg has already discussed its preliminary view on the lack of supply substitution for digital terrestrial television broadcast transmission from satellite, cable, and the internet platforms in the assessment of market A (having regard to the reliance of the downstream entry in the wholesale provisioning of national digital television broadcasting transmission services via DTT multiplexes on terrestrial networks on said upstream market).
- 5.129 As self-supply by wholesale customers has also already been considered above, the following considers whether substitution by an existing supplier of broadcast transmission services to provision of a multiplexing service could feasibly constrain a HM of the latter service from profitably sustaining a 5-10% price increase.
- 5.130 For similar reasons to those discussed above under demand substitution prompt or effective supply side substitution to provision of digital DTT multiplex services by other platform providers or by a national terrestrial broadcast transmission service provider is likely to be hampered by a number of factors. These include the process and time involved in acquiring a DTT multiplex contract, related costs of entry, e.g. marketing costs, need to negotiate with potential broadcasting customers etc., as well as the fact that existing customers, i.e. TV3 and TG4, have legal requirements which mean they must be available to retail end users on a FTA basis and to a coverage area that for TG4 for example is to the whole of Ireland. Therefore, for any future (commercial) DTT multiplexes to be regarded as a potential alternative for these broadcasters they would have to provide similar characteristics to the PSB DTT multiplex(es) from which these broadcasters are currently broadcasting. That is, from a coverage perspective commercial DTT would have to be able to offer comparable national coverage of the population and be willing to transmit TV3 and TG4 on a FTA basis to retail end users. While this would not be the case for regional broadcasting services, television broadcasters currently acquire transmission services for a national coverage service.
- 5.131 Furthermore, RTÉ, as a vertically integrated entity, is currently the only provider of a national terrestrial broadcast transmission service in the State and it is already licensed as a DTT multiplex operator. For supply-side substitutes to be relevant there would need to be additional competitive constraints arising from suppliers, who are not currently active in the supply of the products in question, but who are able to enter in a relatively short period of time and at low cost by virtue of their existing position in the supply of other services. For the reasons discussed in section 4, although the BAI did conduct a tender process in 2008, this did not result in commercial DTT entry. As noted above, it is not anticipated that there will be any other provider of national terrestrial broadcast transmission services capable of constraining RTÉ in such a timeframe. Thus no additional supply-side constraints from terrestrial broadcast transmission providers on multiplex services are likely to occur.

**Possible indirect constraints– is retail substitution sufficiently effective to constrain wholesale price-setting behaviour?**

- 5.132 The process of analysing an indirect constraint has been discussed in paragraph 5.102. In ComReg's opinion there are no sufficiently strong indirect constraints on a HM in the provision of DTT multiplexing services because DTT broadcasters do not directly sell a service (i.e. charge a price) to retail end users.
- 5.133 However, if the multiplex prices were raised by a small but significant amount above competitive levels (not discounting the possibility that a broadcaster may try to negotiate higher advertising rates to offset this price increase) this could theoretically affect a broadcaster's ability to attract end users to its programme services i.e. by increasing its costs and thereby reducing its revenues, this could impact its ability to attract talent and content to its programme service. Therefore this could impact its viewership base and in turn its negotiating position with advertisers for advertising revenues. In such a case, this would likely benefit a vertically integrated HM as it would reduce competition for viewership of its own programme services.
- 5.134 In reality, however, the extent to which a 5-10% wholesale price increase for this multiplex solution is likely to materially impact a broadcaster's ability to attract talent and content is questionable, particularly in view of the fact that this input forms just one element of its overall cost base as well as the magnitude of the price increase involved. For example, the annual charge to TV3 for analogue broadcast transmission and broadcast distribution by RTÉNL from July 2011 was circa €1.5 million.<sup>116</sup> According to their accounts, in 2010 TV3 earned circa €53 million in revenue turnover and €50 million in operating expenses. At the extreme, a 10% rise in its broadcast transmission and broadcast distribution costs would translate to a €150,000 increase in its cost base which is approximately 0.3% of its total turnover and operating expenses in 2010.
- 5.135 It is also unlikely that a sufficient number of retail end users would move from terrestrial transmission to another platform in response to such a scenario which would constrain the behaviour of a HM for this service. A particular programme service will have a relative proportion of viewing audience related to that platform and the programme service would not be differentiated in terms of talent/content on other platforms.
- 5.136 Therefore, there would be no sufficiently strong indirect effect which would constrain a HM from profitably sustaining a 5 -10% wholesale price increase above competitive levels.

<sup>116</sup>

<http://www.rtenl.ie/wp-content/uploads/2011/07/RTE-NL-changes-13-july-2011.pdf>

### Geographic scope

- 5.137 Based on the market evidence to date, it is reasonable to conclude that DTT broadcasters are likely to continue to acquire DTT multiplexing services on a national coverage (or close to national coverage) basis over the timeframe of this review.
- 5.138 Currently, DTT broadcasters demand access to national terrestrial broadcast transmission services in order to reach as many end users as possible and RTÉ, TV3 and TG4 have legal obligations which mean that they must be broadcast on a national basis.
- 5.139 Terrestrial television broadcasting content is broadcast uniformly to a national area, covering 98% of the population.
- 5.140 ComReg is of the view that the geographic market for this wholesale market is thus national in scope. ComReg proposes to monitor the situation however in case of any change to demand and supply characteristics which may give rise to regional or local offers over the timeframe of this review.

### Summary of the preceding market definition analysis – Market B

- 5.141 In the light of the above analysis, ComReg is of the preliminary opinion that there is a distinct applicable market for access to national terrestrial DTT multiplex, demanded by digital television broadcasters.
- 5.142 This market can be termed as *the market for wholesale access to DTT multiplexing services (market B)*. ComReg is of the preliminary view that:
- From a demand perspective, there is no effective substitute to the broadcast services provided in this market;
  - From a supply perspective, potential suppliers are not able to effectively constrain a HM operator of the broadcast services in this market; and,
  - There is no sufficiently strong indirect constraint on a HM operator of the broadcast services in this market.
- 5.143 An outline of market B is provided below.

### Outline of Market B:

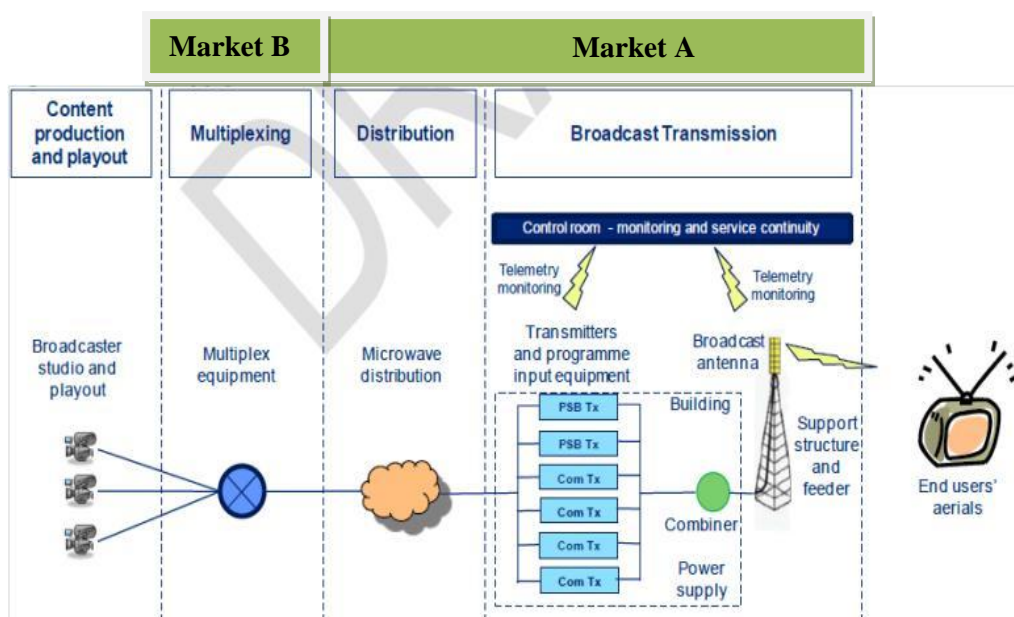
**Market:** the market for wholesale access to DTT multiplexing services (**market B**)  
**Network platform:** terrestrial  
**Service provided:** multiplexing service to enable the broadcasting of national digital television broadcasting signals to retail end-users  
**Supplier:** multiplex operator  
**Direct customers:** access by digital terrestrial television broadcasters  
**Geographic scope:** national

**Overall preliminary conclusions on the wholesale market definition findings**

5.144 Having determined the lack of effective direct constraints (from satellite, cable and internet platforms) in terms of demand and supply substitution at the wholesale level and the lack of effective indirect constraints arising from the retail level, ComReg is of the preliminary opinion that there are two distinct national terrestrial product/service markets which require application of the three criteria test. These are:

- An upstream wholesale market where the supplier provides a managed and/or unmanaged terrestrial broadcast transmission and broadcast distribution service via towers/masts and relevant associated broadcast transmission and broadcast distribution equipment to national analogue radio and multiplex operators to enable the broadcasting of their signals to retail end-users. In this consultation paper this is called the market for wholesale access to national terrestrial broadcast transmission services (**market A**); and,
- A downstream wholesale market from market A, where the DTT multiplex operator provides a multiplexing service to enable the broadcasting of national digital television broadcasting signals to retail end-users. In this consultation paper this is called the market for wholesale access to DTT multiplexing services (**market B**).

5.145 These markets are depicted below where **market A** reflects a national analogue radio and multiplex operator's demand for access to the broadcast distribution and transmission services components, and **market B** reflects a DTT broadcasters demand for access to the multiplexing service where the DTT multiplex operator itself supplies this with broadcast distribution and transmission services to the DTT broadcaster.



Source: Deloitte, based on original stylised representation of broadcast supply chain by Ofcom

- 5.146 This market definition is based on further consideration by ComReg, following its preliminary consultation and response to consultation papers on the “Three Criteria Test on the Broadcasting Transmission Market”<sup>117</sup> having regard to demand and supply substitution and subsequent assessment of differences in the nature of the entry barriers to these markets.
- 5.147 In light of the relationship between both of these wholesale markets ComReg will conduct its analysis of market A first, and subsequently will conduct its analysis of market B, thereby taking into account the impact of its findings in market A on market B.

**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.**

<sup>117</sup> Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 10/98.  
<http://www.comreg.ie/fileupload/publications/ComReg1098.pdf>

Response to Consultation - Three Criteria Test on the Broadcasting Transmission Market, Document Number 11/24.  
[http://www.comreg.ie/publications/response\\_to\\_consultation\\_-\\_three\\_criteria\\_test\\_on\\_the\\_broadcasting\\_transmission\\_market.583.103837.p.html](http://www.comreg.ie/publications/response_to_consultation_-_three_criteria_test_on_the_broadcasting_transmission_market.583.103837.p.html)

**The market for wholesale access to national terrestrial broadcast transmission services (market A)**



## 6 Three Criteria Test – Market A

- 6.1 Following on from the preliminary market definition(s) proposed in section 5, this section analyses the three criteria test in relation to market A.
- 6.2 A market may have characteristics that warrant *ex ante* regulation if it is found to cumulatively satisfy the three criteria test which has been described earlier in this consultation paper in section 3.

### 6.1 Provisions of other legislation

- 6.3 In addition to considering whether competition law (as part of the three criteria test assessment) is substitutable for *ex ante* regulation, the European Commission has also looked at the effect that other legislation may have on broadcasting transmission markets. The European Commission pointed out that insofar as the content of a broadcast was such that it might be considered to meet a general interest objective, then it could be addressed under the “must carry” rules provided for in Article 31 of the Universal Service Directive.<sup>118</sup>
- 6.4 Therefore, before considering the three criteria test itself ComReg will consider the effect other legislation may have on this wholesale market A.
- 6.5 The question arises as to whether the 2009 Act provides a regulatory framework such that any competition concerns that may occur, absent regulation, would be addressed through the provisions of the 2009 Act.
- 6.6 For terrestrial radio broadcasting there are legislative provisions relating to the co-operation of RTÉ with a sound (radio) broadcaster to facilitate the provision of transmission facilities for sound broadcasting services at the behest of the BAI and Minister and periodic payments for those services as the Minister, after consultation with RTÉ and the BAI, directs. These provisions under section 115 (1) of the 2009 Act cover some of the areas that are in other contexts addressed by *ex ante* regulation.
- 6.7 It would thus appear that for those who have a sound broadcasting contract with the BAI, there are legislative provisions in place that could potentially confer some of the important elements of *ex ante* regulation.
- 6.8 However, this would not necessarily result in similar conditions which would arise under *ex ante* regulation such as providing for access in a fair, reasonable and non-discriminatory manner. In addition, this is a particular form of price control but not necessarily one that would arise under the electronic communications regulatory framework (which is specifically aimed at facilitating a sufficiently predictable and transparent environment for existing

<sup>118</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal services and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC.

and potential market players). Given the particular issue of vertical integration, this form of a price control would not be supported by appropriate cost accounting obligations. Nor would the resulting remedy necessarily address the requirement for transparency and non-discrimination, as there would be no requirement that RTÉ charge itself in the same manner.

- 6.9 Further, application of section 109 of the 2009 Act, which sets out the general accounting procedures for “a corporation”, defined in the Act as meaning RTÉ or TG4 or both, as the case may be, would not necessarily result in transparent internal transfer pricing, in the same manner as would an accounting separation obligation imposed by ComReg under the regulatory framework.
- 6.10 For multiplex operators no such provisions are provided for in the 2009 Act, for this market.
- 6.11 Therefore, in the context of a vertically integrated entity that provides broadcasting transmission facilities to actual or potential competitors, the provisions of the 2009 Act do not remove the need for *ex ante* regulation. *Ex ante* regulation has the benefit of well-defined characteristics under the regulatory framework and can provide stability and assurance to markets characterised by high and persistent entry barriers through using a variety of approaches that are methodical, and well understood.

## **6.2 High and non-transitory barriers to entry**

- 6.12 There is one market player, RTÉNL, providing national terrestrial broadcasting transmission services in Ireland and it is envisaged that this will remain unchanged in the timeframe of this review. RTÉNL has now upgraded its network to deliver broadcasting transmission services in digital format.<sup>119</sup>
- 6.13 There are substantial financial costs involved in the establishment of a national terrestrial broadcast transmission network comparable to that of RTÉNL. Most of the costs relate to the development of a network of high towers capable of carrying equipment to broadcast content. These costs would be substantially sunk if the enterprise was to fail.
- 6.14 A broadcasting network is typically designed to give the maximum possible coverage of the target population with a minimum of broadcast transmission sites. This requires selecting suitable high altitude sites (such as hills or mountain tops) which can yield the greatest coverage of the population. RTÉNL has masts located in key, high-altitude sites around the country to enable this. Geographic location of masts would be an issue for any potential competitor and suitable high-altitude sites that could provide the same level of national coverage may not be available, requiring a greater level of investment due to the need for a greater number of sites located at lower-altitude levels. The purchase and maintenance of sites would be costly and the timeframe and technological

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<sup>119</sup> However, it is RTÉ who holds the multiplex(es) licences.

know-how required to build an alternative network would make it uneconomical to compete with an established player such as RTÉNL. It is also unclear whether current coverage levels could be replicated in any event within the timeframe of this review.

- 6.15 Furthermore, construction of broadcast transmission infrastructure, including towers and on-site buildings to house broadcast transmission equipment, requires appropriate planning permission. Given the propagation characteristics of the spectrum used for broadcasting, high-sites (sites typically located on mountains) are the preferred locations for broadcasting transmission infrastructure. Based on the locations of the main transmission sites for the national terrestrial network, there appear to be strategically important high-sites which enable large population coverage to be achieved (for example, Mullaghanish, Kippure, and Clermont Carn).
- 6.16 In relation to planning permission, there would likely be a high risk of rejection of applications for development of new high-sites (even where such sites offering adequate coverage could be readily identified) as these could potentially be viewed as obstructions on the landscape. Further to this, Irish planning guidelines look more favourably on mast and site sharing.<sup>120</sup>
- 6.17 It is possible to implement a terrestrial broadcasting transmission network by a different means, using a denser network of lower towers. As such, ComReg has considered the potential to offer broadcasting transmission services via existing mobile telecommunications networks. Using existing mobile telecommunications networks to provide broadcasting coverage on a national scale would be commercially and technically difficult. The site locations used in a mobile telecommunications network are predominantly low-lying. This would then imply that broadcasting equipment would need to be placed at a greater number of sites to provide an equivalent level of national coverage to that currently offered by RTÉNL's network. Such a network would increase the costs for broadcasters. It may also be difficult to sign the required commercial agreements with existing mobile network providers. Critically, the costs of distribution would rise substantially in such a network structure. Broadcasters would have to set up a complex system for broadcast distribution, which would add an additional layer of cost. It is also unclear whether the level of coverage currently available via RTÉNL's network could be achieved through this means.
- 6.18 In addition, as RTÉNL has used some of its existing infrastructure for the purposes of digital transmission, it may, in the run-up to the ASO date of October 24 2012, be in a position to offer better contractual terms to customers (with whom it already has an established contractual relationship) than a new entrant, who may be required to recoup a greater level of return from a higher risk greenfield investment.

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<sup>120</sup> Telecommunications Antennae and Support Structures Guidelines for Planning Authorities, July 1996

- 6.19 Given the impending ASO, the business case for the construction of an analogue radio only network is also likely to be weak.<sup>121</sup> In theory, local analogue terrestrial network operators might be able to collectively provide broadcast transmission services to achieve national coverage for radio services. However, due to the differences between local and national broadcast transmission networks (including the area of transmitter coverage, emission power of local transmitters, unsuitable location of masts, problems of interference between transmitters co-located at sites), there are complex technical barriers which would have to be overcome by the local terrestrial network operators before they could provide a substitutable service. Consequently, it is very unlikely that the local analogue terrestrial network operators would be able to put RTÉNL under competitive pressure. Moreover, it is unlikely that such a network would be able to compete with a radio broadcasting transmission network that is leveraged off a network of high towers which has also been built to cater for the broadcast transmission of television broadcasting services.
- 6.20 For the reasons discussed above, it is ComReg's preliminary finding that market A satisfies the first criterion "High and non-transitory barriers to entry".

### **6.3 No tendency towards effective competition over the relevant time horizon**

- 6.21 The European Commission found that, in general, the second criterion was not satisfied in wholesale broadcasting markets on an EU-wide basis, so that despite entry barriers that may exist, the market dynamics are such that the market structure tends towards effective competition over a relevant time horizon. This criterion looks at the dynamics underlying barriers to entry.<sup>122</sup>
- 6.22 The European Commission expressed its view that the move from analogue to digital broadcast transmission should result in fewer capacity constraints and more platforms with which to compete. Thus, the impetus for platforms to attract additional broadcasting content would give more power to broadcasters in their negotiations with transmission companies.
- 6.23 In Ireland, there is one player active in this market and no new parties have entered the market since ComReg's last market analysis in 2003/2004 nor has there been any indication that there is likely to be entry in the timeframe of this review. The development of a digital terrestrial platform capable of providing broadcast transmission services for national digital content has been undertaken by RTÉNL, though commercial independent digital radio services are not

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<sup>121</sup> An analogue radio network could be built using a network of lower towers but it is likely that the requirement of a network capable of digital radio services will become more important in the coming years. In any case, such a network could not compete with an operator that placed radio equipment on its pre-existing television transmission network.

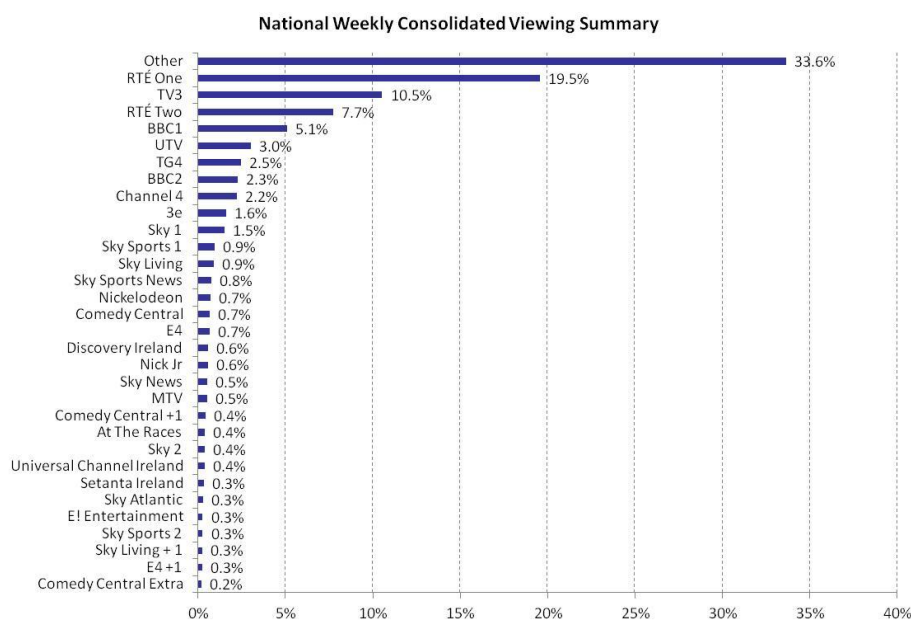
<sup>122</sup> Due to varying characteristics of broadcasting transmission services across different EU Member States, NRAs have adopted different approaches and regulation has been applied in many cases. <http://www.uni-mannheim.de/edz/pdf/sek/2010/sek-2010-0659-en.pdf>

expected to be launched at present. These towers will continue to host analogue radio broadcasting equipment.

6.24 Generally in the EU, there is a separation between broadcast transmission companies and broadcasters (e.g. Arqiva in the U.K.). This is not the case in Ireland. RTÉ provides both the most viewed television and the most listened to national radio programme services in the State<sup>123</sup> and its wholly owned subsidiary RTÉNL provides broadcasting transmission services for FTA reception of radio and television to most households.

6.25 Figure 13 below shows that, according to Nielsen TV Audience Measurement data, in the week between the 4<sup>th</sup> and the 15<sup>th</sup> of April 2012, RTÉ programme services were the most watched with a combined viewing market share of 27.2%, followed by TV3 with 10.5%. TG4 had 2.5% viewing market share. In total these programme services represented 40.2% of programme service viewing market share in that week.

**Figure 13: National Weekly Consolidated Viewing Summary**



Source: TAM Ireland, reported date(s): 09-04-2012 - 15-04-2012

6.26 Given the lack of any new competing national terrestrial network providers in this market to date, and impending ASO on 24 October 2012, at which point contracts may have been signed with RTÉNL for broadcast transmission, it is unlikely that the competitive conditions in this market will materially change in

<sup>123</sup> See consolidated viewing summary at <http://www.tamireland.ie/>

According to Ipsos MRBI JNLR survey results over April 2011 to March 2012 RTÉ radio programme services (RTÉ Radio 1, RTÉ 2fm and RTÉ Lyric FM) had a market share of national market listenership (share of all minutes listened on a weekday between 7am and 7pm) of 69.5 %.

<http://www.bai.ie/wordpress/wp-content/uploads/JNLR-Results-May-2012.pdf>

the timeframe of this review. However, it is the vertical integration of RTÉ that is the key issue to analysing the competitive conditions in this market.<sup>124</sup>

- 6.27 The presence of a vertically integrated entity is an important consideration for the incentives for firms to enter into this market. As a vertically integrated entity, RTÉ, by its actions, can to a large extent influence the competitive dynamic of this wholesale market as well as the related downstream wholesale and retail broadcasting markets. It could be expected that RTÉNL will continue to supply terrestrial broadcasting transmission services to its parent RTÉ. Thus, the commercial opportunity for a competing wholesale service is reduced.
- 6.28 RTÉ, through its subsidiary, RTÉNL, both supplies key network services to some terrestrial radio and television broadcasters and competes with them in a number of important markets. In relation to television for example, RTÉ competes with other terrestrial broadcasters for the rights to screen particular events and movies. Competition is particularly keen with respect to sporting events which are (by Ministerial order or by commercial decision of the rights owner) often available on a FTA basis. In addition, terrestrial broadcasters compete for talent to host shows. Terrestrial programme services then compete for audiences and the consequent advertising revenues that can be raised. Therefore, there is a possibility that a vertically integrated entity, such as RTÉ, seek to establish strategic barriers to entry and expansion by excluding potential terrestrial competitors (national broadcasters and multiplex operators) from accessing RTÉNL's broadcast transmission network and/or potentially charging them excessive broadcast transmission fees thus impeding their ability to compete in downstream (retail/wholesale) markets.
- 6.29 ComReg is of the view that for a vertically integrated entity and for one that is the sole broadcast transmission network provider in this market, the high and non-transitory (structural, regulatory and strategic) entry barriers limit the prospect of effective competition over a foreseeable time horizon. There is thus the ability and incentive for RTÉNL to behave in an anti-competitive manner. As noted in the European Commission's Explanatory Note, the underlying purpose of the *ex ante* regulatory framework is to deal with predictable competition problems that have their origin in structural factors in the industry.
- 6.30 To date, satellite television services (e.g. free to view and Sky's pay television service)<sup>125</sup> in Ireland have been carried by wide-band satellites in the Ku spectrum band (such as ASTRA 2D for example) which have a footprint greater than Ireland. A new narrow-band satellite operating in a different frequency band (using Ka spectrum band) and orbital position, has a spot beam transponder focused specifically on Ireland. RTÉ's Saorsat option, which was discussed in sections 4 and 5, uses capacity on this satellite transponder, as this is expected to potentially overcome the significant potential rights issues that

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<sup>124</sup> Other NRAs, such as Austria for example, have found the need for regulation designating SMP on vertically integrated entities in their terrestrial markets. The European Commission did not contest these findings.

<sup>125</sup> As discussed in sections 4 and 5 Irish terrestrial television broadcasters (TV3, TG4 and RTÉ) have not to date been available on FTA satellites due to rights issues.



might occur for RTÉ if they were to broadcast in the clear from any other existing satellite transponder.

- 6.31 The Saorsat option has some potential to change the dynamic behind the entry barriers if certain assumptions are made. If, for example, a significant number of households had the ability and willingness to erect a satellite dish or to re-direct their existing satellite dish to avail of such free to view services, it is conceivable that broadcasters might be willing to forgo access to national FTA terrestrial services and/or have significantly enhanced countervailing bargaining power vis-à-vis the latter. This would be the case if there was a significant decrease in the number of television households availing of national terrestrial services in favour of this satellite service. Under such circumstances, then the logic of the European Commission would likely hold and the second criterion would no longer be met. However, data shows that around 56% of households with a television have a satellite service, predominantly for pay television services.<sup>126</sup> Although others may also have an inactive dish erected, it still remains the case that a significant number of households have so far been unable or unwilling to erect a satellite dish, and, where they have done so, this has typically been to avail of pay television services.
- 6.32 In addition, given that these existing household satellite dishes are installed to receive satellite services from transponders such as ASTRA 2D, it is unlikely that a significant number of households would adjust their dishes towards the direction of the narrow-band satellite from which Saorsat may broadcast. There is likely to be a more limited number of programme services on the Saorsat satellite service which will operate in a KA-band on a free to view basis, and the reorientation of the dish to receive Saorsat may cause them to lose reception of services that they currently receive. Thus, the impact of the Saorsat platform would not be such that the dynamic towards potential competition is expected to materially change over the lifetime of this review.
- 6.33 It may be that a retail satellite television provider, Real Digital TV, may enter the Irish market at some point in the future.<sup>127</sup> Both free to view and pay television services could be made available from this service. For a number of reasons such as uncertainty of entry, content and unwillingness or inability of end-users to erect a satellite dish, ComReg does not believe that this potential service will affect the market to the extent that the dynamic towards potential competition would change in the timeframe of this review.
- 6.34 Therefore it is the preliminary finding of ComReg that market A satisfies the second criterion – “No tendency towards effective competition over the relevant time horizon”.

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<sup>126</sup> Nielsen TV Audience Measurement Establishment Survey on behalf of TAM Ireland Ltd., May 2012

<sup>127</sup> <http://realdigitaltv.com/about.html>

## 6.4 Insufficiency of competition law alone

- 6.35 This third criterion considers whether there is a need for *ex ante* regulation in market A in the first instance. If *ex post* competition law remedies are sufficient then there should be no need for a separate regulatory regime. However, ComReg considers that competition law alone is insufficient to address failures in this market. Whereas the electronic communications regulatory framework applies *ex ante*, competition law is restricted to *ex post* investigation, analysis, and (if merited) enforcement action. Such investigations, analyses, and enforcement actions can take considerable time to complete and are of course subject to appeal. In a market such as that discussed here, where, in the opinion of ComReg, there is not effective competition nor is effective competition likely to emerge within the relevant time period, the benefits of addressing a particular harm through *ex post* competition law may not generate sufficient certainty or predictability to existing or potential market participants.
- 6.36 A court applying competition law will not normally mandate that specific prices or pricing methodologies be used, nor would the court police the evolution of these prices on an ongoing basis, as ComReg may do under its regulatory framework. Although competition law could be used to allow access to be granted, it would not be likely to deal with other forms of potential discriminatory behaviour, and most especially it would not deal with them in advance of their occurring. It would also be difficult to apply competition law in order to address strategic decisions which limit the possibility of new terrestrial programme services entering the market. For these reasons, it is unlikely, in the current context, that application of competition law would enable a sufficient suite of remedies to be applied that would address the range of problems that might potentially arise.
- 6.37 It is ComReg’s preliminary conclusion that the third criterion, “Insufficiency of competition law alone”, is satisfied in market A.

## 6.5 Preliminary Conclusion

- 6.38 Based on this preliminary analysis, ComReg is of the opinion that the three criteria test is satisfied in market A as there are high non-transitory barriers to entry, the market does not tend towards effective competition over time and competition law alone is insufficient to address market failure(s).<sup>128</sup>
- 6.39 Based on this preliminary finding, ComReg will conduct a market analysis of this market in section 7 of this consultation paper.

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<sup>128</sup> ComReg had previously issued preliminary three criteria test findings in ComReg consultation document 10/98 and its response to said consultation in document 11/24.



**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.**

## 7 Competition Analysis and Assessment of SMP – Market A

- 7.1 Having defined the scope of the relevant product and geographic market(s), and determined its susceptibility to *ex ante* regulation in accordance with the three criteria test, the next step is to determine if the relevant market(s) is effectively competitive or if SMP exists.
- 7.2 In its previous broadcasting transmission market analysis (ComReg consultation paper 03/126 and consultation response paper 04/06), ComReg designated RTÉNL as having SMP in the markets for radio broadcasting transmission services on national analogue terrestrial networks and television broadcasting transmission services on analogue terrestrial networks. The reasons for this were:
- RTÉNL had 100% market share in both markets;
  - There were high and non transitory barriers to entry including financial costs and spectrum capacity limitations;
  - There was limited countervailing buyer power at the wholesale level; and,
  - There was limited scope for potential competition in the markets.
- 7.3 The European regulatory framework for electronic communications networks and services has aligned the concept of SMP with the competition law definition of dominance advanced by the Court of Justice of the *European Union in United Brands v. Commission*:
- 7.4 “The dominant position referred to [by Article 102 of the Treaty on the Functioning of the European Union] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”<sup>129</sup>
- 7.5 Article 14 of the Framework Directive effectively mirrors this definition of dominance and equates SMP with:
- 7.6 “An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it [the

<sup>129</sup>

Case 27/76 United Brands v European Commission [1978] ECR 207, Paragraph 65.

*undertaking] the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.*<sup>130</sup>

7.7 Arising from this definition, there are three key sources of competitive constraint that may affect an operator's ability to act independently, namely constraints from existing competition, potential competition, and strong buyers.<sup>131</sup>

7.8 The European Commission stresses in the SMP Guidelines that the existence of a dominant position cannot be established on the basis of large market shares alone. It recommends a number of criteria that may be used as a guide when measuring the power of an operator to behave independently of competitors, customers, and consumers. According to the SMP Guidelines, potentially relevant factors include the following:

- Overall size of the undertaking;
- Control of infrastructure not easily duplicated;
- Technological advantages or superiority;
- Absence of or low countervailing buyer power;
- Easy or privileged access to capital markets/financial resources;
- Product/services diversification (e.g. bundled products or services);
- Economies of scale;
- Economies of scope;
- Vertical integration;
- A highly developed distribution and sales network;
- Absence of potential competition; and,
- Any other barriers to entry/expansion.

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<sup>130</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 018/33, 24.4.2002.

<sup>131</sup> In markets subject to *ex ante* regulation an operator's behaviour may also be restricted by way of existing regulatory controls. It is necessary however to consider the potential ability of the operator to exert market power in the absence of *ex ante* regulation in the market concerned. To do otherwise might lead to a finding of non-dominance on the basis of regulatory remedies that would cease to exist following the review and in the absence of which the operator may be able to exert market power. The key question is therefore how the operator in question is likely to behave if it were free from regulatory constraints and if the imposition of remedies is as such warranted.

- 7.9 ComReg considers that the relative importance of each factor may vary from one analysis to the next as the market characteristics or dynamics change. Consequently, flexibility is needed in applying the above criteria. In addition, many of the above factors, while presented separately, may be interrelated and all available evidence must be considered as a whole before a determination on SMP can be made.
- 7.10 For the purposes of this market analysis, ComReg sees the following factors as the most relevant for assessment of this market:
- Overall size of the undertaking;
  - Control of infrastructure not easily duplicated;
  - Economies of scale;
  - Economies of scope;
  - Vertical integration;
  - Absence of potential competition;
  - Any other barriers to entry/expansion; and,
  - Absence of or low countervailing buyer power.
- 7.11 Given the potential for overlap, ComReg combines its assessment of these factors under three broad headings as follows:
- Existing competition - assesses factors such as market shares, overall size of the undertaking, and relative strength of existing competitors;
  - Potential competition - assesses the extent to which control of infrastructure is not easily duplicated, economies of scale, economies of scope, vertical integration, as well as considering the overall strength of potential competitors; and,
  - Strength of Countervailing Buying Power – assesses the ability of the buyer(s) (e.g. broadcasters and DTT multiplex operators) to reduce prices to a level consistent with a competitive outcome, or more generally, to obtain terms and conditions of supply more consistent with a competitive outcome.
- 7.12 Other factors which could be used to indicate market power have been considered, but are seen as less relevant in this market, for the reasons outlined below:

- Technological advantages or superiority: any advance made by a provider in this market would (from a technological point of view) likely be adopted by others. It is unlikely that technology itself could be used as a sustainable advantage in this market;
- Easy or privileged access to capital markets/financial resources: while this may be a potentially relevant factor in this market, it is less clear and predictable than other relevant factors and therefore more difficult to measure on a forward looking basis in this market;
- Product or services diversification: this is of relatively less importance in this market as bundled offerings do not feature to a significant extent at the wholesale level;
- A highly developed broadcast distribution and sales network: the existence of a highly developed distribution and sales network would, in ComReg's view, be a secondary factor when considering economies of scale and scope. This factor, over the medium to long term, is likely to be less of a barrier in this wholesale market as terrestrial transmission services are purchased by a relatively small number of wholesale customers.

## **7.1 Existing competition**

### ***Overall size of the undertaking, market shares and existing competition***

- 7.13 RTÉ, the national public service broadcaster, operates the broadcast transmission platform through its network division RTÉNL.
- 7.14 RTÉNL is the only provider of national broadcast transmission services in market A in Ireland and this has remained unchanged since ComReg's last market review in 2003/2004.
- 7.15 RTÉNL currently provides wholesale services to its customers which include broadcast distribution and transmission services. RTÉNL operates from a network of circa 150 transmission sites providing services to national television and radio broadcasters. However, not all of these sites are used for national terrestrial transmission services. RTÉNL owns many of these sites and others are held by lease or licence. With ASO on 24 October 2012 it is expected that RTÉNL will provide its services from approximately 51 broadcast transmission sites around Ireland to enable national broadcast transmission.<sup>132</sup>

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<sup>132</sup> However, not all of these sites may be required for the provision of national radio FM services.

- 7.16 All national terrestrial broadcasters must purchase broadcast transmission services from RTÉNL as there is no alternative source of providing national terrestrial transmission services. As such, to date, all national terrestrial analogue broadcasters (TV3, TG4, RTÉ, Today FM and Newstalk) have signed broadcast transmission agreements with RTÉNL.
- 7.17 RTÉNL has upgraded its network to deliver television and radio broadcast transmission services in digital format. National DTT services were launched in May 2011. DTT multiplex operators require access to RTÉNL's network in order to provide their services in the downstream markets. Currently, there are only two DTT multiplexes in operation i.e. two RTÉ PSB DTT multiplexes, which connect to RTÉNL's network infrastructure. Any other potential commercial DTT multiplex operator would also require access to RTÉNL's network in order to have adequate coverage to attract digital broadcasters to its DTT multiplex service. Furthermore, currently RTÉ provides DAB services from its own sound broadcasting multiplex to a portion of the population. While, at present, the launch of commercial independent digital radio services are not expected, from a future looking perspective, national digital radio services broadcast from sound broadcasting multiplexes would similarly require access to RTÉNL's network infrastructure. Therefore, in order to provide digital radio broadcasters with a national service, sound broadcasting multiplex operators would also require access to RTÉNL's network infrastructure.
- 7.18 Therefore, RTÉNL has 100% market share of the relevant which has been stable over time.
- 7.19 However, market shares and concentration measures alone are not likely to be a reliable guide to whether SMP exists. This is because despite persistently high market shares, entry barriers may be low, existing operators may be able to easily expand in the market and/or customers may have strong bargaining power which may restrict operators with high market shares from actually charging prices above competitive levels. It is therefore vital that factors other than market share are taken into account so that one can understand the actual market dynamics.
- 7.20 There is no existing national terrestrial competitor to RTÉNL in market A and ComReg will now examine whether any potential competition could enter within the period of the review and on a sufficient scale as to undermine any potential market power.

## **7.2 Potential Competition**

- 7.21 In the absence of a material competitive constraint posed by existing competition, ComReg assesses possible constraints posed by potential competition in market A. This assessment of potential competition considers whether entry (and expansion) or indirect constraints in this market are likely

to such an extent that they would constrain RTÉNL's ability to act independently of its competitors and customers.

- 7.22 Indirect constraints which operate at the wholesale level through their effects at the retail level can be taken into account at either the market definition or the competition analysis stage.<sup>133</sup> ComReg has already considered the effects of indirect constraints operating through the retail level in its market definition, and has concluded that these are insufficient for alternative platforms to be included in the relevant market. ComReg considers that, in view, inter alia, of the two-sided nature of broadcasting markets and low development of FTA terrestrial services via other broadcast transmission platforms, the preliminary conclusions reached in market definition (section 5) regarding the ineffectiveness of any indirect retail constraints would also hold in the event of potentially larger wholesale price increases than those applied in a SSNIP framework.
- 7.23 The finite amount of spectrum in bands allocated to broadcasting (in an analogue context) for additional programme services has been a constraint on competing services at the retail level. However, with the move to digital broadcast transmission there is more capacity which should provide for a greater number of competing programme services at the retail level. In assessing the possibility for any potential new entrants to act as a constraint on RTÉNL over the period of this review, ComReg has analysed the nature and extent of any barriers to firms both entering and expanding. The high and non-transitory barriers to entry discussed in section 6 also apply here.
- 7.24 Barriers to entry generally comprise any disadvantage that a new entrant faces when entering a market that incumbents do not currently face.<sup>134</sup> According to the Explanatory Note:
- “... high structural barriers may be found to exist when the market is characterised by substantial economies of scale, scope and density and high sunk costs”.*
- 7.25 Barriers to growth and expansion are obstacles that a new entrant or smaller existing competitor faces in its ability to grow or expand in a particular market and which limit its ability to pose a viable competitive threat over the medium to longer term. Barriers to entry and expansion are closely related as many of the factors that make entry harder also make it harder for new entrants to grow or expand.
- 7.26 ComReg is of the preliminary view that there may be a number of barriers to entry and expansion in this market. These relate to control of infrastructure not

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<sup>133</sup> In its comments on a number of Article 7 cases, the European Commission has noted that indirect pricing constraints, where they are found to exist, should be taken into account in the context of the SMP assessment.

<sup>134</sup> Barriers to exit may also be a relevant consideration. This issue may arise where a firm finds it difficult to leave a market in which they operate where, for example, they own assets that are not easily adapted to other uses. Barriers to exit generally work in the same way as barriers to entry, i.e. the presence of high sunk costs that are not recoverable on exit discourage entry to the relevant market.

easily duplicated due to the importance of high altitude sites for national terrestrial transmission, high sunk costs, economies of scale and scope which would be difficult to achieve by a competing entrant and as RTÉ, through RTÉNL is a vertically integrated entity, and the sole network provider in this market, market failures may arise. ComReg will assess this further below.

***Control of infrastructure not easily duplicated***

7.27 The SMP Guidelines cite control of infrastructure not easily duplicated as one relevant criterion for assessing whether SMP exists. This may be relevant where, for example:

- Access to a certain infrastructure is necessary to produce a particular product or service;
- The required infrastructure is exclusively or overwhelmingly under the control of a certain undertaking; and,
- There are high and non-transitory barriers associated with replacing the infrastructure in question.<sup>135</sup>

7.28 This measure is linked to the absolute size of RTÉNL, as well as the assessment of the sunk costs and economies of scale and scope associated with the infrastructure discussed below.

7.29 According to the SMP Guidelines, it is not necessary for the infrastructure to be deemed “essential” within the meaning of EU competition law. Ownership of a significant infrastructure may confer an absolute cost advantage on the incumbent and the cost and time involved in operators replicating the infrastructure in question may pose a significant barrier to entry. In addition, it may be possible for the owner of the infrastructure in question to leverage their market power into horizontally or vertically related markets.

7.30 There are a number of barriers to replication of RTÉNL’s network. The timeframe and technological know-how required to build an alternative network is likely to make it uneconomical to compete with RTÉNL. It is likely that replication of RTÉNL’s high tower network would take a number of years, from sourcing the materials and suitable transmission site locations, reaching commercial agreements with land owners, and building the network itself while also considering that there may be a high risk of planning permission rejection or planning permission delays associated with this process.

7.31 The fact that RTÉNL has been able to use some of its existing infrastructure for digital broadcast transmission may mean it is in a position to offer better contractual terms to broadcasting customers than a new entrant who would

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<sup>135</sup> See Revised ERG Working Paper on the SMP concept for the new regulatory framework, ERG (03) 09 rev3, September 2005, p. 5.



might be required to recoup a greater level of return from a greenfield investment.

- 7.32 Given the propagation characteristics of the spectrum used for broadcasting, site location is important in terms of the height required for broadcasting to a national area from a network that is deployed in a high tower, high power manner. As previously discussed in section 6, RTÉNL has masts located in important key, high-altitude sites around the country to enable this which enable large coverage areas of Ireland to be achieved. RTÉNL owns many of the sites from which it operates while others are held by lease or licence.
- 7.33 Aside from the difficulty of locating suitable high-site locations, there is a high probability that new entrants would find it difficult to obtain planning permissions as new high-sites may be viewed as obstructions on the landscape. In addition, Irish planning guidelines favour mast and site sharing.
- 7.34 It might be possible to build an alternative network using a denser network of lower towers; however, the complexity and costs of such a network may make this uneconomical. In any event, it is also unclear whether the level of coverage available via RTÉNL's network would be achievable using such a network.
- 7.35 Local analogue terrestrial network operators might also be able to collectively provide transmission services on a national basis but there are complex technical barriers (e.g. area of transmitter coverage, emission power of transmitters, locations of masts, problems of interference between transmitters co-located at sites) which would have to be overcome, making this an unlikely scenario.

### **Financial (Sunk) Costs**

- 7.36 This factor looks at any significant investments in network infrastructure, technology, equipment, marketing, advertising, promotions, staff training costs, research and development, etc. that cannot be resold or recouped or can only be partially recouped on exit from the market.
- 7.37 It should be acknowledged that a certain level of sunk costs will always be needed to enter most markets. Furthermore, the incumbent may also have had to pay a similar level of sunk costs before it entered the market or in emerging markets all new entrants may incur a similar level of upfront investment.
- 7.38 Notwithstanding this, an OECD report on Barriers to Entry<sup>136</sup> notes that in some circumstances it is more difficult for new entrants to break into a market than it was for the incumbent that was the first firm to enter and that *“when a market is already occupied by an incumbent, potential entrants might face an*

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<sup>136</sup> <http://www.oecd.org/dataoecd/43/49/36344429.pdf>

*entrenched brand or brands, as well as demand that is insufficient to permit efficient operation.”*

- 7.39 The OECD’s report also notes that where sunk costs are high, an established incumbent who has already incurred substantial sunk investments may have the ability to respond to new entry by charging prices above its own average costs but below what the new entrant would need to cover its sunk costs of entry. The sunk costs create a decisional asymmetry that is capable of deterring entry because incumbents have already paid them and entrants have not. If sunk costs are high relative to the post-entry price or expected profit opportunity from being in the market, then entry may be deterred.
- 7.40 There are significant financial costs involved in the establishment of a broadcast transmission network capable of providing for the broadcast transmission of national terrestrial radio and television broadcasting services. This relates to the development of a network of high towers capable of carrying broadcasting equipment and purchasing and maintenance of transmission sites. Many of these costs would be sunk in the case where a firm exited the market.
- 7.41 At ASO RTÉNL will operate its digital network from approximately 51 transmission sites. It is estimated that RTÉNL’s capital cost on the basis of building a two PSB digital multiplex network will have cost in the region of €70 million.<sup>137</sup> This is primarily related to additional DTT multiplexes, broadcast transmission and broadcast distribution equipment, antennae and four replacement masts at some of its high sites. RTÉNL is using its existing infrastructure where possible (i.e. the other 47 masts/towers and buildings). While DTT multiplex related assets are not a relevant cost consideration in this market, towers/masts and buildings etc. would represent the largest share of costs. As a new entrant would have to replicate RTÉNL’s network, taking into account that RTÉNL has made use of its established analogue network which would have helped to keep costs down, the cost of a greenfield digital network is likely to be far greater than €70 million.
- 7.42 Related to the costs of entry, the limited market size (and therefore revenues) attainable due to constraints such as spectrum limitations, which restrict the number of programme services that can be accommodated by terrestrial transmission, the ability of the incumbent to self supply, and contracts with existing wholesale customers are likely to deter entry to the market.
- 7.43 The mere existence of sunk costs does not automatically imply that entry barriers are high. Consideration also needs to be given to other relevant factors such as the level of customer demand in the market, customer switching costs and any other barriers to entry/expansion. ComReg believes that combined with the range of other barriers discussed below, these costs are a significant deterrent to market entry and expansion.

<sup>137</sup>

<http://www.rte.ie/about/pdfs/2010-rte-annual-report-for-the-web.pdf>

***Economies of scale and scope***

- 7.44 Economies of scale and scope refer to potential advantages that larger incumbents may enjoy over smaller new entrants. Economies of scale generally refer to the cost advantage which a large scale operator may have over a smaller operator where the marginal cost of production decreases as the quantity of output produced increases. Economies of scope refer to the potential efficiencies which may be gained by a firm jointly producing a range of goods and services, e.g. where a cable network could be used to provide television, voice telephony and internet access services simultaneously.
- 7.45 Economies of scale do not necessarily in themselves create entry barriers. To constrain entry they must be significantly large relative to the market as a whole and other factors such as high sunk costs must be present. One means of examining economies of scale in a market is to determine what is the minimum efficient scale (MES). That is, what is the minimum number of customers, volume of output or level of sales an operator would need to achieve to be cost efficient or to minimise average costs? If the MES is large relative to the market as a whole and sunk costs are large and/or barriers to expansion exist, economies of scale are likely to represent a more significant entry barrier.
- 7.46 ComReg is of the opinion that the barriers to entry to this market as discussed in this section such as the financial costs of entry are so significant and the MES may be so large relative to the market as a whole 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 programme services. This market is currently characterised by one wholesale provider RTÉNL. With ASO on 24 October 2012, television programme services via analogue means will no longer be available; however, radio programme services will continue to be carried over FM.
- 7.47 RTÉ has the most viewed and listened to programme services in the state. It could be expected that RTÉNL would continue to supply to its parent RTÉ as it is a vertically integrated entity. Therefore, the potential market for a competing wholesale service, and its ability to enjoy economies of scale, is further reduced.
- 7.48 Furthermore, national terrestrial broadcasters have contract agreements with RTÉNL for broadcast transmission services, which in the past have been long term e.g. in some cases analogue broadcast transmission contract agreements have been up to ten years. ComReg recognises that with the switch over to a digital network there is a requirement for new contract agreements. However, as RTÉNL has completed the building of its digital network, and given the high non-transitory barriers to entry already discussed, national terrestrial broadcasters will continue to have contract agreements with RTÉNL (as there are currently no alternative national terrestrial networks) and any potential multiplex operator would also have to sign contract agreements with RTÉNL.

- 7.49 Given the above, ComReg is of the preliminary opinion that the competitive conditions of this market are unlikely to materially change in the timeframe of this review. As such, ComReg believes the size of this market is unlikely to grow to such an extent over the timeframe of this review that MES would be achievable by a competing efficient market entrant particularly as it is likely to be exacerbated by the barriers to entry and expansion already discussed.
- 7.50 In terms of economies of scope, RTÉNL's broadcast transmission network is designed to accommodate both radio and television equipment on its mast/tower structures enabling it to spread its investment for both these services over the same network. Given the barriers to entry already identified (e.g. number and location of broadcast transmission sites, planning permission issues etc.) it may be difficult for a new entrant to exploit the economies of scope in this market.

### ***Vertical integration as a barrier to entry into relevant markets***

- 7.51 Vertical integration can constitute an entry barrier where the presence of a firm at multiple levels of the production or broadcast distribution chain raises the costs of new entry. For example, in the presence of a vertically integrated incumbent, the retail market available to the potential entrant in market A is more limited. RTE's television and radio programme services had a terrestrial retail television market share of 70% in 2010<sup>138</sup> and 69.5% of national radio listenership in between March 2011 and April 2012 and this market share is unlikely to be readily available to potential new entrants.
- 7.52 Prospective new entrants may also perceive the need to enter the wholesale and retail markets simultaneously to achieve efficiencies and pose a more viable competitive constraint on the integrated operator.
- 7.53 Vertical integration further increases the possibilities for the integrated operator create strategic barriers to entry by hindering or foreclosing competition at one or more levels in the value chain. For example, where a vertically integrated firm such as RTÉ is the only or primary source of access for certain inputs necessary for competing in downstream markets, the possibility of it leveraging its control into downstream markets could act as a disincentive to new entry into those related markets and in turn reinforce entry barriers at the upstream level.
- 7.54 RTÉ through its subsidiary RTÉNL both supplies key network services to national terrestrial broadcasters (and potentially to non RTÉ multiplex operators) and competes with their programme services in the retail market. As a vertically integrated entity and the only operator in this market, RTÉ through RTÉNL has the ability and incentives to exclude potential terrestrial competitors (broadcasters and multiplex operators) from accessing RTÉNL's broadcast transmission network and/or to potentially charge them excessive

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<sup>138</sup> Irish Broadcasting Landscape: Economic and Environmental Review for the BAI, Athena Media, 2010.

broadcast transmission fees or engage in margin squeezing where RTÉNL could price its upstream services in such a way as to impede effective downstream competition, due to an insufficient margin between wholesale and retail prices (in the case where there was commercial DTT for example) and, in the case of other competing broadcasters, by increasing their costs and reducing their ability to attract talent and content.

- 7.55 It may also be in RTÉ's interests to strategically determine the available capacity on its network for potential downstream competitors, thus effectively foreclosing or impeding entry/expansion in downstream markets and further delaying network investment and entry in upstream market A.
- 7.56 ComReg is of the view that in a market such as this where there is a vertically integrated entity who is the sole transmission network provider protected by high structural barriers to entry and with a significant presence in downstream markets, market failure may arise where the network operator could act independently of its competitors and customers to an appreciable extent.

#### ***Overall strength of potential competitors***

- 7.57 For the reasons discussed above ComReg is of the preliminary view that it is unlikely that effective competition will develop in this market in the timeframe of this review. In sections 5 and 6 ComReg gave its preliminary view that alternative (non-terrestrial) platforms are unlikely to act as a constraint on potential anti-competitive behaviour in this market.
- 7.58 Terrestrial broadcast transmission is of the most material value to national radio broadcasters as the majority of retail end-users listen to the radio via this means given the limitations over other platforms (e.g. lack of comparable mobility, lack of receivers etc.) discussed in sections 5 and 6.
- 7.59 In the context of terrestrial television, terrestrial FTA services have different service characteristics to broadcasting services available via other platforms such that effective substitution is unlikely. Free to view services are available via satellite transmission. However, due to rights issues Irish terrestrial programme services are not available via free to view satellite. Although, there is now one satellite with a specific spot beam on Ireland which may potentially overcome such rights issues, for the reason discussed in sections 5 and 6 (e.g. different orbital position to existing satellites and the related potential loss of existing broadcasting programme services if end-users were to reorient their dishes towards Saorsat, inability/unwillingness of households to erect a satellite dish etc.) ComReg is of the preliminary view that this is unlikely to materially change the competitive dynamics of the market in the timeframe of this review.

## Countervailing buying power

7.60 Another potential constraint on an undertaking's ability to exercise market power is buying power. Countervailing buying power can arise if, for example, a particular purchaser is sufficiently important to its supplier to influence the price or other terms and conditions of supply. In its Guidelines on horizontal mergers, the European Commission notes that:

*“Countervailing buyer power ..... should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers.”*<sup>139</sup>

7.61 The circumstances where countervailing buying power might be observed include where a customer:

- Accounts for a significant proportion of the supplier's total output;
- Is well-informed about alternative sources of supply; and,
- Is able to switch to other suppliers at little cost to itself, or to self supply the relevant product relatively quickly and without incurring substantial sunk costs.

7.62 RTÉNL currently supplies national analogue broadcasting transmission services to the following broadcasters RTÉ, TG4, TV3, Today FM and Newstalk. As discussed earlier, there is no alternative source of supply for national terrestrial broadcast transmission to RTÉNL's network and this is unlikely to change within the timeframe of this review.

7.63 As mentioned earlier, many of these broadcasters have agreed long term contracts with RTÉNL in the past. If similar contracts remain in place between RTÉNL and broadcasters, this could further deter future entry to this market.

7.64 Similarly, for multiplex operators, in order to provide their services they have no option except to negotiate with RTÉNL for access to its network infrastructure. There is no alternative source of supply of comparable network services which RTÉNL provides.

7.65 The alternative would be for RTÉNL's customers to threaten to cease terrestrial broadcast transmission. While this would be unlikely to happen, if it did, this would also benefit the broadcasting activities of RTÉ as it is a vertically integrated entity that competes in the downstream retail market with other broadcasters for audience market share and advertising revenues.

<sup>139</sup>

European Commission, “Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings”, Official Journal C 31, 05.02.2004, para 64.

7.66 Given the barriers to entry and expansion already discussed ComReg does not view it as likely that the competitive conditions of this market will change. Buyers (i.e. broadcasters and multiplex operators) are not able to credibly exert a significant constraint on the price or other terms and conditions of supply offered by RTÉNL given the lack of alternative options. Neither are there alternative suppliers apart from RTÉNL who could provide national terrestrial broadcast transmission services, and the conditions of the market do not allow for self-supply.

### **7.3 Preliminary conclusion**

7.67 ComReg has considered market A in terms of existing competition, potential competition and countervailing buying power to determine whether there is SMP in the market.

7.68 RTÉNL is the sole national terrestrial network provider and this has remained unchanged overtime. ComReg is of the preliminary view that there are a number of barriers to entry and expansion in this market. These relate to control of infrastructure not easily duplicated, high sunk costs, economies of scale and scope which would be difficult to achieve by a competing entrant and given the nature of vertical integration in this market, market failures may arise for actual/potential downstream competitors of RTÉ. ComReg is of the preliminary view that there is no effective constraint on RTÉNL from potential competitors and insufficient countervailing buying exists in this market.

7.69 In summary, ComReg's preliminary conclusions are that:

- RTÉNL has 100% market share of the relevant market and this has remained stable over time;
- RTÉNL services operate from an extensive range of high tower/mast sites located throughout Ireland, many in strategically located high-sites, which enable almost complete coverage of the population of Ireland. There is no alternative terrestrial network capable of ensuring the same level of services in Ireland for national terrestrial broadcasters and multiplex operators;
- Barriers to entry/expansion exist such as high financial (sunk) costs, control of infrastructure not easily replicated, economies of scale and scope, and vertical integration;
- The terrestrial broadcasting market can be influenced to a large degree by the action of RTÉ as a vertically integrated entity. The presence of RTÉ as a vertically integrated entity is an important determination for the level of competition in the market. Access may be limited/foreclosed and/or there may be the potential for charging excessive fees to actual or potential to limit the competitive threat to RTÉ's position in the retail market; and,

- Insufficient countervailing buying power exists in this market and so national terrestrial broadcasters and multiplex operators do not have the ability to exert significant constraint on their cost or other terms and conditions of supply from RTÉNL.

#### **7.4 Designation of undertaking(s) with SMP**

7.70 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 27(4) of the Framework Regulations as having SMP.

7.71 Having regard to the preliminary conclusions of the above market analysis, ComReg is therefore of the preliminary view that:

**RTÉNL, the wholly owned subsidiary of RTÉ should be designated as having SMP in market A.**

**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.**



## 8 Competition Problems – Market A

- 8.1 ComReg is obliged to impose at least one remedy, further to Regulation 27(4) of the Framework Regulations, once it designates an undertaking with SMP. According to Regulation 8(6) of the Access Regulations, the remedies imposed must be based on the nature of the competition problems identified, and be proportionate and justified in light of ComReg’s objectives as set out in section 12 of the Communications Regulation Acts 2002-2011.<sup>140</sup>
- 8.2 It is not necessary for ComReg to point to examples of actual anti-competitive activity within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and/or section 5 of the Competition Act, 2002 that have occurred or are occurring. A finding of SMP indicates the potential for competition problems to arise and this is sufficient to justify the imposition of proportionate *ex ante* regulation. As noted in the Explanatory Note, the underlying purpose of the *ex ante* regulatory framework is to deal with predictable competition problems that have their origin in structural factors in the industry.<sup>141</sup> The finding of durable barriers to entry/expansion and an absence of effective competition in relevant markets indicates the potential for competition problems to arise over the period of this review, thereby justifying the imposition of *ex ante* regulation.
- 8.3 In determining what form of *ex ante* regulation is warranted in this market, ComReg has carried out an assessment of potential competition problems that are likely to arise assuming SMP regulation is absent and taking account of the structure and characteristics of market A.
- 8.4 In the absence of regulation of this market, a dominant operator would have the potential ability and incentive to influence a range of competition parameters, including access, prices, and the variety or quality of goods and services provided.
- 8.5 Three broad types of competition problems may arise in this market where an operator has SMP:
- Foreclosing or excluding competitors to protect its existing dominance;
  - Exploiting customers by virtue of its SMP position; and,
  - Leveraging its market power into adjacent vertically related markets.

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<sup>140</sup> Pursuant to section 12 of the Communications Regulation Act 2002 as amended, ComReg’s relevant objectives in relation to the provision of electronic communications networks and services are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community.

<sup>141</sup> Commission Staff Working Document, Explanatory Note, Accompanying document to the Recommendation, SEC (2007) 1483, dated 13/11/2007 (the Explanatory Note).

[http://ec.europa.eu/information\\_society/policy/ecomms/doc/library/proposals/exp\\_note\\_markets\\_en.pdf](http://ec.europa.eu/information_society/policy/ecomms/doc/library/proposals/exp_note_markets_en.pdf)

## 8.1 Exclusionary practices

- 8.6 In addition to any exploitative practices and potential leveraging into vertically related markets discussed below, an operator may attempt to defend its existing SMP position in the relevant market by engaging in conduct aimed at foreclosing the market.
- 8.7 ComReg's preliminary view is that exclusionary practices which are likely to occur in the market are also those associated with the motivation and incentives of a vertically integrated SMP operator. In addition to raising entry barriers and impeding competition in the downstream retail market, many of the practices outlined in the sections on leveraging above may have the added effect of delaying infrastructure investment and entry to a related wholesale market.
- 8.8 Where a competitor in a related downstream wholesale market relies partially on wholesale inputs from the SMP operator for their own wholesale offering, the SMP operator could restrict or distort competition through practices including refusing to supply access, applying unreasonable or discriminatory terms and conditions of access, and/or creating or exploiting information asymmetries.
- 8.9 In an open competitive market there should be no restrictions that prevent broadcasters and multiplex operators from negotiating access as such agreements would be negotiated on a commercial basis and in good faith.
- 8.10 RTÉ competes with broadcasters for viewing and listenership market share (and related advertising revenues) in the retail market. Given the barriers to entry to this wholesale market, RTÉNL which is RTÉ's subsidiary, is the only network provider and this is likely to remain the case in the timeframe of this review. In this context a situation a vertically integrated SMP entity may foreclose or limit access either tactically or outright to national analogue radio broadcasters, and multiplex operators as otherwise it would likely lose retail audience market share to the programme services they carry as well.
- 8.11 The failure of potential commercial DTT multiplex operators to negotiate successfully with RTÉNL (as discussed in section 4 of this consultation paper) for access to its network may be suggestive of such competitive issues.
- 8.12 As has been previously discussed in section 6 whereas there are legislative provisions under the 2009 Act which that make provisions which may overlap with some of the important elements of *ex ante* regulation these provisions of the 2009 Act do not provide for remedies which may be necessary in this market or account for those outside of these legislative provisions such as multiplex operators for example.

## 8.2 Exploitative behaviour

- 8.13 Economic theory suggests that where a firm possesses market power it is in a position to increase prices above and/or reduce output below competitive levels, thereby allowing higher than normal profits to be earned. These higher profits effectively create a wealth transfer from the consumer to the firm with market power. It is ComReg's preliminary view that an operator with SMP in market A would potentially have the incentive and ability to engage in exploitative practices, such as excessive pricing, and/or inefficiency.

### ***Excessive Pricing***

- 8.14 According to EU competition case law, excessive pricing refers to a situation where the prices charged by a dominant operator are not closely related to the value to the consumer and/or the cost of producing or providing the relevant service.<sup>142</sup> In line with established competition law practice, concerns about excessive pricing arise where, absent regulation, price levels are likely to be persistently high with no effective pressure (e.g. from any existing or potential competition) to bring them down to competitive levels over the period of the review.
- 8.15 ComReg is of the preliminary view that, given the barriers to effective competition analysed earlier in sections 6 and 7, and in the absence of SMP regulation in this market, the potential for excessive pricing and/or margin squeeze to dis-incentivise market entry of national terrestrial analogue radio broadcasters and multiplex operators could arise. This would harm competition where the excessively priced transmission services would make it more difficult for other broadcasters' ability to compete with RTÉ in downstream markets where broadcasters rely on the upstream input to compete. This may, in turn, lead to reduced choice and quality for consumers in the retail market.
- 8.16 It is therefore important to ensure that no excessive pricing and/or margin squeeze is prevented in order to ensure that there is no restriction or distortion of competition, for broadcasters and multiplex operators using RTÉNL's broadcast transmission and broadcast distribution services.

### ***Inefficiency***

- 8.17 A firm with SMP in this market may also, by virtue of the lack of effective competitive pressure in that market, be insulated from the need to innovate and improve efficiency to stay ahead of rivals. This may limit the development of new technology and/or lead to costlier and less efficient methods of production

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<sup>142</sup> Case C 27/76 United Brands v. Commission, [1978] ECR 207, [1978] 1 CMLR 429, para. 250. In United Brands the Court of Justice of the European Union held that: "...charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be... an abuse."

and consequently higher prices for customers than would otherwise exist under competitive market conditions. This, in turn, is likely to lead to a less rich range of offerings for retail end-users than otherwise might occur.

- 8.18 As an SMP operator in wholesale market A, ComReg is of the preliminary view that there may be less effective pressure (absent regulation) on RTÉNL to provide an efficient service than may otherwise be the case. Therefore, delays may arise, for example, in the provisioning of forms of access where broadcasters and multiplex operators may express a demand for an access product which is not provided. This could impede such broadcasters and multiplex operators' ability to compete in related markets and in turn delay the delivery of retail services to end-users. This could, in other terms, effectively foreclose market entry if the business conditions of entry for broadcasters and multiplex operators were time critical e.g. retail end-user decision making at ASO.
- 8.19 Although RTÉNL, would, if it were not part of a vertically integrated entity, want to get as many customers as it could on its network in order to increase its revenues, as its parent (RTÉ) operates in the downstream retail market, concerns by RTÉ about the potential negative impact of other programme services on the advertising revenues it could command, would mean that there may be an incentive to deter market entry by delaying the provision of broadcast transmission services to third parties or by increasing the costs of their access and carriage or by imposing unreasonable terms and conditions. For example, RTÉNL might have a limited incentive in keeping network cost to an efficient level, since higher broadcast transmission charges could be passed through to broadcasters and multiplex operators which would hinder the development of competition and this could benefit the broadcasting activity of RTÉ.

### **8.3 Leveraging of market power into vertically related markets**

- 8.20 As acknowledged in Regulation 25 of the Framework Regulations, where an integrated operator has SMP in one market which has links with other adjacent markets either at a similar or different level in the production or distribution chain, the SMP operator may attempt to transfer (leverage) its market power to such vertically related markets. This could enable the SMP operator to strengthen its position in those related markets and potentially also reinforce its existing market power in the SMP market in question.

#### ***Vertical leveraging***

- 8.21 Vertical leveraging arises where a vertically integrated operator has dominance at one level in the production or distribution chain, e.g. the wholesale level, and can potentially transfer this market power into downstream wholesale or retail markets where it is also active. This would mean that a vertically

integrated operator that is dominant in market A may have the incentive to use this market power to affect the competitive conditions in related downstream markets, such as the market for retail broadcasting services, where competitors rely on this vertically integrated operator for a key input.

### *Refusal to deal/denial of access*

- 8.22 Vertical leveraging can manifest as an outright refusal to supply or a constructive refusal to supply. Refusal to supply is particularly relevant when the SMP operator is vertically integrated which facilitates the SMP operator to gain strategic advantage over rivals in the downstream markets. Constructive refusal to supply could include delaying tactics such as protracted negotiations in respect of the supply of new wholesale products or features, discriminatory use or withholding of information, quality discrimination, disproportionate entry criteria as well as unreasonable terms and conditions associated with access. Further examples of potential leveraging behaviour can include creating or exploiting information asymmetries, margin squeeze, and practices aimed generally at raising rivals' costs.<sup>143</sup> The failure of the commercial DTT negotiation process may be indicative of such potential issues. ComReg's preliminary view is that SMP in Market A may create the conditions which absent regulation, have the potential for these competition issues to arise.

### *Non price issues*

- 8.23 Where the SMP operator is vertically integrated, potential discriminatory behaviour is possible as it can be difficult to observe that equivalent conditions are provided by the SMP operator to broadcasters and multiplex operators in similar circumstances.<sup>144</sup> For example, it may be difficult to compare products used internally with those offered to third parties in the wholesale market, and it may be difficult to compare how products are developed and implemented. A lack of transparency in how products and services are both developed and implemented internally to the SMP operator could make it difficult to demonstrate equivalence and provide the potential and incentive for a means of leveraging market power.

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<sup>143</sup> Unlike predatory pricing, certain practices can be employed which unfairly raise a rival's costs and reduce competition and which do not necessarily require the SMP undertaking to incur short run losses. For example, an integrated firm with market power in an upstream market may have incentives to raise the price of the inputs it sells to its downstream rivals, thereby potentially raising their costs and reducing demand for their products. Furthermore, the integrated operator could potentially give priority to its own affiliate at network bottlenecks or apply standards that are easier for its own affiliate to meet than for its downstream competitors. (See Krattenmaker, T.G. and S.C. Salop (1986) "Anticompetitive Exclusion: Raising Rival's Costs To Achieve Power over Price", Yale Law Journal, 96:209-93; Salop, S.C. and D.T. Scheffman (1987), "Cost-Raising Strategies", Journal of Industrial Economics, 36:19-34).

<sup>144</sup> Regulation 10 (1) (2) of the Access Regulations, states that "The regulator may... impose on an operator obligations of non-discrimination...(a) applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and (b) provides services and information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners."

- 8.24 A vertically-integrated SMP operator may act to foreclose wholesale-based competition in the retail market by creating or exploiting information asymmetries.
- 8.25 An example of information asymmetries could include where wholesale broadcasters and multiplex operators require service level agreements including metrics on service delivery and fault repair to view the overall performance of RTÉNL's wholesale product from a provisioning and service assurance perspective. Failure by RTÉNL to provide such services to wholesale customers could act as a deterrent to entry. Uncertainty for such broadcasters and multiplex operators as to the performance and quality of their purchased inputs relative to the services and information made available internally to a potential competitor (RTÉ) could possibly discourage investments in markets dependent upon RTÉNL's wholesale products.
- 8.26 Information asymmetries may also apply to future planning by the SMP operator. For example, changes by RTÉNL to its network may have significant implications for broadcasters and multiplex operators using its wholesale service and a lack of information and associated uncertainty may impact existing broadcasters and multiplex operators or discourage potential entry to the market. Such information asymmetries may lead to a delayed consideration of broadcasters and multiplex operators' requirements in turn delaying their ability to respond to downstream market dynamics.
- 8.27 An SMP operator may also engage in delaying tactics where it does not refuse to supply a certain input to its downstream competitors but the independent broadcasters and multiplex operators are supplied at a later point in time compared to its retail affiliate. This could come in various forms such as lengthy negotiations. This may restrict competitor entry and would enable RTÉ to protect its advertising revenues from downstream competitors.
- 8.28 Furthermore, an SMP operator in this market may impose undue requirements on potential competitor customers to prevent entry or expansion. These are any contract terms which are unnecessary for the provision of the upstream product by the SMP operator but raise rivals costs or restrict rivals sales. This type of behaviour could include stipulating unnecessarily onerous or unwarranted requirements for security payments or termination penalties.

### *Pricing issues*

- 8.29 Vertical leverage may also be apparent in the use of price. RTÉ has an incentive to minimise the number of broadcasters on the terrestrial network to reduce the potential loss of its advertising revenues which might otherwise occur if more third party broadcasting programme services were made available via terrestrial means. This could occur if, for example, RTÉNL could devise a tariff structure which would discourage broadcasters' interest in accessing its broadcast transmission network. RTÉ through RTÉNL could favour its own digital programme services and multiplex to other programme services and multiplexes by applying discriminatory charges or by engaging in

the practice of margin-squeeze. As a vertically integrated operator which has SMP at the wholesale level and provides a wholesale input on which other operators rely to compete in a downstream market it could price its upstream services in such a way as to impede effective downstream competition by excessively raising its upstream costs or due to an insufficient margin between wholesale and retail prices.

- 8.30 Where an entity is vertically integrated discriminatory pricing practices can manifest and are not easily visible. For example, it may be difficult to compare the prices charged to third parties compared to those charged to its own internal arm.

#### **8.4 Preliminary conclusion on competition problems**

- 8.31 In summary, ComReg's preliminary view is that, absent regulation, there is the potential and incentive for an SMP operator in market A to engage in actions which could inhibit competition at the wholesale level and consequently negatively impact the diversity and breadth of programme services available to end-users in the downstream retail market. ComReg has provided examples of some potential competition problems, but notes that it is neither necessary to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuse. The purpose of *ex ante* regulation is to prevent the possibility of abuses.
- 8.32 On a preliminary basis, RTÉNL has been identified with SMP in the relevant market, and thus has both the incentive and ability to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users. Therefore, it is ComReg's preliminary view that *ex ante* regulation is needed in this market.

**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.**

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

## 9 Remedies – Market A

- 9.1 In section 8, ComReg identified a range of competition problems and competition/consumer impacts that, absent regulation, could arise in the relevant market A by virtue of RTÉNL having SMP. In this section, ComReg now considers the imposition of appropriate and proportionate remedies to mitigate such competition problems.
- 9.2 In accordance with Regulation 8(1) of the Access Regulations, where an operator is designated as having a SMP on a relevant market, ComReg is required to impose on such an operator such of the obligations set out in Regulations 9 to 13 as ComReg considers appropriate. In this regard, the obligations that may be imposed by ComReg on SMP undertakings are those relating to:
- (a) Access;
  - (a) Transparency;
  - (b) Non-Discrimination;
  - (c) Price Control and Cost Accounting; and
  - (d) Accounting Separation.
- 9.3 In addition, Regulation 8(6) of the Access Regulations provides that any of the above obligations imposed must:
- (a) Be based on the nature of the problem identified;
  - (b) Be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Acts 2002-2011 and Regulation 16 of the Framework Regulations<sup>145</sup>;
  - (c) Only be imposed following public consultation and notification of the draft measures to the European Commission, BEREC and other NRAs in accordance with Regulation 12 of the Framework Regulations.
- 9.4 Regulations 12(1) and 12(4) of the Access Regulations also provide statutory criteria that ComReg must take into account before imposing access obligations on an SMP undertaking. These criteria include, inter alia, examining the technical and economic viability of using or installing competing facilities; the feasibility of providing access; the initial outlay of investment by the undertaking; and the need to safeguard competition in the long term.

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Pursuant to section 12 of the Communications Regulation Acts 2002-2011, ComReg's relevant objectives in relation to the provision of electronic communications networks and services are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community.



- 9.5 The considerations set out in the paragraphs above are taken into account, as appropriate, when assessing whether and what form of obligation to impose and are also discussed in further detail in the context of the RIA in section 10.
- 9.6 Apart from the above, in considering the imposition of remedies on SMP operator, ComReg has also taken the following into account:
- The European Regulators Group (ERG<sup>146</sup>) common position on the approach to appropriate remedies in the electronic communications networks and services regulatory framework<sup>147</sup>;
  - The comments letters issued by the European Commission pursuant to Articles 7 and 7a of the Framework Directive in its review of regulatory measures notified by Member States under the EU consultation mechanism for electronic communications services (the “Comments Letters”);
  - The European Commission’s ‘2005 Accounting Separation and Cost Accounting Recommendation’<sup>148</sup>.
- 9.7 ComReg sets out below its proposed approach to regulation within the relevant market A.

### **9.1 Option of No Regulation**

- 9.8 ComReg has considered whether the option of regulatory forbearance is appropriate in the Relevant Market A.
- 9.9 Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations require ComReg to impose at least some level of regulation on undertakings designated as having SMP. In section 6, ComReg set out its view that the relevant market A is not effectively competitive (or likely to become effectively competitive within the timeframe covered by this review). In section 7, ComReg identified a range of competition problems that could occur in this market absent regulation.

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<sup>146</sup> Pursuant to [Regulation \(EC\) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications \(BEREC\) and the Office](#) ERG was replaced with the Body of European Regulators for Electronic Communications (BEREC).

<sup>147</sup> Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, ERG (06)33, May 2006, available at [http://www.erg.eu.int/doc/meeting/erg\\_06\\_33\\_remedies\\_common\\_position\\_june\\_06.pdf](http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf). Please note that BEREC is currently working on up-dating this ERG Common Position. No date for completion of this work has yet been announced.

<sup>148</sup> European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC).

- 9.10 In view of this, absent the imposition of any remedies within the relevant market A, it is ComReg's view that this market would not likely function effectively. For example, in the context of negotiations between RTÉNL and broadcasters and multiplex operators access could be denied or effectively refused, and/or its wholesale service prices could be set at an excessive level (even where agreement for access has been reached).
- 9.11 It is ComReg's preliminary view that the option of regulatory forbearance in the relevant market A is not, therefore, appropriate or justified. The relevant issue to be considered, therefore, relates to what form of regulation is appropriate, in particular, which of the remedies under the Access Regulations are appropriate having regard to the particular circumstances of the relevant market A and the associated competition problems. ComReg sets out its preliminary views on these issues below.
- 9.12 The detail of the specific obligation(s) proposed is set out in the draft Decision Instrument contained in section 11 of this consultation paper. These are considered proportionate based on the nature of the actual and potential competition problems identified in this report, and justified in light of the objectives laid down in section 12 of the Communications Regulation Acts, 2002-2011.
- 9.13 ComReg proposes to closely monitor relevant developments (if any) in the market over the period of the current review, to assess whether the obligation(s) remain appropriate.
- 9.14 It should be noted that due to varying characteristics of broadcasting transmission services across different EU Member States, NRAs have adopted different approaches and regulation has been applied in many cases.<sup>149</sup>
- 9.15 Ireland is among a very select few EU terrestrial broadcasting markets with a vertically integrated operator. However, one such country where there is vertical integration in terrestrial broadcasting markets is Austria where ORS is a technical subsidiary of public service broadcaster ORF. In 2005, the technical operations were separated from ORF's programme activities and relocated to a new company named ORS (which is 60 percent ORF owned). ORF dominates the television and radio market. In Austria, obligations of access, non-discrimination, transparency, accounting separation and price control have been imposed on the incumbent for terrestrial television and radio, and the European Commission had no specific comments at that time on market definition or SMP analysis. The Austrian NRA, more recently submitted a three criteria test notification to the European Commission in which it proposes that the market for terrestrial radio, and for multiplexing and digital terrestrial broadcast transmission satisfy the three criteria test.

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[http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/eu\\_consultation\\_procedures/working\\_doc\\_comm\\_art7\\_en.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/eu_consultation_procedures/working_doc_comm_art7_en.pdf)

## 9.2 Proposed remedies

9.16 Pursuant to Regulation 12(4) of the Access Regulations, when considering whether to impose obligations referred to in paragraphs (1) and (2) of Regulation 12 and, in particular, when assessing whether such obligations would be proportionate to the objectives set out in section 12 of the Communications Regulation Acts 2002-2011, ComReg has taken the following into account:

- *Technical and economic viability of using or installing competing facilities:* ComReg has considered the viability of competing alternatives to the terrestrial transmission facilities of RTÉNL. ComReg's preliminary SMP analysis in section 7 indicates that it does not anticipate alternative modes of terrestrial broadcast transmission which would be capable of constraining RTÉNL's dominance in market A in the timeframe of this review.
- *Feasibility of providing access in relation to capacity available:* Capacity for the provision of terrestrial services is constrained by the finite amount of spectrum available for a national service in bands allocated to broadcasting. However, ComReg is not aware of any significant constraints limiting RTÉNL from providing access to its network for national analogue broadcasters or multiplex operators.
- *The initial investment of the facility owner:* As per Regulation 13(2) of the Access Regulations, ComReg's approach to imposing access remedies in the market is based on principles that, among others, allow a reasonable rate of return on adequate capital employed, taking into account the risks involved.<sup>150</sup> ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs.
- *The need to safeguard competition:* Competition in the retail broadcasting market depends on effective regulation in the relevant wholesale market(s). ComReg believes that the range of remedies discussed in this consultation paper is needed due to RTÉNL's dominance in market A, in order to contribute to the development of competition to benefit end-users.
- *Intellectual property rights:* ComReg's view is that intellectual property rights are not a significant concern in this market.

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According to Regulation 13(2) of the Access Regulations, "When considering the imposition of [price control] obligations under paragraph (1), the Regulator shall, take into account the investment made by the operator which the Regulator considers relevant and allow the operator a reasonable rate of return on adequate capital employed, taking into account the risks involved".

- *Pan-European services:* Regulation of the broadcasting transmission market is dependent on national circumstances. While many NRAs have designated SMP, or found the three criteria test to be met in part(s) of their broadcasting transmission market, other NRAs have deemed the market to be effectively competitive and thus not warranting ex-ante regulation. ComReg is of the view that the principles applied by ComReg in this consultation paper adhere to the European Commission's 2007 Recommendation on Relevant Product and Services Markets.

### ***Obligation to provide access***

- 9.17 ComReg's preliminary conclusions on remedies are selected given the market structure, the extent of the market power of the SMP operator and the particular competition problems which may occur in this market. In this particular case, given the importance of access to the non-replicable network infrastructure, access to market A on fair and reasonable terms and conditions are an important focus of the regulatory policy.
- 9.18 The access obligation referred to here is not intended to represent an exhaustive list of the services which may be subject to a request. 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, means (but is not limited to) access to RTÉNL's sites, masts and antenna systems as is necessary to enable the provision of broadcasting transmission and distribution services. This would include where applicable, access to allow for the installation and maintenance of broadcast transmission and distribution and related equipment and the connection of such equipment to power and other essential services.
- 9.19 Given this meaning, the provision of the following services is covered, as either a fully managed or unmanaged service or combination of both:
- Access to allow for the installation and maintenance of broadcast transmission and/or distribution and related equipment (including provision of access to permit installation by third parties);
  - Access for the connection of such equipment to power and other essential services;
  - Access to sites for the use or establishment of common or exclusive building accommodation; and,
  - Access to and use of shared or shareable broadcast equipment comprising combiners, feeders, data lines, antennas, transmitters and self-contained equipment housing.

- 9.20 As national analogue radio broadcasters and multiplex operators are reliant on broadcast transmission infrastructure provided by RTÉNL for delivery of their services it is appropriate to ensure that effective access is provided.
- 9.21 An access obligation can be justified as a means of increasing competition but this must be balanced against the rights of an infrastructure owner to exploit its infrastructure for its own benefit.
- 9.22 As per Recital 19 of the Access Directive, imposition of an access obligation that increases competition in the short term should not be imposed if it reduces incentives for competitors to invest in alternative facilities that will secure more competition in the long term in the relevant market. Given the high and non-transitory barriers to entry ComReg does not believe that investment in alternative infrastructure capable of constraining RTÉNL is likely within the timeframe of this review.
- 9.23 Given potential exclusionary behaviour as previously discussed, ComReg believes that an access remedy is required in this market.
- 9.24 As discussed in sections 6 to 8, while there are legislative provisions that may overlap with some elements of *ex ante* regulation, for example, section 115 of the 2009 Act, ComReg does not believe that these provide the necessary conditions for access which are applicable under *ex ante* regulation. For example, to counter the potential for the SMP operator to employ a tactical refusal of access ComReg can impose conditions which support the provision of timely and efficient access, such as the implementation of SLAs, and fair, reasonable and timely access. This can include the provision to have in place legally binding SLAs and to provide access to associated facilities on fair and reasonable terms.
- 9.25 Pursuant to Regulation 12(1) of the Access Regulations and in accordance with section 115 of the Act of 2009, ComReg proposes that an obligation be imposed on RTÉNL to provide access to its terrestrial broadcasting transmission network including broadcast distribution and associated facilities in a fair and reasonable and timely manner, and on non-discriminatory terms and conditions (including charges) to broadcasters who have secured a national or quasi-national radio broadcasting contract from the BAI for the provision of terrestrial analogue radio broadcasting services and multiplex operators who have secured a multiplex contract for the establishment, maintenance and operation of a multiplex(es). This is required in order to facilitate sustainable downstream competition.
- 9.26 This obligation allows for the use of RTÉNL's facilities but does not allow for building and erecting of third party towers and masts on RTÉNL sites as ComReg does not consider this reasonable or proportionate. ComReg is of the preliminary view that the conditions of the access obligation suggested in this consultation paper are sufficient for broadcaster and multiplex operators' needs and should enable competition to develop in downstream markets.

- 9.27 The specific detail of this obligation is discussed in section 11.

***Conditions attached to the access obligation***

***Obligation to negotiate in good faith***

- 9.28 Given the potential for an express or constructive refusal to supply, ComReg proposes to impose an obligation that RTÉNL should negotiate in good faith with broadcasters and multiplex operators requesting access to its network and services. ComReg notes that the obligation to negotiate in good faith implies that the responsibility rests with RTÉNL to demonstrate that its approach to negotiation with broadcasters and multiplex operators was done in good faith and that any unmet access requests can be shown to be unreasonable.
- 9.29 Recital 19 of the Access Directive states in relation to access requests to the SMP operator that “*such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity.*” ComReg therefore proposes that when an access request is refused, the objective criteria for refusal should be provided in reasonable detail and in a timely manner to the party making the access request.
- 9.30 In addition, ComReg proposes that an obligation to negotiate in good faith also includes, but is not be limited to, negotiations in relation to the conclusion of fit-for-purpose and legally binding Service Level Agreements (SLAs).

***Obligation not to withdraw access to services and facilities already granted***

- 9.31 ComReg believes that there is also a need for an obligation not to withdraw access to services and facilities already granted without the prior approval of ComReg. Changes by RTÉNL to its network may have significant implications for broadcasters and multiplex operators using its broadcast transmission and broadcast distribution services and ultimately retail end-users of their services. Each occasion will be considered on a case by case basis as there may be circumstances where different timeframes may be appropriate.
- 9.32 The need for an obligation not to withdraw access to services and facilities already granted without the prior approval of ComReg has to balance the requirement for broadcasters and multiplex operators to have some certainty over the future of their own investments against the requirement to support network development. Lack of information regarding changes by RTÉNL to its network may have significant implications for broadcasters and multiplex operators which use its broadcast transmission and broadcast distribution services.
- 9.33 With the introduction of new infrastructure, RTÉNL might wish to discontinue services based on legacy platforms. Furthermore, RTÉNL may propose to withdraw access where demand for certain network services/facilities becomes

redundant over time. ComReg would propose to assess any request by RTÉNL to withdraw access to such existing services/facilities on a case-by-case basis.

- 9.34 While mindful of the need to support network development, ComReg is of the preliminary view that any such withdrawal of access should be flagged sufficiently in advance so as to give broadcasters and multiplex operator's adequate notice of the impending change. The purpose of this is to allow time for alternative supply arrangements or alternative services to be put in place so as to minimise potential adverse effects on downstream competition. Another consideration for ComReg in such cases would be to minimise potential adverse impacts on end-users of services relying on the withdrawn facility.

***Obligation to grant access in a fair, reasonable and timely manner***

- 9.35 Conditions covering fairness, reasonableness and timeliness can be attached to the access obligation which aim to protect the integrity of the access obligation against more strategic rather than outright attempts of access denial e.g. delays in provisioning of access which may discourage potential entry.
- 9.36 In assessing the scope for competition problems to arise in the market in section 8, ComReg identified the potential for an SMP operator to engage in a constructive refusal to supply e.g. through delaying tactics, discriminatory use or withholding of information, disproportionate entry criteria as well as unreasonable terms and conditions associated with access. ComReg thus proposes that a condition should be attached to the access obligation which would oblige RTÉNL to grant access to its transmission and distribution network infrastructure and associated facilities in a fair, reasonable and timely manner.

***Service Level Agreements (SLAs)***

- 9.37 To ensure that conditions of access are provided on fair, reasonable terms and in a timely manner, ComReg proposes to attach conditions to the access obligation to ensure that legally binding SLAs are appropriately concluded and implemented.
- 9.38 As part of RTÉNL's regulatory obligations following ComReg's 2003/2004 market review as detailed in Decision Notice D16/04, RTÉNL had an obligation to make available to all parties with which RTÉNL has contractual arrangements and make available to ComReg, details of the technical specifications, network characteristics and terms and conditions of supply, under a service level agreement which ComReg may oblige RTÉNL to make publicly available. ComReg proposes that an obligation to provide SLAs should be imposed on RTÉNL in this wholesale market.
- 9.39 Furthermore, ComReg proposes that, for the purpose of clarity and to provide certainty to industry, the list of parameters included as part of that SLA obligation should be included as part of the SLA obligation proposed in this market as well. These are located in Appendix A of this consultation paper.

- 9.40 ComReg also proposes to make a specific provision that RTÉNL should be obliged to negotiate in good faith with broadcasters and multiplex operators in relation to the conclusion of legally binding and fit-for-purpose SLAs.
- 9.41 As has been noted in sections 7 and 8 of this consultation paper, RTÉNL has the ability and the incentive to engage in anti-competitive practices to discourage downstream market entry in order to benefit the broadcasting activities of RTÉ. This could include issues related to quality of service, where failure to provide guaranteed quality of service may deter downstream market entry and expansion. Therefore, ComReg has proposed that SLAs should be provided to deter such behaviour. ComReg believes that absent regulation, RTÉNL may not be incentivised to meet any conditions of an agreed SLA, without some level of compensation to wholesale customers, should the SLA be breached.
- 9.42 Therefore, ComReg proposes a specific obligation to ensure that the SLA should specify a level of compensation (service credits) that adequately compensates the customer for a breach of the SLA. For example this may occur where there is a failure to deliver or repair a service appropriately within a prescribed time as described in the SLA. This measure would provide RTÉNL with an incentive to deliver and maintain its broadcast transmission and distribution service to a pre-defined and pre-agreed level of performance or otherwise compensate its customer accordingly. The process of compensation should not be burdensome and the methodology used and calculation of SLA credits should be clearly explained by RTÉNL in the SLA with examples. To ensure the effectiveness of this obligation, it is further proposed that the payment of any service credits should be made in a timely and efficient manner.
- 9.43 Given the potential competition problems identified in this consultation paper relating to discrimination, ComReg is of the preliminary view that certain quality guarantees are appropriate in respect of RTÉNL's provisioning of its transmission network services. Such assurances are also commonplace in contractual agreements between suppliers and their customers.
- 9.44 ComReg notes the ERG Common Position that *“SMP players often prefer not to be committed to supplying that product according to a particular time-scale or quality or to be committed to repairing faults within an agreed time-scale. Commitments of this kind would be normal commercial practice and it is entirely legitimate – and may be necessary for proper functioning of the market – for the NRA to require the SMP player to make reasonable commitments of that nature.”*<sup>151</sup>

<sup>151</sup>

ERG Common Position on Remedies, p. 67.



*Obligation to provide objective criteria for any refusal or part refusal of access*

- 9.45 ComReg also proposes that RTÉNL should be obliged to provide objective criteria for refusing a request, or only partly meeting a request, to the broadcaster and multiplex operator which has made the request. This is considered proportionate and justified in light of the ability and incentives for RTÉNL to refuse to supply to RTÉ's competitors and the associated potential competitive and consumer impacts on related markets. ComReg would thus expect that RTÉNL's response should be fair, reasonable and timely.

**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.**

**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.**

**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.**

**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.**

**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.**

***Obligation of non-discrimination***

- 9.46 In general, non-discrimination requires that the SMP operator apply equivalent conditions in equivalent circumstances to other broadcasters and multiplex operators providing equivalent services and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. Thus, third parties should not be treated less favourably than the SMP operator's own internal operations.
- 9.47 In its Decision Notice 04/122 ComReg had imposed a non-discrimination remedy on RTÉNL with respect to the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks and the wholesale market for television broadcasting transmission services on analogue terrestrial networks.
- 9.48 ComReg proposes that a non-discrimination obligation is a necessary support for access to RTÉNL's network in this wholesale market. The aim of a non-discrimination obligation is to ensure that RTÉNL does not discriminate either between broadcasters and multiplex operators, such as between RTÉ and other broadcasters and multiplex operators. If RTÉNL were only required to provide access, it could potentially discriminate in favour of RTÉ, for example, by providing products to broadcasters and multiplex operators which were not of the same quality or pricing as those supplied to RTÉ. The non-discrimination obligation therefore supports the objective of promoting the development of sustainable competition which should be to the benefit of end-users.
- 9.49 ComReg, in discussions with broadcasters and a party involved in a previous application for commercial DTT multiplex contracts has been informed that there is concern that prices they are or were proposed to be charged were excessive and at least prohibitive and it was not visible as to how the charges relate to their cost of use. It is therefore important to ensure that there is no discrimination in prices charged to actual or potential entrants, to ensure that there is not over-recovery relative to the degree of recovery from RTÉ.
- 9.50 This obligation could be imposed by itself but usually supports other regulatory obligations such as access, transparency and price control. Given the potential to discriminate between RTÉ and other broadcasters and multiplex operators on the terms and conditions of access, quality of service, and price, the obligation of non-discrimination is required to ensure competition problems do not arise.

***Obligation to apply equivalent conditions in equivalent circumstances, and to ensure that services and information are provided under the same conditions and of the same quality***

- 9.51 ComReg recognises there may be commercial sensitivity surrounding the provision of information and services by RTÉNL to broadcasters and multiplex operators, and proposes that it is reasonable to restrict the obligation

regarding non-discrimination to the provision of services and information to a broadcaster and multiplex operator who has already agreed a reference offer with RTÉNL. ComReg does not consider it proportionate or justified to expect RTÉNL to make available commercially sensitive information to all market players, irrespective of whether or not they rely on RTÉNL supplied wholesale inputs to compete.

- 9.52 ComReg suggests that this obligation is a proportionate and reasonable approach taking into account potential commercial sensitivities surrounding the provision of information and services to other broadcasters and multiplex operators.
- 9.53 To ensure that broadcasters and multiplex operators are in the same position as RTÉ, with respect to the provision of information and services, such information and services should be provided at the same time to RTÉ.

#### *SLAs*

- 9.54 ComReg believes that RTÉNL should also ensure that it offers SLAs to broadcasters and multiplex operators in accordance with its obligation relating to non-discrimination.

**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.**

**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.**

#### ***Obligation of transparency***

- 9.55 Transparency supports the monitoring of the non-discrimination obligation. In order for such remedies to be effective there is a requirement that there is

transparency otherwise ComReg and industry players would have no assurance that there was no discrimination by RTÉNL.

- 9.56 In market A, RTÉNL could provide less favourable terms and conditions of access to RTÉ's downstream competitors than to RTÉ itself. Furthermore, broadcasters and multiplex operators require agreed levels of service which may not be forthcoming or inferior to those provided to RTÉ. For example, a lack of transparency on SLAs provided to RTÉ vis-à-vis other broadcasters and multiplex operators could make it difficult to demonstrate that discrimination is not occurring.
- 9.57 Also, RTÉNL could foreclose competition in market A by limiting or withholding information as uncertainty could potentially discourage investments in markets dependent on RTÉNL's wholesale products.
- 9.58 A transparency obligation is also required to monitor and ensure the effectiveness of any price control obligations and to support any accounting separation obligations, as this would allow the calculation of costs and prices (i.e. internal price transfers) to be rendered visible. This would also allow ComReg and industry to monitor the compliance of RTÉNL's pricing behaviour with any non-discrimination obligations, and address potential competition problems relating to cross subsidisation, excessive pricing, price discrimination and the application of margin squeezes.
- 9.59 As set out in Regulation 9(1) of the Access Regulations, transparency obligations may be used in relation to *“interconnection, access or both interconnection and access, requiring such operator to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices”*.
- 9.60 Transparency can be applied on its own but it usually supports other obligations. It is unlikely that the provision of a transparency measure alone would be sufficient to address potential competition problems that have been identified. Transparency serves the purpose of ensuring that access and pricing behaviour are observable.
- 9.61 RTÉNL has been subject to a transparency obligation in the wholesale market for radio broadcasting transmission services on national analogue terrestrial networks and the wholesale market for television broadcasting transmission services on analogue terrestrial networks pursuant to ComReg Decision Notice 04/122.
- 9.62 ComReg is of the preliminary opinion that, transparency obligations are necessary, both to allow monitoring and visibility of how RTÉNL is meeting its obligations, and to provide information which broadcasters and multiplex operators may use to make a decision to enter the retail market. The specific detail of this obligation is discussed in section 11.

- 9.63 To support the proposed non-discrimination obligations and to ensure that market participants have adequate visibility of the conditions and quality of the wholesale service offered, ComReg proposes a number of publication requirements. These relate to the publication of a reference offer, publish separated accounts, publication of information about products and services, and publication of SLAs to support the access obligations.

**Publication of a reference offer**

- 9.64 ComReg proposes that a reference offer should be published on RTÉNL's website which should contain at least a description of all relevant offerings broken down into components according to market needs, a description of the technical specifications and network characteristics of the access being offered, the mechanism of pricing for access and approaching RTÉNL for access, and a description of the associated terms and conditions for supply and use, including prices, to RTÉNL's network infrastructure. It is important to note that this reference offer does not represent an exhaustive list of the services which might be the subject of a reasonable request.
- 9.65 As part of this reference offer, in order to aid transparency and support the obligations of non-discrimination ComReg requires RTÉNL to continue to publish a description of how its tariffs are derived in a similar form and content to that currently being provided by RTÉNL<sup>152</sup>, and that this continues to be made available by it on its website. ComReg may consider refinements, additions or amendments are required to this tariff model documentation to improve transparency.
- 9.66 ComReg proposes that the Tariff Model Documentation shall include details on:
- Sources of information used in Tariff Model (including financial and engineering information);
  - Description of main costs;
  - Description of main assets categories;
  - Description of main cost drivers;
  - Details of assumptions made;
  - Basis of calculation of any returns/margins; and,
  - Explanation of any material changes the assumptions/cost drivers in the Tariff Model from prior years.
- 9.67 The obligation of a reference offer gives potential entrants detail on the supply characteristics and terms and conditions and prices of access before they

<sup>152</sup>

<http://www.rtenl.ie/wp-content/uploads/2011/07/RTE-NL-changes-13-July-2011.pdf>

<http://www.rtenl.ie/wp-content/uploads/2011/02/080220.pdf>

approach RTÉNL. This means that third parties will have an understanding of the type of services and the characteristics and prices of these services on offer before negotiating with RTÉNL thereby facilitating more effective and competitive negotiations between RTÉNL and third parties who otherwise may be deterred from entry due to a lack of information.

- 9.68 Its purpose is to provide a sufficient degree of certainty to allow broadcasters and multiplex operators to plan and run their operations efficiently, but does not prevent them from submitting bespoke requests or requesting additional services where circumstances suggest it.
- 9.69 Any terms not covered by the reference offer would, in the first instance, be subject to commercial negotiation with a right for either party to bring a dispute about such terms to ComReg for resolution.
- 9.70 ComReg recognises that a reference offer would require time to develop. ComReg therefore suggests that it is reasonable to allow RTÉNL four months, from the date of the proposed Decision taking effect, to develop and publish its reference offer. RTÉNL would then be obliged to keep the reference offer publically available and up-to-date on its website.
- 9.71 Reference offers have been imposed by other NRAs in their broadcasting transmission markets. For example in the UK, following its market analysis in 2005 Ofcom imposed a reference offer for the provision of network access on NTL and Crown Castle (now Arqiva).<sup>153</sup>
- 9.72 In other electronic communications markets ComReg has also deemed it necessary to impose the obligation of a reference offer.<sup>154</sup>
- 9.73 ComReg proposes that specific obligations should be placed on RTÉNL regarding any changes to the reference offer. The mechanism should provide for all proposed changes, including changes to prices, and the introduction of new services and facilities to be published or otherwise communicated to broadcasters and multiplex operators in a timely and transparent fashion.
- 9.74 To ensure the effectiveness of this transparency obligation, any proposed changes to the reference offer should not be implemented without prior notification to ComReg, broadcasters and multiplex operators. Furthermore, ComReg proposes to retain flexibility to issue directions requiring RTÉNL to make changes to the reference offer or to publish information from time to time where appropriate for ensuring the effective operation of this obligation. Such changes would be consulted on, and imposed pursuant to a direction in accordance with Regulation 18 of the Access Regulations.

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<sup>153</sup> <http://www.arqiva.com/corporate/documentation/referenceoffers/>

<sup>154</sup> For example, Eircom is obliged to provide reference offers for access <http://www.eircomwholesale.ie/Reference-Offers/>

- 9.75 RTÉNL should publish proposed changes to the reference offer and any proposed changes to wholesale prices (including prices for new services and facilities) at least two months before they come into effect, and notify ComReg of such proposed changes an additional month before publication. This would mean that ComReg would be notified at least three months before proposed changes were implemented, to be followed by publication at least two months before implementation.
- 9.76 In order to offer the greatest flexibility to RTÉNL, other market players and ultimately consumers, ComReg proposes that there should also be provision for ComReg to extend or reduce this period where appropriate on a case-by-case basis. For example, in the case of significant changes to products or prices ComReg proposes to reserve the right to extend the publication and notification periods beyond the two-month period if appropriate and necessary on a case-by-case basis.

#### **Publication of information about products and services**

- 9.77 ComReg proposes that, as part of the transparency obligation, RTÉNL should be required to publish any reasonable information or data which broadcasters and multiplex operators may require in order to be able to compete effectively based on RTÉNL inputs. This could include, for example, accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.
- 9.78 The need for this may arise where broadcasters and multiplex operators require more granular information than would be available via the reference offer discussed above.

#### **Publication of SLAs**

- 9.79 RTÉNL is currently, subject to ComReg Decision Notice D16/04, under obligation to make available to all parties with which RTÉNL has contractual arrangements and make available to ComReg, details of the technical specifications, network characteristics and terms and conditions of supply, under a SLA which ComReg may oblige RTÉNL to make publicly available.
- 9.80 As noted, under the proposed access obligation ComReg proposes that as a condition of RTÉNL's access obligation that RTÉNL should be obliged to negotiate, conclude and implement SLAs in this wholesale market. ComReg further proposes that a transparency obligation is required to ensure that SLAs are kept up-to-date and published on RTÉNL's website. The justification for SLAs is in the context of the access obligation where the failure to provide an agreed level of service could act as a means to deter entry of potential competitors or as a means to discriminate against potential competitors and the transparency obligation further supports the effective application (i.e. monitoring) of this access obligation.



- 9.81 ComReg believes that publication of SLAs would provide more transparency and assurance to ComReg and industry in demonstrating equivalence. As ComReg does not believe that SLAs would contain any commercially sensitive information ComReg believes this is proportionate.

**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.**

**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.**

**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.**

***Obligation of accounting separation***

- 9.82 This obligation is put in place to specifically support the obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations.

In sections 6 to 8 ComReg has identified potential competition problems associated with possible price-related leveraging such as excessive pricing which highlights the importance of establishing a transparent and effective mechanism of accounting separation and transfer charges between the various RTÉ's entities so that costs and its allocation to each customer (RTÉ and competitor broadcasting activities) are efficient and can be transparently identified.

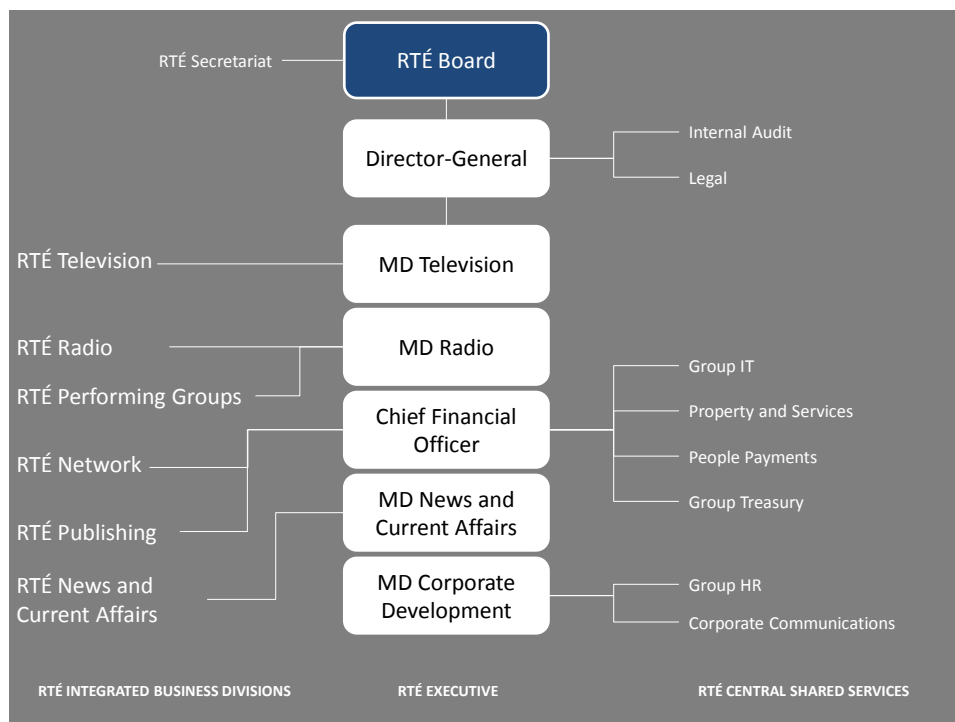
- 9.83 Separated accounts help disclose such possible competition problems and make visible the wholesale and internal transfer prices of a dominant operator's services, thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on RTÉNL to maintain separated accounts.
- 9.84 The main objective of accounting separation is to make non-discrimination and cost-orientation transparent by showing cross-subsidisation between products and thereby enable one to identify unfair cross-subsidisation. In requiring separated accounts for the main products and services, this creates more transparency on internal transfer pricing and repartition of common and joint costs.
- 9.85 It is proposed that RTÉNL should have obligations of transparency and non-discrimination in this market and it is proposed that RTÉNL should also be subjected to a price control obligation. Therefore, the imposition of the obligation of accounting separation on RTÉNL would support these obligations.
- 9.86 As RTÉ should ensure that it conducts its commercial activities such as those of RTÉNL under market conditions it is important that the costs incurred by the commercial subsidiaries, should be the minimum overhead costs allocated to the accounts of these subsidiaries.
- 9.87 ComReg notes sections 108 and 109 of the 2009 Act. Section 108 provides that all transactions entered into by a corporation, as between the activities arising from (a) its public service objectives, and (b) its exploitation of commercial opportunities, shall be made at arm's length and on commercial terms. At the direction of the Minister, a report on compliance with this requirement shall be made by the Compliance Committee of the BAI.
- 9.88 Section 109 of the 2009 Act sets out the general accounting procedures for "a corporation", defined in the Act as meaning RTÉ or TG4 or both, as the case may be. These accounting procedures include the requirement for a corporation to prepare and submit audited accounts to the Minister as required. The BAI, at the direction of the Minister and having consulted with the corporation, shall prepare and publish guidance for the corporation as regards the cost accounting principles and methods to be considered in preparing a statement made in respect of public funding paid to it under section 123 of the 2009 Act. In particular, section 109(9)(b) provides that a corporation shall,

after the end of each financial year, send to the Minister a statement in respect of the total revenue and costs derived by the corporation in that financial year. That statement to the Minister shall distinguish between monies received or expended on (a) activities in pursuance of its public service objectives, and (b) activities in pursuance of its exploitation of commercial opportunities objective.

- 9.89 The above provisions of the 2009 Act appear to be aimed at securing accountability for expenditure of public monies and protecting against inappropriate use of public funds. These provisions are not designed to address issues of SMP per se, and neither provision would, in ComReg's view, result in full transparency of internal pricing in the same manner as under the electronic communications regulatory framework.
- 9.90 ComReg has previously imposed the obligation of Accounting Separation in other markets (telecoms and postal) on Eircom (ComReg document No. 10/67) and on An Post (ComReg document No. 06/63). Furthermore, under the terms of a Concession Agreement between the Minister for Communications, Energy and Natural Resources and BT, BT as the provider of emergency call answering services ("ECAS") is required to prepare and have audited separated accounts for its ECAS operation and submit these to ComReg.

#### **Current reporting requirements of RTÉ**

- 9.91 RTÉ is a vertically integrated operator in that it provides wholesale services as well as offering retail services and thereby competing with other broadcasters. RTÉ is also a statutory corporation established under legislation while RTÉNL is an incorporated company with limited liability and is a 100% wholly owned subsidiary of RTÉ.
- 9.92 For its own internal reporting purposes RTÉ's organisational structure is reported as follows:



Source: RTÉ 2010 annual report.

- 9.93 RTÉNL annually files statutory financial statements with the Companies Registration Office. Statutory financial statements tend to be used to comply with companies' legal obligations, such as compliance with taxation requirements and Companies Registration Office filing requirements. While they are also used to report the financial performance at a given point of time the information contained within them is usually not sufficiently granular in detail to support regulatory decisions.
- 9.94 RTÉ also publishes an annual report<sup>155</sup>, which contains audited financial statements of the RTÉ Group. These financial statements include the reporting of the internal transfer charges between RTÉNL and other RTÉ integrated business divisions. These internal charges are removed on consolidation of RTÉ's activities thereby reflecting the amount RTÉ charges third parties for use of its broadcasting network. However, the annual report does not differentiate between the broadcasting and non-broadcasting customers using its network or between regulated and non-regulated activities. Therefore, the level of detail provided in the RTÉ annual report is insufficient for ComReg when conducting regulatory reviews.
- 9.95 As a result, the current form of publicly available financial statements for RTÉ and RTÉNL does not provide sufficient transparency or financial data of a sufficient level of granularity which would assist ComReg in its regulatory objectives.
- 9.96 Separated accounts are more granular in detail than statutory financial statements and often contain confidential and commercially sensitive

<sup>155</sup> <http://www.rte.ie/about/pdfs/2010-rte-annual-report-for-the-web.pdf>

information and can therefore assist regulators in meeting regulatory objectives. Separated accounts also enable regulators to understand whether or not there are potential cross-subsidisation or competition issues arising from incorrect or inappropriate cost allocations. The information contained within them is presented in a form to meet regulatory needs which often is not comparable to statutory reporting requirements.

### **Main proposals for Accounting Separation**

- 9.97 ComReg proposes that RTÉNL submit separated accounts in a format which assists ComReg in discharging its regulatory functions. This will require financial data to be presented that reflects the broadcasting and non-broadcasting elements of RTÉNL's business for market A.
- 9.98 The main proposals to be included in the obligation of accounting separation are:
- (i) Presentation of accounts (paragraph 9.99)
  - (ii) Transfer charging mechanism (paragraph 9.122)
  - (iii) Allocation of costs (paragraph 9.125)
  - (iv) Audit (paragraph 9.127)
  - (v) Documentation (paragraph 9.138)

#### **(i) Presentation of accounts**

- 9.99 In this consultation ComReg does not propose to prescribe a particular format for separated accounts because the prescription of a particular format at this point could render the accounts inflexible at a future date should requirements change.
- 9.100 Instead ComReg intends to discuss with RTÉNL its regulatory requirements in the presentation of financial data. Therefore, as requirements for financial data change over time this will allow ComReg adopt a flexible approach when requesting this data. It will also ensure that RTÉNL's financial accounting systems can produce the required information in a cost effective and timely manner. This is similar to the approach ComReg has adopted with Eircom, An Post and BT (as the ECAS provider) in other markets.
- 9.101 ComReg is conscious of not imposing an unnecessary burden upon RTÉNL in terms of the accounting separation obligation. ComReg therefore is endeavouring to utilise as much information as contained within the current accounting systems of RTÉNL while at the same time meeting its own regulatory requirements. The proposed separated accounts will draw substantially upon information contained with the statutory accounts of RTÉNL.
- 9.102 However, ComReg is of the preliminary view that the separated accounts should include the following:

- Regulated Accounts;
- Additional financial data (“AFD”); and,
- Documentation.

9.103 ComReg proposes that RTÉNL submit separated accounts to ComReg within four months of the end of its financial year.

### **Regulated Accounts**

9.104 ComReg proposes that the Regulated Accounts would be audited annually and published on RTÉNL’s website. They would show financial data similar in nature to that of the statutory financial statements.

9.105 While the tariffs charged to non-broadcast and local broadcast customers will not be subject to regulation, ComReg, for completeness and reconciliation purposes, requires details of the revenues and expenses of these. ComReg currently receives similar information from other regulated entities.

9.106 Due to the commercial sensitivity of much of the underlying data it may not be possible to provide further analysis in the Regulated Accounts. However, ComReg considers that where necessary it should receive financial data of a more granular nature as part of the AFD (and this is discussed further in paragraph 9.114).

9.107 ComReg is of the preliminary view that the Regulated Accounts should contain the following information:

- A statement or reference to the Regulatory Accounting Principles<sup>156</sup> followed when preparing the Regulated Accounts;
- Income Statement and Balance Sheet; And,
- Notes to the Regulated Accounts (where required).

9.108 The Regulated Accounts would be accompanied by:

- A signed statement from the directors of RTÉNL acknowledging their responsibilities for the preparation of the regulated accounts and confirming their compliance with the requirements of the Decision Instrument in this respect;

<sup>156</sup>

These are discussed further under the obligations relating to price control and cost accounting.

- A report and opinion by an Auditor<sup>157</sup> on the regulated accounts and RTÉNL's compliance with the requirements of this Decision Instrument, in respect of the preparation of the regulated accounts; and,
- The Income statement should provide details on the underlying cost categories under the following headings:
  - Employee costs
    - Wages and salaries
    - Social Welfare costs
    - Pension costs and Life Assurance
  - Other Personnel related operating costs
  - Network electricity
  - Maintenance costs
  - Rent and rates
  - Central shared services costs
  - Other operating costs
  - Depreciation and amortisation

9.109 These classifications reflect those as presented in the statutory accounts for RTÉNL. These could be amended by ComReg from time to time as required. If ComReg requires further details on any of the cost categories it can request this as part of AFD (see below) as this information is likely to be confidential and commercially sensitive.

9.110 The balance sheet should be prepared in a format similar to that used for statutory reporting purposes.

9.111 The notes to the Regulated Accounts will differ, in some respects, to the notes produced for the statutory financial statements with the notes to the Regulated Accounts reflecting ComReg's regulatory requirements.

9.112 ComReg considers that it is important that the Regulated Accounts be accompanied by a directors' responsibility statement. This will ensure that the directors acknowledge their responsibilities for ensuring that the Regulated Accounts are compliant with the Decision Instrument.

9.113 While the specific requirements of any audit are discussed below (see paragraph 9.127) ComReg considers that the Regulated Accounts be

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<sup>157</sup> See ComReg Document No. 12/19 ComReg agrees new 'duty of care' arrangements with regulated entities and their auditors".

independently audited and that the audit opinion reflects whether or not they are *fairly presented in accordance* with (“FPIA”) the Decision Instrument.

#### **Additional Financial Data**

- 9.114 In ComReg’s view it is necessary, in the interests of transparency and non-discrimination, to obtain certain detailed information below the market level as it is typically below the market level that wholesale prices and internal transfer charges are determined. However, much of the information at this level would be of a commercially sensitive and confidential nature the publication which could have a detrimental effect on RTÉNL. Therefore ComReg would require RTÉNL to submit to it AFD for material regulated services and products, in confidence and as required by ComReg.
- 9.115 When necessary ComReg is of the view that the AFD for broadcasting services may be audited by a qualified independent body (which may include a registered Auditor<sup>158</sup>). The nature of the audit may vary compared to that required on the Regulated Accounts. For example, some audits may be on income and expenditure accounts while others may be on specific cost drivers.
- 9.116 As more granular information is sought at the AFD level it may become more difficult to obtain an opinion from a registered Auditor (without incurring substantial cost). Therefore it may be more appropriate to obtain an opinion from a qualified independent body (such as a broadcast engineer, or economist) rather than a registered Auditor. This could apply for example where ComReg required assurance over a particular cost driver.
- 9.117 If ComReg considers that an audit is required on AFD it will discuss these requirements with RTÉNL before the end of its financial period.
- 9.118 ComReg notes that while the costs of operating and maintaining the PSB DTT multiplexes are incurred by RTÉNL the licences for these DTT multiplexes are held by RTÉ.
- 9.119 At present RTÉNL issues RTÉ with invoices for the cost of operating and maintaining the DTT multiplex(es). Therefore when issuing invoices in relation to these DTT multiplex(es) RTÉNL does not differentiate between RTÉ’s own usage and that of third parties.
- 9.120 RTÉ calculates the cost per broadcaster for the use of the DTT multiplex(es) and charges the broadcasters accordingly. This relates to both RTÉ’s own usage and that of third party broadcasters. Therefore details on the revenues and costs associated with the DTT multiplexes are not obtained here but in market B.

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<sup>158</sup> “Auditor” means a firm(s) which is/are authorised to conduct the audit of financial statements of companies registered in Ireland.



## **Documentation**

9.121 While the requirement for RTÉNL to document its systems is discussed further below (see paragraph 9.138) ComReg considers that it should be in two formats:

- Primary Accounting Documentation (which will be publically available on the RTÉNL website); and,
- Secondary Accounting Documentation (which will be submitted to ComReg in confidence).

### **(ii) Transfer charging mechanism**

9.122 With the proposed introduction of the new reporting structure ComReg is also proposing to introduce requirements for RTÉNL to clearly identify how it accounts for transfer charges with RTÉ and its subsidiaries and to report this to ComReg. This would be reflected in both the content of the Regulated Accounts and AFD as well as through its description in the Primary Accounting Documentation and Secondary Accounting Documentation.

9.123 A well defined, transparent and verifiable transfer charging system is necessary to demonstrate non-discrimination and to calculate internal costs and revenues. RTÉNL would be required to ensure that the tariffs it charges RTÉ and its subsidiaries are prepared on the same basis as those that it charges to third parties. If there are any differences in the basis of preparation of tariffs these would have to be explained to ComReg.

9.124 This information will assist ComReg in monitoring RTÉNL's compliance with the relevant non-discrimination obligations with regard to wholesale prices as well as its internal transfer charges. This will also help to detect and prevent unfair cross subsidisation.

### **(iii) Allocation of costs**

9.125 Separated accounts will enable ComReg to assess RTÉNL's compliance with the proposed Price Control and Cost Accounting obligations. While these obligations are discussed in more detail in the next section of this chapter ComReg considers that these should include:

- Cost causality;
- Objectivity;
- Transparency; and,
- Consistency.

9.126 Separated accounts will further ensure that:

- Only those activities which cause costs to be incurred, either directly or indirectly, are allocated the costs;
- Costs are objectively applied and no one gains a benefit at the expense of another;
- The way costs are allocated is applied consistently from year to year; and,
- Transparency is achieved as cost methodologies and documentation has to be published.

**(iv) Audit**

9.127 As noted above ComReg considers that it should seek to have RTÉNL's Regulated Accounts audited by an Auditor. In doing so it considers that the associated audit opinion be addressed to ComReg and RTÉNL whereby both will be owed a "duty of care" from the Auditors. This will provide assurance as to whether or not the Regulated Accounts are compliant with the relevant parts of ComReg's Decision Instrument and thereby enable ComReg to place reliance on them.

9.128 As has been stated, ComReg has imposed an obligation of accounting separation on Eircom and An Post in other markets. The Auditors of the Regulated Accounts owe a duty of care to both ComReg and the regulated entities. While no obligation of accounting separation has been imposed upon BT (as ECAS provider), ComReg is also owed a duty of care by its Auditor in the audit report of the ECAS financial statements.

9.129 The duty of care is contained in Letters of Engagement signed by ComReg, the regulated entities and the Auditors, and is reflected in the wording of the audit reports.

9.130 In determining what level of audit opinion is provided on RTÉNL's Regulated Accounts ComReg is of the preliminary view that a "*Fairly presents in accordance with*" audit opinion would be the most appropriate as it is similar to a "True and Fair" audit opinion on statutory financial statements.

**"Fairly presents in accordance with" audit opinion**

9.131 ComReg considers that an unqualified "*Fairly presents in accordance with*" audit opinion in connection with the regulatory audits would provide it with a reasonable level of assurance that the Regulated Accounts as a whole have been drawn up in accordance with the applicable Decision Instrument. In the context of the Decision Instrument this would mean that they are free from material misstatement.

9.132 It should be noted that the Decision Instrument under which the Regulated Accounts have been prepared is specific to the particular circumstances in this market, taking account of the legislative and regulatory environment in which RTÉNL operates.

9.133 ComReg is of the view that an “*Fairly presents in accordance with*” audit opinion would therefore provide it with reasonable but not absolute assurance that that the Regulated Accounts, taken as a whole, have been drawn up in accordance with the prescribed Decision Instrument, and only in the context of that Decision Instrument, and are free from material misstatement.

9.134 Therefore in providing an unqualified “*Fairly presents in accordance with*” audit opinion the auditor would consider, inter alia, whether:

- The reasonableness of the apportionment methodologies;
- The objectivity of the selection of those methodologies; and,
- The appropriateness and robustness of the data sources supporting the apportionments.

**“Properly prepared in accordance with” audit opinion**

9.135 Where a “*Fairly presents in accordance with*” audit opinion may not be either necessary or obtainable a “*Properly prepared in accordance with*” audit opinion may be appropriate instead.

9.136 A “*Fairly presents in accordance with*” audit opinion may not be necessary where a higher level of assurance is not required by ComReg. For example ComReg might not require the Auditor to form an opinion on the reasonableness of the apportionment methodologies but instead seek an opinion that the prescribed methodologies have been correctly applied. In other instances a “*Fairly presents in accordance with*” audit opinion may not be obtainable depending on the nature of the audit to be undertaken.

9.137 Therefore when applying a “*Properly prepared in accordance with*” audit opinion the accounting framework must be articulated in sufficient detail to allow the auditor to report, inter alia, whether:

- The Regulated accounts and/or the AFD have been compiled in accordance with that framework; and,
- There are material issues of note exist regarding certain services and products.

**(v) Documentation**

9.138 ComReg is of the preliminary view that RTÉNL provide Primary and Secondary Accounting Documentation.

#### **Primary Accounting Documentation**

9.139 In accordance with the Access Regulations, where an obligation of cost accounting is imposed, the regulated entity must publish a description of its cost accounting system which shows at least the main categories under which costs are grouped and the rules used for the allocation of costs.

9.140 Where a regulated entity has a price control obligation this also assists with the burden of proof that charges are derived from costs including a reasonable rate of return on investment, which lies with the regulated entity concerned.

9.141 ComReg requires RTÉNL to publish a description of its cost accounting systems. ComReg requires that this would be published within four months of the end of RTÉNL's financial year.

#### **Secondary Accounting Documentation**

9.142 Associated with the obligation of cost accounting is the proposed requirement for RTÉNL to document its cost accounting systems. It is important for ComReg to understand how costs are allocated by RTÉNL between regulated and non-regulated activities and within regulated activities to RTÉ and third parties.

9.143 It is not intended that the documentation by RTÉNL of its cost accounting systems be open ended. Therefore ComReg proposes that RTÉNL addresses the more material aspects that drive costs within its regulatory accounting process. This approach, which is consistent with accounting separation obligations imposed by ComReg on other regulated entities, should address ComReg's regulatory needs and be proportionate to RTÉNL.

9.144 ComReg will discuss with RTÉNL its requirements in this regard. However, at a minimum ComReg would require sufficient documentation from RTÉNL which would identify the main cost categories in its Regulated Accounts including:

- The primary sources of financial information;
  - RTÉNL's own operating costs
  - Transfer charges from other RTÉ activities
  - The basis for the asset lives applied
  - How fixed asset investment is recorded
- The main assumptions / cost drivers used to allocate these costs to regulated and non-regulated activities and within regulated activities; and,

- How RTÉNL applies the Regulatory Accounting Principles within its cost accounting systems.

9.145 ComReg therefore proposes that RTÉNL maintain sufficient accounting separation to ensure the above principles are applied in a non discriminatory manner and that this is transparent to industry. Appropriate separated accounts would be submitted to ComReg within four months of the end of RTÉNL's financial year.

**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.**

**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.**

### ***Obligations relating to price control and cost accounting***

9.146 RTÉNL is not currently subject to *ex ante* regulatory obligations of price control and cost accounting. However, given the persistent risk of price-related competition problems deriving from an SMP position in the market, ComReg considers that the imposition of a price control and cost accounting obligation is appropriate and proportionate.

9.147 For example, RTÉ by way of RTÉNL would have the ability and incentive to price excessively and/or margin squeeze to deter entry/expansion of broadcasters and potential multiplex operators. RTÉ might also have a limited incentive in keeping network cost to an efficient level, since higher transmission charges would hinder the development of competition and this

could benefit the broadcasting activity of RTÉ. These issues have already been discussed in sections 6 to 8 as part the SMP analysis, competition problems and RIA.

- 9.148 ComReg believes it necessary to impose a price control and cost accounting obligation on RTÉNL as this is the only way to ensure that prices are an actual reflection of cost and that they are non-discriminatory.
- 9.149 Regulatory intervention may be relatively light, such as an obligation that prices are reasonable or heavier such that prices are cost oriented to provide full justification for prices where competition is not strong enough to prevent excessive pricing. The method used should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and end-user benefit.
- 9.150 ComReg has aimed to ensure that this obligation is effective but also that this obligation is not unnecessarily onerous on RTÉNL and so with that in mind, among the potential options for price control implementation ComReg considers cost orientation the most appropriate. When applied on its own, cost orientation would typically allow the regulated company greater flexibility in relation to the setting of tariffs, as long as the company can demonstrate that the tariffs are cost-reflective and are on fair, reasonable and non-discriminatory terms.
- 9.151 ComReg is mindful of Regulation 13(3) of the Access Regulations which states that any cost recovery mechanism or pricing methodology that is imposed by ComReg should serve to promote efficiency and sustainable competition and maximise consumer benefits.
- 9.152 ComReg also takes account of Regulation 13(2) of the Access Regulations which notes that, when imposing obligations under Regulation 13(1), ComReg should take into account any relevant investments made by the operator and allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by other operators while also ensuring that the SMP operator makes a reasonable return on its efficient investment.
- 9.153 The burden of proof to demonstrate that charges are derived from costs including a reasonable rate of return on investment rests with the SMP operator. Following a direction from ComReg as per Regulation 13(4) of the Access Regulations an operator may be required to provide full justification for its price and may, where appropriate, require prices to be adjusted. For the purpose of setting a cost oriented price in the future, ComReg has the option to choose from a number of cost models to calculate appropriate charges so long as it promotes efficiency, competition and end-user benefit. Were ComReg to leave the choice to the SMP operator itself it would likely reduce its effectiveness, contribution to competition and end-user benefit.

- 9.154 Where a cost accounting system is mandated to support price control, a description of the cost accounting system must be made public where at least the main categories under which costs are grouped and the rules used for the allocation of costs are provided.
- 9.155 The tariffs charged by RTÉNL are not currently subject to price control or cost accounting obligations.
- 9.156 These tariffs are derived through a series of tariff models owned and operated by RTÉ and RTÉNL. The tariff models allocate operating costs and capital costs to broadcasting customers based on a series of assumptions and calculations. The cost data for the tariff models tends to be derived from information solely from RTÉ and RTÉNL.
- 9.157 While tariffs for individual broadcasting customers are published, the tariff models underpinning these have not been subject to external regulatory review through a price control remedy. Nor have they been provided to third party broadcasters for their own independent assessment. These tariff models may contain commercially sensitive and confidential data the publication of which could have a negative impact upon RTÉNL. However, it should be noted that the tariff models have been reviewed by ComReg following a request from the Minister for Communications, Energy and Natural Resources under section 130 of the 2009 Act. This review has focused on DTT tariffs for both the simulcast period and post ASO. This review is ongoing.
- 9.158 In the interests of transparency and non-discrimination it is necessary for broadcasters to understand the basis for the tariffs they are being charged. While certain information relating to the tariff models is provided on RTÉNL's website, broadcasters have told ComReg that they believe it provides limited visibility and that there is limited ability for them to query any aspect of the tariffs or the inputs and assumptions used to derive the tariffs. Furthermore, as discussed earlier in this consultation paper, there is no suitable alternative infrastructure available nor, in ComReg's opinion is there likely to be in the timeframe of this review, for the broadcast transmission of national terrestrial broadcasters' and multiplex operators' broadcasting services. Therefore, if dissatisfied with the tariffs charged by RTÉNL, broadcasters and multiplex operators cannot switch to an alternative provider.
- 9.159 In addition, as RTÉNL's tariffs are not subject to regulation there is less certainty over the length of period to which they apply. Currently RTÉNL publishes tariffs on its website which it expects to remain in force for a period of 12 months. However, if RTÉNL considers that due to a change in circumstances that tariffs need to be amended during the period it can amend them unilaterally (upwards or downwards). This can lead to uncertainty for broadcasters as it can be difficult for them to accurately plan their costs in relation to RTÉNL tariffs for an extended period of time (i.e. greater than 12 months).

- 9.160 In contrast, licenses issued by the BAI to broadcasters, tend to be more periods of between 7 and 10 years<sup>159</sup> thereby affording licensees regulatory certainty in this regard. This enables broadcasters to develop business plans for the period of their licenses and to budget for the necessary capital expenditure.
- 9.161 Therefore, currently broadcasters, have to reconcile the regulatory certainty provided by the length of licenses issued by the BAI against a certain level of uncertainty in RTÉNL tariffs as these are only set for a 12 month period.
- 9.162 In comparison, for the telecommunications and the postal sectors for example, regulated prices tend to be set for periods of between three and five years. For both sectors, ComReg, in determining tariffs, has made certain assumptions regarding the future costs and volumes used to derive regulated tariffs.
- 9.163 In terms of national terrestrial broadcasting services there are few broadcasting customers and given the high level of capital commitment required to enter the market, broadcasters do not readily enter and leave the market. This, therefore, leads to generally stable market conditions.
- 9.164 Often, ComReg includes provisions within its price control obligations to allow for interim reviews of prices during the period of a price control. This is to provide for situations where there are significant changes to underlying assumptions or input data. If significant changes are required ComReg generally issues a public consultation to ensure transparency and to continue regulatory certainty.
- 9.165 Pursuant to Regulation 13(1) of the Access Regulations “The Regulator *may ...impose on an operator ...obligations for cost orientation of prices and obligations concerning cost accounting systems....*”
- 9.166 ComReg, in accordance with Regulation13(1) is proposing that RTÉNL be subject the following obligations:
- Price control – cost orientation; and,
  - Cost Accounting.
- 9.167 Although specific to national circumstances, a number of NRA’s throughout Europe have found the need to impose a price control and cost accounting obligation.<sup>160</sup>

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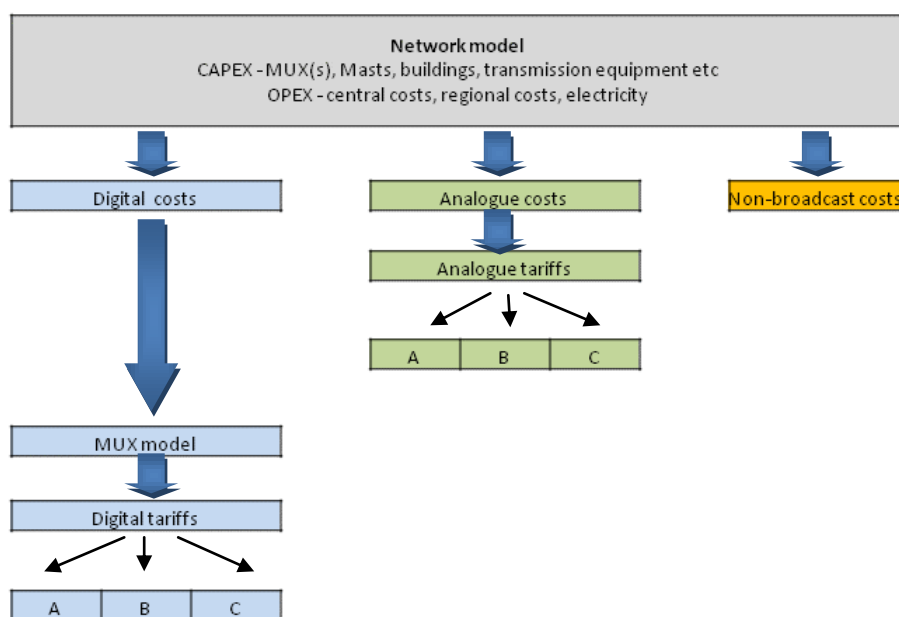
<sup>159</sup> [www.bai.ie/?page\\_id=75](http://www.bai.ie/?page_id=75)

<sup>160</sup> For example, a price control has been imposed in Austria, Estonia, France, Hungary, Lithuania, Poland, Portugal, Romania, Spain, and the UK. In a number of cases this was a cost orientation obligation i.e. Hungary, Portugal, Romania, Spain and the UK. Cost accounting has also been implemented in many cases i.e. Estonia, Finland, France, Lithuania, Poland, Romania, Spain and Sweden.



*Price control*

- 9.168 Given the preliminary view that RTÉNL holds SMP in market A ComReg considers that there is a need for a price control obligation to ensure that the SMP operator sets appropriate wholesale prices such that effective wholesale and retail competition is facilitated.
- 9.169 However, given the complexity involved in such a process the actual determination of cost orientated tariffs may be subject to a separate consultation process.
- 9.170 ComReg is of the preliminary view that, absent an appropriate price control obligation, RTÉNL would have the ability and incentive to set excessive prices and/or margin squeeze in the wholesale market which would potentially harm competition from broadcasters and multiplex operators relying on RTÉNL's wholesale services. ComReg thus considers it appropriate and justified to impose a price control obligation on RTÉNL to guard against such potential excessive pricing and margin squeeze.
- 9.171 RTÉ's vertically integrated structure across broadcasting and transmission network activities is important when considering the pricing principles that should be followed in setting tariffs, and in determining such charges.
- 9.172 As noted in sections 6 to 8, an operator with SMP in this market may engage in excessive or discriminatory pricing activities which would require ex ante regulation.
- 9.173 Sections 7 and 8 highlighted the importance of ensuring that tariffs are set on a transparent and non-discriminatory basis.
- 9.174 The pricing mechanism applied to set tariffs will need to ensure that these incentives discussed above do not become a reality, in order to ensure a level playing field for all broadcasters and not disadvantage Irish viewers and listeners.
- 9.175 The tariffs charged, both internally and externally, should be fair, transparent, reasonable and non-discriminatory. This needs to apply both in the context of:
- Digital versus analogue transmission services;
  - The cost of broadcasting (digital and analogue) versus non-broadcasting services; and,
  - (i) Market A and (ii) Market B.
- 9.176 This is represented visually as follows:



Source: *ComReg*

### *Pricing Methodologies*

9.177 In practice, there are several mechanisms that are generally used to determine regulated prices, which are consistent with the following:

- Maximizing consumers welfare;
- Ensuring RTÉNL recovers efficient costs;
- Avoiding any cost over-recovery by RTÉNL;
- Encouraging efficient investment in infrastructure and not deterring incentives to deploy alternative infrastructure; and,
- Practical implementation.

9.178 ComReg is of the preliminary view that a price control based upon cost is the most appropriate approach to assessing compliance with the obligation while taking into account the five categories above.

9.179 Consumer welfare can be maximised by ensuring that the tariffs charged to broadcasters and multiplex operators are reflective of the cost incurred by RTÉNL in providing the service. This means that broadcasters' and multiplex operators' resources are not unnecessarily diverted away from broadcasting to paying for unreasonable wholesale tariffs. This allows broadcasters and multiplex operators to provide a wider range of services to consumers through content or additional channels.

- 9.180 By ensuring that RTÉNL only recovers its efficiently incurred costs broadcasters and multiplex operators are not being required to pay for inappropriate investment decisions or excess costs for which there would be no benefit.
- 9.181 The avoidance of potential cost over-recoveries by RTÉNL also ensure that tariffs are not excessive and that ultimately there is not a transfer of resources from the consumer to RTÉNL.
- 9.182 Investment in capital intensive industries is often rewarded through a return on capital. The return on capital tends to only be applied to efficiently incurred investment. Therefore if inefficient investment is made no return is awarded.
- 9.183 Economic regulators generally use the Weighted Average Cost of Capital (“WACC”) as the most appropriate measure of the returns that investors require before they will invest in a business. The WACC determines the normal level of profit that must be earned by a business if it is to continue to attract funds in a market where financial resources have many alternative uses. It represents the rate of return a company should earn on its invested capital in order to provide sufficient returns to the investors who are financing the investment. The calculation of an appropriate WACC is not part of this review.
- 9.184 The WACC is regarded as the minimum return a regulator should allow in setting the prices of regulated activities, although sometimes regulators allow returns in excess of the WACC level, to stimulate innovation / investment and to allow for regulatory risk. While the WACC is generally used as the measure of return allowed to regulated companies, it might not be appropriate in the case of services which are not network-based. For example, maintenance services are not capital intensive and as such the return calculated by applying only a WACC mark-up would be negligible.
- 9.185 Economic regulators tend not to use returns on operating costs as a means of financing the costs of regulated companies. Returns on operating costs would not incentivise efficiencies in regulated companies because the higher the operating costs the higher the return. One of ComReg’s aims and objectives is the encouragement of efficient investment.
- 9.186 ComReg is of the preliminary view that this approach should be followed in this market.
- 9.187 The use of cost is also a practical means of setting tariffs. Most of the information that ComReg considers might be necessary to set tariffs can be found in the accounting records of RTÉNL. ComReg is of the view that the use of this data provides a robust basis for tariffs but would also be subject to further regulatory scrutiny. ComReg is also of the view that the use of RTÉNL’s own data minimises the regulatory burden on RTÉNL.

9.188 There are a number of different methods for determining cost. These include:

- Retail minus;
- Reasonable costs; and,
- Cost orientation.

9.189 *Retail minus* is generally used where either there is regulation of a retail market or where there is effective competition in the retail market providing sufficient constraint on the potential to price excessively at the retail level. This mechanism has tended to be used for utility type regulation of wholesale prices where the retail service is identifiable with a single or few prices points allowing for easy implementation. However, ComReg does not consider that the use of *retail minus* is appropriate as RTENL is a wholesale network operator only for market A and there is no separately identifiable retail price point or points on which a wholesale price could be based.

9.190 *Reasonable costs* involve assessing the costs proposed by the SMP operator and determining whether or not they could be considered to be reasonable in the normal course of business. These would include both capital costs and operating costs. In assessing whether costs are reasonable, comparison with other countries and international best practice is often undertaken. Incurred costs which are clearly unnecessary, excessive or avoidable may not be deemed reasonable. However, determining reasonable costs requires a significant analysis of financial information, detailed discussion with the operator and a level of judgment. Comparisons with other countries can also prove problematic where markets, products or services do not align with those in Ireland. Reasonable cost reviews are also more appropriate to annual reviews and not for the setting of tariffs for an extended period of time. As ComReg is of the view that wholesale tariffs for broadcasting should cover more than one year it is of the preliminary view that *Reasonable Costs* is not the appropriate means to determine tariffs on a forward looking basis and may not provide sufficient transparency and confidence from the market that tariffs being charged are not excessive or discriminatory.

9.191 *Cost orientation* tends to be the most widely used means of determining the appropriate wholesale tariffs to be charged. Cost orientation allows the SMP operator to recover its efficiently incurred costs and a regulated rate of return on the appropriate capital base. ComReg uses cost orientation to regulate many wholesale tariffs in other regulated industries. It is also commonly used by other regulators for the same purpose.

9.192 Two principle types of cost orientation are available:

- Benchmarking; and,
- Cost based.

- 9.193 *Benchmarking* costs requires using the costs of similar industries or competitors in Ireland or abroad to determine an appropriate wholesale tariff for the SMP operator. Benchmarking can prove problematic where there are not similar industries or competitors. For example, RTÉNL does not have any comparable competitors in Ireland that use a similar national terrestrial infrastructure network. ComReg does not consider that the use of international benchmarks would be appropriate either. For example, Arqiva in the UK is an independent network company which is not vertically integrated into the retail market unlike RTÉ. Furthermore the geography and population spread of the UK is likely to require differences in network configuration when compared to Ireland.
- 9.194 The use of an appropriate *cost base* requires an assessment of the costs of the SMP operator. This includes both capital costs and operating costs. Adjustments to these costs can be made to reflect efficiencies and to remove potential legacy issues.
- 9.195 In accordance with Regulation 13 of the Access Regulations when imposing cost orientation regulators should take into account the investment made by the SMP operator and allow a reasonable rate of return on the capital. Regulation 13 also requires the SMP operator to prove that the tariffs are derived from cost. To support this, a description of the cost accounting systems is required to be published. When considered necessary compliance can be verified either by the regulator or by a suitably qualified independent body. ComReg has adopted this approach with Eircom<sup>161</sup>.
- 9.196 ComReg set out its preliminary views above that prices charged by RTÉNL for market A should be cost oriented and as outlined above is of the view that they be cost based.
- 9.197 There are a number of options available to ComReg in terms of the costing methodologies used to determine the appropriate regulated wholesale prices under the cost orientation principle.

**Figure 14: The four possible costing methodologies for the setting charges in market A**

	Top-down		Bottom-up	
	Historic costs	Current costs	Historic costs	Current costs
FL - LRAIC		TD LRAIC		BU LRAIC
FDC	HCA	CCA		

<sup>161</sup> See ComReg Document No. 10/67 “Accounting Separation and Cost Accounting Review of Eircom Limited”

- 9.198 In sections 6 to 8 ComReg gave it's of the preliminary view that there is little likelihood of infrastructure being replicated by another operator during the timeframe of this review. This has implications for how ComReg determines which costing methodology it considers would be most appropriate for setting charges in market A.
- 9.199 Aligned to this are the relevant regulatory objectives (as noted above by ComReg) that it must take into account when applying remedies.
- 9.200 ComReg has a number of options available to it in terms of achieving its regulatory objectives which takes into account the current demand and supply situation in the relevant market, technological advancements and the data available to ComReg. ComReg is of the view that the relevant options to determine an appropriate costing methodology can be summarised as follows:
1. Historic costs or current costs;
  2. Top-down ("TD") model, bottom-up ("BU") model or hybrid model; and,
  3. Long run incremental costs (LRIC) or fully distributed costs ("FDC").

***1. Historical Costs or Current costs:***

- 9.201 A key regulatory decision to consider in determining wholesale regulated charges is the cost base to adopt, i.e. historic costs or their current cost equivalents.
- 9.202 Under the historic cost basis, the operator recovers costs actually incurred in providing the products, services or associated facilities, plus a normal rate of return on the investment. The historical cost accounts ("HCAs") are based upon the actual reported financial results of an operator for a given period which has expired. The results from the HCAs should be directly reconcilable with the statutory financial statements of the operator. A potential issue with the HCA accounts is the lack of granularity of the data contained within them. However, as RTÉNL is not selling numerous services (unlike in the telecoms or postal sectors) significant additional granularity is not required from the accounts currently prepared by RTÉNL which are on the basis of historical costs. However, as noted above, a certain level of granularity beyond that contained in the statutory financial statements is required for regulatory purposes.
- 9.203 Current cost accounts (CCA) tend to be used by regulators as cost base when incentivising investment while at the same time accounting for the cost of modern equivalent assets ("MEA"). It is often applied when promoting wholesale competition. In some cases it may also be necessary where there is little or no information available on the initial cost of investments, for example most utility companies have been in place for decades and financial records may not be what they are today. In such cases it is necessary to make assumptions of the likely cost of equivalent assets at today's market values.

However, as noted by ComReg above, wholesale competition is unlikely to take place during the timeframe of this review. Furthermore many of the assets associated with this market are not subject to significant technological change. Some of the most significant asset classes, and which also account for a high level of the costs, are buildings and towers and masts. Another significant asset class includes transmission and distribution equipment. While elements of these might be subject to some technological change this tends to be on a stepped/once off basis and not an incremental/ongoing basis. For example the move from analogue to digital could be considered as a stepped/once off change whereas the technology associated with certain combiners or generators has not changed in many years. Therefore there is little necessity to use MEA on an ongoing basis.

- 9.204 The historic cost basis has the advantage that there is no risk of an operator being paid for services it did not provide, nor being paid more than it spent on assets required to provide the regulated services.
- 9.205 In the case of digital transmission, RTÉNL has invested significant sums in upgrading its network in recent years, the most significant costs associated with towers and masts. As such, the underlying material cost of the network is readily available and therefore the actual cost incurred can be used.
- 9.206 ComReg is of the preliminary view that as there is little likelihood of alternative competing infrastructure being developed in the timeframe of this review and given that the majority of the costs relating to RTÉNL's network have only recently been replaced, the actual costs incurred from the HCA is the most appropriate costs on which to base wholesale regulated charges.

## **2. Top down or Bottom up:**

- 9.207 Another key regulatory decision to consider in determining wholesale regulated charges is the most appropriate modelling approach to use. This choice is interlinked with the choice of the cost valuation base and the cost accounting methodology, and in turn depends on the regulatory objectives given the current and prospective situation in the market.
- 9.208 Traditionally the choice of cost models has been between a Top Down ("TD") and a Bottom Up ("BU") approach.
- 9.209 In TD models the starting source of information for estimating the costs of services is normally the costs actually incurred by the operator. The main disadvantage of the TD approach is that, depending on the services to be modelled, it could require a significant amount of detail from the operators accounting systems and on the inventory of the operator's network. The TD information relies heavily on the robustness of the data provided by the operator. As RTÉNL does not offer numerous services, a lower level of granularity than would be required for postal or telecoms regulation is possible. Also, the information that would be required of RTÉNL is primarily sourced from its statutory financial statements with a certain level of

disaggregation for regulatory purposes. Capital expenditure should be sourced from its fixed asset register and operating costs should reflect the ongoing costs of operating and maintaining the network.

- 9.210 TD models can be developed with either a current cost or a historic cost base. Similarly, both FDC and LRIC are compatible with a TD approach. However, the TD approach implies that the reference point is the operator's actual set of accounts. An issue in this regard is that there will always be some legacy issues by which the model is inevitably constrained in the analysis. The TD approach is not, and cannot easily be converted into a forward-looking approach. Equally, TD models might provide the SMP operator with incentives to over-invest, since incurred costs are generally allowed to be recovered.
- 9.211 However, when using TD models adjustments can be made to reflect certain efficiencies or adjust for legacy issues identified. For example, if certain sites in the RTÉNL network were no longer active (but not yet retired) the cost of these sites could possibly be excluded from the TD model. Operating costs could also be assessed to ensure that only the relevant and reasonable costs of operating and maintaining the network are included.
- 9.212 On the other hand, the advantages of using a TD approach stem from the same aspect of the model, i.e. the starting point of the analysis is the statutory accounts of an existing operator. As a consequence:
- All incurred costs are accounted for (critics of BU models argue that certain cost categories are erroneously ignored); and,
  - TD models manage to avoid disincentives for the SMP operator to invest, since incurred costs are generally allowed to be recovered.
- 9.213 The starting point of BU models is forward-looking demand data; this is used to dimension, through economic, engineering and accounting principles, an efficient network capable of serving that demand (hence its name). The Gross Replacement Costs ("GRC") of the network is then estimated and annualised. Service/product costs are then estimated by allocating the costs of the different network components to the services/products which use them.
- 9.214 Given that BU models do not depend as heavily as TD models on complex accounting data, BU models better reflect the choices of a hypothetical, forward-looking efficient operator from both a technical and an operational point of view, as network legacy cost issues are less of a problem than in a TD context. For the same reasons, they are easier to develop and maintain.
- 9.215 BU models are often used to model the costs of a potential new entrant into the market. However, as noted above ComReg does not consider that there will be new entrants into this market during the timeframe of this review and therefore the use of BU models in this context may not be appropriate.



- 9.216 ComReg is of the preliminary view that a TD model is likely to be more compatible with the use of historic costs as the relevant cost base. This is because no new entrants are likely during the timeframe of this review and a material proportion of the capital costs have been incurred in recent years.
- 9.217 The TD model also uses as its starting point the audited statutory accounts of RTÉNL. While any model developed for tariff setting is likely to go to a level below the statutory accounts (for example efficiency adjustments, likely future changes) its results will still be reconcilable.
- 9.218 ComReg is of the preliminary view that the TD data is the appropriate choice for this cost model

### 3. *LRIC or FDC:*

- 9.219 Another key regulatory decision to consider in determining wholesale regulated charges is the cost accounting approach to adopt. ComReg considers that LRIC cost accounting methodology and the fully distributed cost methodology (also known as fully allocated costs) are relevant in this regard.
- 9.220 ComReg is of the preliminary view that the most appropriate cost accounting approach to adopt is FDC. The FDC methodology allocates all the operator's costs from their financial information to all the services, products or regulated operations of the company. ComReg believes that the FDC approach is appropriate as it is based on historic accounting information. While the use of historic costs does not incentivise efficiency, adjustments can be made for this.
- 9.221 FDC data is also open to a level of subjectivity from a regulated entity where it has multiple markets, services and products such as in the telecoms industry. However, as previously noted RTÉNL does not offer services to the same extent as in telecoms and postal markets by Eircom or An Post for example and therefore the level of subjectivity in allocating costs under FDC is greatly reduced.
- 9.222 ComReg is of the view that an alternative to FDC cost accounting is the use of various forms of Long Run Incremental Cost accounting. This cost accounting methodology includes all of the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned, plus an apportionment of joint and common costs. These include:
- Long Run Incremental Cost (“LRIC”)
  - Long Run *Average* Incremental Cost (“LRAIC”); and,
  - Long Run *Average* Incremental Cost *plus* (“LRAIC plus”)
- 9.223 LRIC, and its variations, can be used where an additional service is added to an existing network and the new service only pays for its incremental costs as other tariffs (regulated and unregulated) are already covering the other costs (including common costs) of the network.

- 9.224 LRIC calculates the cost of providing a defined increment of output, on the basis of forward looking costs incurred by an efficient operator. It identifies the range (between the incremental cost ‘floor’ and stand-alone cost ‘ceiling’) between which a pricing signal could be considered rational. It therefore helps NRAs in setting prices that neither encourage inefficient investment nor discourage efficient investment.
- 9.225 LRAIC is the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned over the long-run. This however does not include an apportionment for common costs.
- 9.226 LRAIC plus includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. LRAIC plus is a mark up to allow recovery of fixed and common costs typically using an equi-proportionate mark up (“EPMU”). The LRAIC cost accounting methodology does not include a mark-up for joint and common costs.
- 9.227 LRAIC plus is more commonly used in the telecoms industry where there is a high level of indirect (duct and cables) and common costs (exchange buildings) which require allocation to multiple services (line rental, broadband, voice calls).
- 9.228 As noted above pure incremental cost accounting does not allow for the recovery of common costs. If it were used, other services apart from the new service would have to cover the costs of these common assets. For example, if LRIC were used for the introduction of DTT this would only bear the cost of the new DTT assets. On the basis of non-discrimination all users of DTT (RTÉ and third party broadcasters) would be charged the incremental cost only. Other services, such as analogue radio and non-broadcast services would be required to cover the common costs. This is despite DTT, analogue radio and non-broadcast services all using the same common assets.
- 9.229 ComReg is of the preliminary view that a FDC approach combined with a TD costing model is the most appropriate method to set charges in market A.
- 9.230 ComReg is of the preliminary view that FDC is the preferred cost accounting methodology for the setting of market A tariffs combined with a TD cost model (with appropriate efficiency adjustments). It is recommended that this approach is used as the basis of setting tariffs in market A as it mirrors the price that RTÉNL incurred in rolling out its network.
- 9.231 In setting the timeframe for tariffs ComReg must reflect the necessity for RTÉNL to recover its efficiently incurred costs while at the same time providing certainty on the tariffs purchasers of wholesale services will be charged. When doing so ComReg bases the regulated tariffs on financial data adjusted for certain economic forecasts. This is to avoid possible fluctuations in the tariffs. These economic forecasts cover both supply and demand factors.

- 9.232 ComReg must determine the likely usage of RTÉNL's infrastructure over the timeframe of the review including new users or possible exits from the market by service providers using the infrastructure. If the timeframe is too short regular updating of tariffs would be required creating uncertainty for all.
- 9.233 ComReg must also dimension the expected expenditure on the network over the timeframe of the review. For capital expenditure ComReg must dimension what level of investment would be required over the timeframe of the review; the shorter the timeframe the lower the likelihood of significant capital expenditure. However, if there a consecutive short term reviews there may come a point where significant expenditure is required causing a spike in tariffs. Aligned to this is the need to have appropriate asset lives applied to the capital expenditure. Where asset lives are too short investment would be recovered over too short a period resulting in higher tariffs. Where asset lives are too long RTÉNL would be required to wait too long to recover its investment and this may affect further investment in its network.
- 9.234 Operating costs must also be considered to ensure that they reflect the costs of operating the network over the period of the review. This ensures that fluctuations in costs (e.g. additional costs for severe weather, voluntary redundancy schemes) are removed.
- 9.235 As mentioned elsewhere in this consultation paper RTÉNL currently updates its tariffs annually, whereas the BAI tends to grant contracts for a period of 7 to 10 years. When determining timeframes for other regulated industries ComReg often allows for interim review periods. These take account of possible unforeseen fluctuations in underlying data and assumptions used to determine tariffs.

### *Cost accounting*

- 9.236 The obligation to maintain appropriate cost accounting systems generally supports the obligations of price control and accounting separation, and can assist ComReg in monitoring the obligation of non-discrimination. ComReg proposes to oblige RTÉNL to maintain appropriate cost accounting systems in respect of wholesale products, services or facilities.
- 9.237 To support the effective operation of a price control obligation, it is necessary for RTÉNL to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. A key part of this process is the stage which identifies those parts of the underlying activities or network components that directly support, or are consumed by, those particular services or products. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product.
- 9.238 The division of services and products, and the corresponding costs, capital employed and revenues between the different services and products should be

reflected in costing systems, and coherence and integrity of information should be assured. Where such particular costs form part of the cost of an SMP service, ComReg needs to have visibility as to the basis of and amount of allocation across all services.

**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.**

**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.**

**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.**

## 10 Regulatory Impact Assessment – Market A

- 10.1 The Regulatory Impact Assessment (RIA) is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have a desired impact. It is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- 10.2 ComReg’s approach to RIA follows the RIA Guidelines<sup>162</sup> published by ComReg in August 2007 and takes into account the Government’s Better Regulation programme<sup>163</sup> and international best practice (for example, considering developments about RIA published by the European Commission and the OECD).
- 10.3 Section 13(1) of the Communications Regulation Acts 2002-2011 requires ComReg to comply with Ministerial Policy Directions. In this regard, Ministerial Policy Direction 6 of February 2003<sup>164</sup> requires that, before deciding to impose regulatory obligations, ComReg shall conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the Government’s “Better Regulation” programme.
- 10.4 ComReg’s approach to RIA follows five steps:
- Step 1: Describe the policy issue and identify the objectives.
  - Step 2: Identify and describe the regulatory options.
  - Step 3: Determine the impacts on stakeholders.
  - Step 4: Determine the impacts on competition.
  - Step 5: Assess the impacts and choose the best option.
- 10.5 The purpose of a RIA is to aid decision-making through identifying regulatory options and analysing the impact of those options in a structured manner. The Government’s Revised RIA Guidelines state that:

*“RIA should be conducted at an early stage and before a decision to regulate has been taken.”*

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<sup>162</sup> ComReg, “Guidelines on ComReg’s Approach to Regulatory Impact Assessment”, [ComReg Document 07/56a](#), 10 August 2007 (the ‘RIA Guidelines’).

<sup>163</sup> Department of the Taoiseach, “Regulating Better”, January 2004. See also “Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis”, June 2009, [/www.betterregulation.ie/eng/Publications/Revised\\_RIA\\_Guidelines.pdf](http://www.betterregulation.ie/eng/Publications/Revised_RIA_Guidelines.pdf).

<sup>164</sup> Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

- 10.6 The European Commission, in reviewing its own use of impact assessments, also notes that:

*“Impact assessments need to be conducted earlier in the policy development process so that alternative courses of action can be thoroughly examined before a proposal is tabled.”<sup>165</sup>*

- 10.7 Having regard to these guidelines, it is clear that the RIA should be introduced as early as possible in the assessment of potential regulatory options, where appropriate and feasible. The consideration of regulatory impact provides a discussion of options, and the RIA should therefore be integrated within the overall preliminary analysis. This is the approach that ComReg is following in this market review. The RIA will be finalised in the final Decision Instrument, having taken into account all the responses to this consultation paper and any comments from the Competition Authority and the European Commission.

### **10.1 Step 1 - Describe the policy issue and identify the objectives**

- 10.8 ComReg’s principal objective is to ensure that broadcasting transmission services provides for effective competition to positively benefit end-users. To this end, ComReg aims to ensure that a dominant operator is prevented from potential exploitation of its market power, as this would negatively impact the retail market.
- 10.9 As has been discussed previously in this consultation paper, ComReg notes that this is a second market review of broadcasting transmission services, and that regulatory remedies were put in place following the previous (first round) market review in 2003/2004.
- 10.10 The market analysis concluded that RTÉNL had SMP in two markets. A range of actual and potential competition problems were identified and, in order to address these, remedies were imposed (obligations of transparency and non-discrimination).
- 10.11 In this review, ComReg has carried out a preliminary analysis of competition which indicates that RTÉNL has SMP in the wholesale market for access to market A. Further to 27(4) the Framework Regulations, following a finding of SMP, ComReg is obliged to impose at least one regulatory obligation. Therefore, not imposing a regulatory obligation is not an option under the Framework Regulations or under the Access Regulations.

<sup>165</sup>

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Second strategic review of Better Regulation in the European Union”, COM(2008) 32 final 30.01.2008, p. 6.

- 10.12 There is one broadcast transmission provider in this market, RTÉNL. RTÉNL has built a transmission network capable of digital broadcast transmission on a national basis with ASO expected on the 24 October 2012. While analogue terrestrial television services will cease on 24 October 2012, analogue terrestrial radio services will continue to be broadcast.
- 10.13 ComReg does not believe the competitive conditions of this market will be substantially altered in the timeframe of this review as RTÉ, through its subsidiary RTÉNL, has sole control of the network infrastructure in this market. The fact that this infrastructure also caters for the transmission of digital signals (which should allow for the carriage of more programme services) rather than analogue signals alone, as was the case at the time of the ComReg's previous market review, does not improve the competitive conditions of the market due to the incentives of RTÉ. As RTÉ has the ability and incentives to engage in exploitative and exclusionary behaviour in this market in order to protect its audience share of the retail market and in turn the commensurate advertising revenues it can command, this may mean that quality and choice is restricted in the retail market for end-users.
- 10.14 It is therefore necessary and appropriate, to impose regulatory obligation(s) on RTÉNL in order to facilitate greater choice and quality to end-users and to ensure a level playing field for at the wholesale level.
- 10.15 There are a number of considerations to take into account since ComReg's last market review in 2003/2004 which ComReg considers require the introduction of remedies. These include:
- The Broadcasting Act, 2009 and Analogue Switch Off;
  - Investment by RTÉNL in infrastructure; and,
  - Concerns expressed by broadcasters.

#### **The Broadcasting Act, 2009 and Analogue Switch Off**

- 10.16 ComReg imposed obligations of transparency and non-discrimination on RTÉNL in 2004 following the designation of SMP as ComReg believed these obligations to be appropriate at that time. ComReg, at that time, believed that this level of regulation was appropriate, expecting that this would facilitate growth and development of a market which was new to *ex ante* regulation.
- 10.17 The 2009 Act introduced the possibility of digital terrestrial services entering the market. This would enable multiplex operators programme services to compete at the retail level with RTÉ, however, any potential multiplex operator would require access to RTÉNL's infrastructure for the purposes of broadcasting their own programme services.
- 10.18 The move to digital terrestrial transmission should mean that there is capacity available for more content on the terrestrial network but the potential

competition problems are exacerbated as well. This is because ComReg is of the preliminary opinion that over time potential competition problems in a terrestrial context have remained for analogue broadcasters and they have now also expanded (to include issues for potential multiplex entrants) with the move to digital transmission such that more rigorous *ex ante* regulation is required to address failures in market A.

10.19 With the potential for more competition from a greater number of broadcasters and broadcasting content an SMP operator may engage in anti-competitive activity to protect its own position in the downstream market. While an SMP operator would earn more revenues from carriage of a greater number of broadcasters and multiplex operators, broadcast transmission revenues are not comparable to the advertising revenues that can be commanded.<sup>166</sup> Therefore, the market conditions may not be conducive to a competitive outcome as entry may be limited to the downstream retail market by anti-competitive behaviour in this wholesale market.

10.20 ComReg considers that it is unlikely that an alternative national terrestrial transmission source will develop in the timeframe of this review and so broadcasters and multiplex operators will be dependent on access to RTÉNL's network infrastructure in order to provide their own market services.

10.21 It is therefore important to ensure that access to RTÉNL's infrastructure is not foreclosed or limited and that access is appropriately priced as there are currently no alternative network infrastructure options available and therefore negotiation of reasonable prices by commercial means may be less likely.

### **Investment by RTÉNL in infrastructure**

10.22 RTÉNL has made significant investment in upgrading its network to cater for digital terrestrial transmission. The number of sites considered necessary for transmission of digital services will reduce from the current number used for analogue television services.

10.23 Much of RTÉNL's network infrastructure has been in place for a long time and has required replacement regardless of the move to digital transmission. Some of this has involved the replacement of towers and masts which require significant levels of investment.

10.24 As the sites required for digital broadcasting may be different to the sites required by RTÉNL to offer analogue broadcasting and non-broadcasting services it would be necessary to ensure that costs are allocated appropriately across the network. This is to ensure that broadcasting and non-broadcasting customers receive their fair share of costs in a non-discriminatory fashion.

<sup>166</sup>

For example, according to RTE Annual Report and Group Financial Statements 2010, total group (after removal of intra group revenues and costs) advertising income was €132.647 million in the year ended 2010, while transmission, mast and towers income was €15.085 million.



### **Concerns expressed by broadcasters**

- 10.25 In recent years concerns have been expressed to ComReg from some broadcasters regarding the pricing of RTÉNL's broadcast distribution and broadcast transmission services. Concern has been expressed at the perceived lack of transparency in the tariffs being charged by RTÉNL. None of these tariffs have been subject to independent review.
- 10.26 The introduction of the obligations of price control and cost accounting would enable ComReg to assess the validity of any future complaints and provide transparency and/or assurances that the calculation of tariffs by RTÉNL is reasonable.
- 10.27 While it is not necessary for ComReg to point to actual examples of competition problems arising from dominance, where SMP is identified in a market such competition problems may arise absent regulation.

### **10.2 Step 2 - Identify and describe the potential regulatory options**

- 10.28 ComReg recognises that regulatory measures should be kept to the minimum necessary to address the identified market failure in an effective, efficient and proportionate manner. There are a range of potential regulatory options available to ComReg to address competition problems in this market.
- 10.29 In this regard, regulation can be considered to be incremental, such that only obligations which are necessary and proportionate to the competition problems which have been identified are imposed. The lightest measure that can be imposed is the obligation of transparency. Should this be insufficient to address competition problems on its own, ComReg may apply a non-discrimination obligation. If this is still not sufficient, ComReg may next consider the imposition of an access obligation, generally supported by accounting separation obligations. The final measure to be considered is the imposition of a price control and cost accounting remedy.
- 10.30 The question of regulatory forbearance and the incremental imposition of one or more of the above obligations are considered below.

#### ***Forbearance***

- 10.31 In sections 6 to 8 ComReg set out its view that this market is neither effectively competitive nor likely to become effectively competitive within the timeframe covered by this review.
- 10.32 As such, absent the imposition of any remedies, it is ComReg's preliminary view that this market would not be likely to operate in an effectively competitive manner. It is ComReg's preliminary view that the option of regulatory forbearance in this market is not, therefore, appropriate or justified.

### ***Transparency Obligations***

10.33 Following ComReg's review of potential competition problems in sections 6 to 8 ComReg is of the preliminary view that a transparency obligation is necessary in this market to facilitate the development of effective downstream competition.

10.34 However, ComReg is of the view that transparency obligations on their own are not sufficient. While transparency obligations allow monitoring and observation of actions, they do not directly affect the actions/ behaviour of an SMP operator itself.

### ***Non-Discrimination Obligations***

10.35 In light of the competition problems identified in sections 6 to 8 ComReg is of the preliminary view that a non-discrimination obligation should be imposed on RTÉNL. A non-discrimination remedy requires that RTÉNL ensures that other broadcasters and multiplex operators being provided with the same terrestrial transmission services are not treated differently, for example in a different manner to the services which RTÉNL provides to RTÉ.

10.36 The transparency obligation is complementary to this non-discrimination obligation as it provides the means of observing that discrimination is not occurring. In view of potential issues of discriminatory treatment (on price or non-price terms), transparency obligations alone would not address such issues. Furthermore, a non-discrimination obligation itself (or coupled with transparency) does not specifically address what type of product or service should be offered, or how it should be offered. Recourse to a non-discrimination obligation tends to be on an *ex post* basis, so that a broadcaster and multiplex operator alleges a breach after the event.

10.37 Thus, the operation of the non-discrimination and transparency obligations alone are considered inadequate by ComReg as a means of ensuring *ex ante* that RTÉNL provides access, including requests for different types of access in a fair, reasonable and timely manner.

### ***Access Obligations***

10.38 In its review of the potential competition problems in sections 6 to 8, ComReg identified issues related to denial of access. While a non-discrimination obligation would be a necessary supporting obligation to address these issues, it is ComReg's preliminary view that it would not on its own, or coupled with transparency obligations, be sufficient.

- 10.39 An access obligation gives operators the right to request access and establishes the principles on which the relevant products and services should be made available. ComReg is of the preliminary view that, an access remedy relating to the requirement to provide access, and to do so in a fair, reasonable and timely manner (and to provide objective reasons where requests for access are refused); the requirement to negotiate in good faith; the requirement not to withdraw access to facilities already granted is required in this wholesale market.
- 10.40 It is ComReg's preliminary view that the absence of such obligations would hinder the development of effectively competitive retail markets by restricting or distorting competition to the detriment of end-users.
- 10.41 ComReg is cognisant of the investment RTÉNL has had to make in this market. However, ComReg does not believe that in the absence of a stipulated access remedy, competition will develop to the benefit of retail end-users. ComReg believes that this access obligation is not imposing an unreasonable burden on RTÉNL. In a competitively functioning market RTÉNL would have the incentive to attract as many customers as possible to increase its revenues. The imposition of an access obligation is not at the denial of RTÉNL's rights to be allowed a reasonable return reflective of the costs incurred in granting access.
- 10.42 In view of SMP designation and the competition problems identified in relation to a potential refusal of supply, ComReg proposes that, it is justifiable to oblige RTÉNL to have an obligation to supply access to its broadcast transmission and broadcast distribution network. The aim of the access remedy is to ensure that broadcasters and multiplex operators can access wholesale products/services which will allow them to compete effectively in the retail broadcasting market without having to replicate RTÉNL's extensive network of infrastructure as replication of comparable network services is extremely difficult for the reasons already discussed in sections 6 to 8 of this consultation paper.
- 10.43 Access obligations are therefore considered necessary and appropriate in achieving the objectives of section 12 of the Communications Regulation Acts 2002-2011 and Regulation 16 of the Framework Regulations, namely the promotion of competition, and protecting the interests of end-users.

#### *Accounting Separation Obligations*

- 10.44 ComReg is of the preliminary view that RTÉNL should ensure its wholesale prices and its internal transfer prices are transparent in view of the potential competition problems identified in sections 6 to 8.
- 10.45 Separated accounts would make visible the wholesale prices and internal transfer prices of RTÉNL's services, thereby facilitating transparency as regards any potential misallocation of costs across different services. It is

therefore considered proportionate to impose an obligation on RTÉNL to keep separated accounts to help disclose possible competition problems which might otherwise undermine the proposed access, non-discrimination, transparency and price control obligations.

### *Price Control and Cost Accounting Obligations*

10.46 In light of the review of competition problems in sections 6 to 8 ComReg is of the preliminary opinion that it is necessary to ensure that wholesale charges for access should be subject to price control and cost accounting obligations. ComReg has proposed imposing requirements that access is cost oriented, where the detailed nature of the specific costing methodology may be subject to a separate pricing consultation paper.

10.47 It is ComReg's preliminary view that RTÉNL has SMP, there is limited constraint offered by actual competition, potential competition and countervailing buying power and as a consequence, RTÉNL's wholesale prices are not likely to be appreciably constrained in the absence of regulation. ComReg is of the view that transparency, non-discrimination and access obligations combined are not sufficient to address this potential market failure and therefore a price control and cost-orientation obligation is necessary to address the potential for discriminatory pricing.

## **10.3 Steps 3 & 4 - Determine the Impacts on Stakeholders and Competition**

10.48 ComReg has proposed that regulatory forbearance is not an option and so it can be discounted when considering impacts on stakeholders.

10.49 ComReg will now identify the incremental impact of each obligation on stakeholders.

10.50 ComReg will consider the potential impact on RTÉ and RTÉNL and the potential implications for competition and end-users arising from the proposed obligations.

### ***Impact on RTÉ and RTÉNL***

#### *Access Obligations*

10.51 ComReg's preliminary view is that transmission services voluntarily provided over RTÉNL's network may not exist in some cases absent regulation. Absent regulation, access to RTÉNL's broadcast transmission infrastructure may be

restricted (either explicitly or tacitly) or to supplied on discriminatory or unreasonable terms and conditions.

10.52 In light of this, ComReg has proposed that there is a need for an access obligation to be imposed on RTÉ NL. This relates to access for broadcasters and multiplex operators for the provision of terrestrial broadcast transmission services required for sustainable downstream competition. This access obligation would be applicable to broadcasters and multiplex operators who have secured a national or quasi-national radio broadcasting contract from the BAI for the provision of terrestrial analogue radio broadcasting services and/or a multiplex contract for the establishment, maintenance and operation of a multiplex(es).

10.53 No access obligations have been previously imposed on RTÉ NL; however, given the range of potential competition issues discussed in this consultation paper ComReg is of the opinion that the conditions of this obligation are proportionate and justified.

10.54 RTÉ is a vertically integrated entity and therefore it is relevant to consider the impact of this obligation on both its upstream and downstream operations. At the retail level RTÉ has the most viewed and listened to national television and radio programme services in the state. RTÉ generally operates on a 50:50 public broadcasting model.<sup>167</sup> This means that approximately 50% of its revenues are derived from commercial activities. Commercial advertising revenues in the broadcasting sector are generally related to the amount and type of viewers/listeners a broadcaster can reach i.e. based on every 1,000 population and type reached.

10.55 From a retail perspective, it may be that in the long run RTÉ may face more competition in the retail market should the access obligation(s) be imposed in this market. For example, according to a report by Athena Media in 2010, as per footnote 170 below, RTÉ television programme services had a 70% market share of viewers on the analogue terrestrial platform in 2010 and 27.1% on cable and satellite platforms which have a greater number of competing programme services. However, DTT is unlikely to be able to provide anywhere near the number of programme services which are available via cable and satellite. The initial line up on DTT includes nine television programme services compared to hundreds on cable and satellite platforms. In any case, some reduction of viewership/listenership time would likely translate to a reduction in commercial revenues for RTÉ. However, given its popularity due to its position as the national public service broadcaster, its access to key content such as certain live sports events and the fact that circa 50% of its revenue stream is publicly provided, the revenue impact on RTÉ is likely to be less than would otherwise be the case.

<sup>167</sup>

Athena Media, Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland (BAI), august 2010.

10.56 From a wholesale perspective RTÉNL would experience an increase in revenue streams in the case where there was the addition of more customers using its network (e.g. multiplex operators). This means the net revenue impact on RTÉ (as a group entity) would be lower. Furthermore, RTÉ's own costs may fall due to a greater sharing of common costs across the network. It should be noted that under the cost orientation principle RTÉNL would be allowed to cover its costs of providing services to its customers as well as allowing RTÉNL to earn a reasonable rate of return on its efficient investment.

10.57 While ComReg acknowledges that the conditions of this access obligation, such as the requirement to provide SLAs, might impose a burden on RTÉNL in terms of time and other resources required to meet these conditions, ComReg does not believe these are unwarranted in the context of the need to ensure that RTÉNL provides an agreed quality service to broadcasters and DTT multiplex operators.

10.58 ComReg believes that the need to seek approval from ComReg before withdrawal of services, the need to negotiate in good faith, grant access in a fair and timely manner and the need to provide objective criteria for any refusal of access to broadcasters and multiplex operators are appropriate and justified in the context of the competition problems that may arise in this market. These conditions are proposed to ensure that RTÉNL operates in a fair and reasonable manner towards third parties.

#### *Non-discrimination Obligations*

10.59 ComReg proposes that an obligation of non-discrimination should be imposed on RTÉNL to ensure that it applies the same conditions in equivalent circumstances to broadcasters and multiplex operators as it does to RTÉ. The provision of relevant information on services is only proposed to apply to broadcasters and multiplex operators who have already agreed a reference offer with RTÉNL as such information may be commercially sensitive.

10.60 The collation and provision of relevant information to broadcasters and multiplex operators may consume RTÉNL time and other resources but ComReg does not see this as placing a majorly unnecessary burden on RTÉNL. RTÉNL is already subject to non-discrimination for analogue terrestrial transmission so the impact of this obligation is unlikely to lead to the same level of burden that would otherwise occur if this was a new process to RTÉNL. Imposing this condition means that potential discriminatory behaviour by RTÉNL towards its network users is reduced.

#### *Transparency Obligations*

- 10.61 A lack of transparency in the market could make it difficult to demonstrate equivalence and present the opportunity for RTÉ to leverage its market power to prevent competition.
- 10.62 ComReg proposes that RTÉNL should publish information or data which a broadcaster and multiplex operator may reasonably require to compete effectively based on RTÉNL's wholesale services. Provision of SLAs will provide assurance to potential entrants that RTÉNL will treat them to an agreed standard of service. Given the potential for RTÉNL to provide a lesser quality of service to downstream competitors than to RTÉ, ComReg considers it proportionate and justified that the industry should be able to observe the range of SLAs provided by RTÉNL to RTÉ and other broadcasters and multiplex operators.
- 10.63 RTÉNL is already subject to transparency obligation(s) for national radio and television analogue network transmission services so the impact of this obligation is unlikely to lead to the same level of burden that would otherwise occur if this was a new process to RTÉNL.
- 10.64 These conditions are likely to place some costs of compliance on RTÉNL in terms of time and resources dedicated to implementing these obligations but ComReg views these as necessary to ensure a level playing field in the market. Given that RTÉ is a vertically integrated entity it is only under these conditions that one can ensure non-discrimination.

#### ***Accounting Separation Obligations***

- 10.65 As already discussed in sections 6 to 8, there may be potential competition problems in this market related to RTÉNL's pricing behaviour. Separated accounts help to reduce this potential problem by making wholesale prices and internal transfer pricing visible, thereby facilitating transparency. ComReg believes that an obligation such as this is necessary and proportionate in the context of a vertically integrated entity like RTÉ.
- 10.66 This is likely to impose some cost burden on RTÉNL in terms of its implementation but it will help ensure that RTÉNL does not behave in a discriminatory manner in terms of pricing by providing transparency to ComReg and the market. ComReg is proposing that RTÉNL prepares accounting documentation describing its cost accounting systems. It is also proposing that RTÉNL submits detailed financial information to it as required by ComReg on a case by case basis. However, ComReg considers that much of the underlying information is already available in the books and records of RTÉNL and therefore the cost burden should not be significant.

#### ***Price Control and Cost Accounting Obligations***

- 10.67 In light of the potential competition problems relating to discriminatory pricing behaviour discussed in sections 6 to 8 ComReg proposes to implement

a price control and cost accounting obligation on RTÉNL to prevent possible excessive pricing and/or margin squeeze. As RTÉ competes with other broadcasters in the retail market it may be concerned that it would lose audience market share to other broadcasters and therefore lose the related advertising revenues it could otherwise command. Therefore, RTÉ has the incentive and through RTÉNL has the ability to engage in practices to minimise this potential competitive threat. RTÉ could reduce other broadcaster's ability to compete with RTÉ for content and talent and retail audience market share by engaging in discriminatory pricing practices. This may also have the added effect of deterring potential market entry and expansion.

10.68 Cost accounting supports the obligations of price control and accounting separation. A price control obligation will ensure that RTÉNL sets appropriate wholesale prices to enable effective competition. ComReg believes that these obligations are necessary and appropriate in the context of the ability and incentive of RTÉNL to set excessive prices and margin squeeze which would harm competition in downstream markets and ultimately end-users.

10.69 The impact of such a move on RTÉNL is that it would constrain its ability to harm actual or potential competitors by linking prices to actual costs and stopping the potential for discriminatory pricing. This therefore has the potential to reduce the amount of revenues RTÉNL might otherwise acquire were such an obligation not in place but allow a reasonable return to RTÉNL based on its efficient investment.

10.70 ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by operators while also ensuring that the SMP operator makes a reasonable return on its efficient investment.

### ***Impact on competition***

#### ***Access Obligations***

10.71 The proposed access obligations should improve the conditions for market entry and expansion to market A which may otherwise be restricted due to the actions of RTÉNL arising from the perceived competitive threats by RTÉ in downstream markets. It is likely that under such conditions commercial DTT could be more easily facilitated for example.

10.72 Where such services were launched this would have the potential to impact the competitive conditions of the related wholesale market B. By removing restrictions of entry to market A there is the possibility that this could



positively change the dynamic of competition in the downstream wholesale market B in the long run.

10.73 If commercial DTT multiplex operators were operational in the wholesale downstream market B and providing the same wholesale DTT service to that which RTÉ provides, then RTÉ customers such as TV3 and TG4 could, theoretically, switch to this supplier.

10.74 However, it is not certain whether other DTT multiplex operators capable of constraining RTÉ will enter the market in the timeframe of this review. Therefore, irrespective of whether potential for the competitive conditions of the wholesale market for access to market A did improve; ComReg could not be assured that the competitive conditions of market B would improve in tandem. This will be assessed as part of the three criteria test for market B.

10.75 A condition of acting in good faith would mean that RTÉNL would be required to demonstrate that its approach to negotiations was in good faith and that any unmet access requests can be shown to be unreasonable. This helps to give greater confidence and assurance to the market that RTÉNL will not have the potential to behave in such a manner as to be deliberately unreasonable in negotiations for access in order to limit entry and expansion in the market.

10.76 A condition not to withdraw access to existing services prior to approval of ComReg helps to ensure that RTÉNL does not withdraw services upon which third parties rely for their business operations without valid reasoning for doing so and this, therefore, gives a level of protection to broadcasters and multiplex operators reliant on RTÉNL's transmission infrastructure.

10.77 Granting access in a fair, reasonable and timely manner will help to ensure that there are no unnecessary delays in providing access which could otherwise constrain third party activity in the market.

10.78 Provision of SLAs will help to ensure a defined quality of service provided to third parties. This is important because a reduced/inferior quality of service to third parties could affect their ability to compete at the retail level and from a multiplex operator perspective, their ability to attract broadcasters to their own platform.

### *Non-discrimination Obligations*

10.79 It is important that third parties are not discriminated against in either price or non-price terms by RTÉNL as this would reduce their ability to compete effectively in the market and be a major consideration to any potential entrants and as such could contribute to foreclosing market entry and expansion. A non-discrimination obligation would help to ensure that RTÉNL treats RTÉ and third parties in a similar manner, thereby helping promote competition in the market.

### *Transparency Obligations*

- 10.80 Transparency obligations act as support for other obligations by ensuring that any potential anti-competitive behaviour contravening such obligations can be easily observed and therefore, allow appropriate enforcement action to be taken if needed. This reduces the ability for anti-competitive behaviour by RTÉNL. ComReg believes such an obligation tied to other obligations will ensure that competition is promoted in this market.
- 10.81 Publication of a reference offer would allow for a degree of certainty to enable broadcasters and multiplex operators to plan and run their operations efficiently, enabling broadcasters and multiplex operators to observe the detail of the wholesale offerings made available by RTÉNL. Publication of further information or data which broadcasters and multiplex operators would require in order to compete in the market would further promote transparency and thereby help to encourage market entry and expansion.
- 10.82 Publication of SLAs will ensure that service level guarantees to all market players reliant on RTÉNL's infrastructure equipment are observable and provide assurance to industry that there is no discrimination among market players in this area.
- 10.83 Transparency in relation to the proposed obligations will provide clarity on services and costs to potential entrants and therefore should help to encourage market entry and expansion.

### *Accounting Separation Obligations*

- 10.84 In a vertically integrated market where possible price related problems may arise, accounting separation is very important as it ensures transparency in regards to allocation of costs across different services thereby ensuring that they are allocated correctly. This means that inappropriate pricing behaviour can be observed independently and reduces the potential for such practices.
- 10.85 This obligation supports the obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations. As RTÉ is a vertically integrated entity, it should ensure that RTÉ makes transparent its wholesale prices and its internal transfer prices.
- 10.86 ComReg has identified potential competition problems related to price discrimination. Separated accounts help disclose these competition problems and make visible the wholesale prices by facilitating transparency with regard to any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on RTÉNL to maintain separated accounts.

10.87 This should help to promote the development of entry and expansion and in downstream markets as entrants can be assured that price related discriminatory practices are observable.

### ***Price Control and Cost Accounting Obligations***

10.88 Given the risk of price-related competition problems in this market, as identified in sections 6 to 8 of this consultation paper, ComReg considers that the imposition of a price control and cost accounting obligation on RTÉNL is appropriate as this is the only way to ensure that prices are an actual reflection of cost and that they are non-discriminatory. For example, RTÉ through RTÉNL would have the ability to price excessively and/or margin squeeze to deter entry/expansion of broadcasters and potential commercial DTT multiplex operators.

10.89 A price control will ensure that RTÉNL sets wholesale prices at the appropriate level as there is the potential to engage in excessive pricing and margin squeeze. Cost accounting supports the obligations of accounting separation and price control and assists in monitoring non-discrimination. For a price control, cost accounting identifies and attributes relevant costs to services and products based on agreed accounting principles.

10.90 ComReg is mindful that any cost recovery mechanism or pricing methodology that is imposed by ComReg should serve to promote efficiency and sustainable competition and maximise consumer benefits.

10.91 These conditions should enable the promotion of competition in the market as they would prevent RTÉNL from engaging in discriminatory pricing practices against broadcasters and multiplex operators reliant on its broadcast transmission services. This, in turn, may enable broadcasters and multiplex operators to provide greater quality of services and products to end-users and thus encourage broadcasters and multiplex operators to compete to a greater extent in the retail market.

### ***Impact on consumers***

10.92 Consumer satisfaction in the retail market is driven by price, quality and choice. The transition to digital terrestrial transmission should allow for more and better quality content to end-users. However, as has been discussed already, where an operator is designated with SMP it may have the ability to constrain competition in this market to protect its own interests so that the end-user could suffer due to a lower level of quality and choice.

10.93 In proposing these obligations ComReg has taken the impact on end-users into consideration and believes that without the appropriate obligations listed above, end-users would be worse off due to a lack of competition in the market.

10.94 Each of the obligations outlined above is complementary to each other and in ComReg's view merited in this market. Each obligation helps to support the other, promoting market entry and expansion by ensuring that the market does not tend towards foreclosure or other anti-competitive practices. This means that the utility of end-users should be increased through greater choice and quality of product and services.

10.95 These obligations could possibly lead to conditions in which a commercial pay or hybrid pay DTT service is more easily established for example and thereby, a wider diversity of broadcasting content and talent made available, providing more quality and choice to retail end-users.

#### **10.4 Step 5 - Assess the impacts and choose the best option**

10.96 ComReg has taken full account of its obligations under Regulation 8(6) of the Access Regulations (including that any proposed remedies are to be based on the nature of the problem identified), as well as its relevant objectives as set out under section 12 of the Communications Regulation Acts 2002 to 2011.

10.97 Based on SMP assessment, the potential competition problems and ComReg's belief that there is a lack of effectiveness to current regulation, ComReg proposes that the imposition of a full suite of remedies is appropriate and justified in market A. The option of imposing no remedies does not apply in this market because, when there is a (preliminary) finding of SMP, ComReg is obliged to impose at least one remedy. Section 11 provides detail on the regulation ComReg believes is necessary in this market.

10.98 While these obligations may impose costs on RTÉNL in terms of time and resources dedicated to complying with these proposed obligations, it is ComReg's view that such obligations will promote competition in the market to the benefit of end-users, thereby exceeding any costs associated with their implementation.

10.99 ComReg will keep the Irish broadcasting sector under review to determine whether such remedies continue to be justified and proportionate in light of relevant developments, if any, in the market.

**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.**

## 11 Draft Decision Instrument – Market A

**[Note the following text is in draft form only, being a draft measure in relation to which ComReg is required to consult upon pursuant to Regulation 19 of the Framework Regulations].**

### STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (Decision Instrument) is made by the Commission for Communications Regulation (ComReg) and relates to the market for wholesale access to national terrestrial broadcast transmission services as satisfied by the three criteria test in ComReg Document [12/77] as required by the European Commission in its Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation<sup>168</sup> and as defined by ComReg in ComReg Document [12/77].

- i. Having had regard to sections 10 and 12 of the Communications Regulations Act, 2002 to 2011<sup>169</sup> and Regulation 16 of the Framework Regulations<sup>170</sup> in particular;
- ii. Having taken account of its functions under Regulation 6(1) of the Access Regulations<sup>171</sup>;
- iii. Having had regard to, where appropriate, the Broadcasting Act, 2009<sup>172</sup>;
- iv. Having, where appropriate, complied with the Policy Directions made by the Minister further to section 13 of the Communications Regulation Act 2002<sup>173</sup>;
- v. Having taken the utmost account of the European Commission’s Recommendation of 17 December 2007 and the

<sup>168</sup> European Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services – OJ L 344/65.

<sup>169</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

<sup>170</sup> S.I. No. 333 of 2011 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (“Framework Regulations”) which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended.

<sup>171</sup> S.I. No. 334 of 2011 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (“Access Regulations”) which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, as amended.

<sup>172</sup> Broadcasting Act, 2009, No 18 of 2009.

<sup>173</sup> Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

European Commission's Guidelines on market analysis and the assessment of significant market power<sup>174</sup>;

- vi. Having had regard to the three criteria test, market definition, market analysis and reasoning conducted by ComReg in the Consultation [Market Review: Broadcasting Transmission Services in Ireland];
  - vii. Having taken account of the submissions received in relation to [Market Review: Broadcasting Transmission Services in Ireland];
  - viii. Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations;
  - ix. Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 13 of the Framework Regulations and having taken the utmost account pursuant to Regulation 13(6) of the Framework Regulations of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State in accordance with Article 7(3) of the Framework Directive<sup>175</sup>
  - x. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations.
- 1.2 The provisions of Consultation document 12/77, and Response to Consultation and Final Decision DX/12 shall, where appropriate, be construed with this Decision Instrument.

## **PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)**

### **2 DEFINITIONS AND INTERPRETATION**

#### **2.1 In this Decision Instrument:**

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<sup>174</sup> European Commission Recommendation of 17 December, 2007 on Relevant Product and Service Market; European Commission Recommendation on regulated access to Next Generation Access Networks, 20 September 2010, (2010/572/EU); and European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services of 11 July 2002 – OJ C 165/03.

<sup>175</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

“**Access**” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time; for the purposes of this Decision Instrument access shall include Associated Facilities where appropriate;

“**Access Regulations**” means the European Communities (Electronic Communications and Network Services) (Access) Regulations, 2011 (S.I. No. 334 of 2011), as may be amended from time to time;

“**Act of 2009**” means Broadcasting Act, 2009, No.18 of 2009

“**Act of 2002**” means Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).;

“**Associated Facilities**” shall have the same meaning as under Regulation 2 of the Framework Regulations and for the avoidance of doubt shall include handover with a multiplex contractor;

“**Associated Services**” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“**Authorisation Regulations**” means the European Communities (Electronic Communications and Network Services) (Authorisation) Regulations, 2011 (S.I. No. 335 of 2011), as may be amended from time to time;

“**BEREC**” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“**BAI**” means the Broadcasting Authority of Ireland, as established in accordance with Part 2 of the Act of 2009;

“**Broadcast Distribution Services**” means the delivery of programme material (television and/or radio) from where it is compiled to a network of broadcast transmission sites;

“**Broadcasting Service**” shall have the same meaning as under section 2 of the Act of 2009;

“**Broadcast Transmission Services**” means the delivery of programme material (television and/or radio) via a terrestrial network for consumption by the public;

“**Broadcast operator**” means, for the purposes of this Decision Instrument, a multiplex contractor and a national sound broadcasting contractor;

**“ComReg”** means the Commission for Communications Regulation, as established under section 6 of the Act of 2002;

**“Feeders”** means equipment used to connect the output of an apparatus for wireless telegraphy or combiner to an antenna;

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, (S.I. No. 333 of 2011), as may be amended from time to time;

**“handover”** means adequate connectivity to a multiplex service;

**“Multiplex”** means an electronic system which combines programme material and related and other data in digital form and the broadcast transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public, the term “multiplexing services” shall have the same meaning;

**“Multiplex Contractor”** shall have the same meaning as under section 2 of the Act of 2009 and for the avoidance of doubt shall include a sound broadcasting multiplex contractor;

**“Programme material”** shall have the same meaning as under section 2 of the Act of 2009;

**“Related material”** means material and other data directly related to, and associated with, the programme material;

**“RF Combiner”** means radio frequency equipment that is used to combine radio frequencies from a number of different broadcast transmission sources into one output;

**“RTÉ”** means Raidió Teilifís Éireann and its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns;

**“RTÉNL”** means RTÉ Network Limited and its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns and including for the avoidance of doubt RTÉ;

**“Service Level Agreements (SLAs)”** are legally binding contracts between RTÉNL and a broadcast operator in relation to the service levels which RTÉNL commits to from time to time;

**“Significant Market Power (SMP) obligations”** are those obligations set out in Regulation 8 to 13 of the Access Regulations, as may be amended from time to time;



**“sound broadcasting service”** means a sound broadcasting service, as defined by section 2 of the Act of 2009, which is available on a national or quasi-national basis;

**“sound broadcasting contractor”** means persons having entered into a sound broadcasting contract with the BAI under section 63 of the Act of 2009, where the area specified in the sound broadcasting contract is national or quasi-national;

**“sound broadcasting multiplex contractor”** means a person who has a contract in accordance with the provisions of the Act of 2009 for the purpose of a multiplex in which programme material is predominantly sound.

**“Third Party”** means a party acting on behalf of a broadcast operator seeking access to RTÉNL’s infrastructure in order to provide terrestrial broadcast transmission services on behalf of that broadcast operator.

**“Transmission”** shall have the same meaning as under section 2 of the Act of 2009;

**“Terrestrial”** shall have the same meaning as under section 2 of the Act of 2009;

**“Wireless Telegraphy”** shall have the same meaning as under section 2 of the Act of 2009.

**“wholesale access to national terrestrial broadcast transmission services”** means the market for wholesale access to national terrestrial broadcast transmission services and, for the avoidance of doubt, includes both wholesale broadcast distribution services, broadcast transmission services and sound broadcasting services, and is synonymous with the Market;

- 2.2 For the avoidance of doubt, where there are any conflicts between the provisions and/or definitions of this Decision Instrument and the Act of 2009, the provisions of the Act of 2009 will prevail.

### **3 SCOPE AND APPLICATION**

- 3.1 This Decision Instrument applies to RTÉNL in respect of activities falling within the scope of the Market defined in section 4 of this Decision Instrument.
- 3.2 This Decision Instrument is binding upon RTÉNL and RTÉNL shall comply with it in all respects.

### **4 MARKET DEFINITION**

- 4.1 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's Recommendation, and taking utmost account of its Guidelines on market analysis and the assessment of significant market power and in accordance with the principles of competition law, the product market in this Decision Instrument is defined as the market for wholesale access to national terrestrial broadcast transmission services;
- 4.2 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's Guidelines on market analysis and the assessment of significant market power and the European Commission's Explanatory Note<sup>176</sup> and in accordance with the principles of competition law, the relevant geographic market is defined as Ireland.

## **5 DESIGNATION OF UNDERTAKING WITH SMP**

- 5.1 Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations and consistent with the European Commission's Guidelines on market analysis, the completion of the three criteria test and the assessment of significant market power, having determined that the market is not effectively competitive, RTÉNL is designated as having SMP on the Market.

## **PART II – SMP OBLIGATIONS**

### **6 SMP OBLIGATIONS**

- 6.1 ComReg is imposing certain SMP obligations on RTÉNL in accordance with and pursuant to Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations, as detailed further in sections 7 to 12 below.

### **7 OBLIGATIONS TO PROVIDE ACCESS**

- 7.1 Pursuant to Regulation 12 (1) of the Access Regulations and in accordance with section 115 of the Act of 2009, RTÉNL shall meet all reasonable requests from broadcast operators for the provision of Access, including Associated Facilities.
- 7.2 Pursuant to Regulation 12 (2) of the Access Regulations and without prejudice to the generality of section 7.1, and notwithstanding the provisions of sections 7.3 and 7.4, RTÉNL shall provide and grant Access to broadcast operators to the following particular associated services and associated facilities:
- For the installation and maintenance of broadcast transmission and/or distribution and related equipment (including provision of access to permit installation by third parties);

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<sup>176</sup> Commission Staff Working Document Explanatory Note accompanying document to the European Commission's Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation SEC (2007) 1483/2, 13 November 2007.

- For the use of common building accommodation; and,
- For the use of shared or shareable broadcast equipment comprising, but not limited to RF combiners, feeders.

7.3 Without prejudice to the generality of sections 7.1 to 7.3, RTÉNL shall:

- (i) Pursuant to Regulation 12 (2) (a) of the Access Regulations, give third parties access to specified network elements or facilities;
- (ii) Pursuant to Regulation 12 (2) (b) of the Access Regulations, negotiate in good faith with broadcast operators requesting Access;
- (iii) Pursuant to Regulation 12 (2) (c) of the Access Regulations, not withdraw Access to services and facilities already granted, without the prior approval of ComReg;
- (iv) Pursuant to Regulation 12 (2) (e) of the Access Regulations, grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services;
- (v) Pursuant to Regulation 12 (2) (f) of the Access Regulations, provide co-location or other forms of associated facilities sharing;

## **8 CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS**

8.1 Without prejudice to the generality of section 7, RTÉNL shall, in relation to the obligations set out under section 7, grant Access to the Market and Associated Facilities, pursuant to Regulation 12 (3) of the Access Regulations in a fair, reasonable and timely manner.

8.2 Without prejudice to the generality of section 8.1, RTÉNL shall:

- (i) Conclude, maintain or update, as appropriate, legally binding SLAs that shall include, but shall not be limited to the SLA requirements as set out in Appendix A, which maintain the current SLA's as imposed by Decision D16/04
- (ii) Negotiate in good faith with broadcast operators in relation to the conclusion of legally binding and fit-for-purpose SLAs;
- (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter of negotiation between RTÉNL and broadcast operators and recovery of service credits shall be in the first instance, a matter for the individual broadcast operators and RTÉNL;

- (iv) Ensure that SLAs detail how service credits are calculated, to include the provision of an example calculation;
  - (v) Ensure that payment of service credits, where they occur, shall be made in a timely and efficient manner.
- 8.3 Where a request for provision of Access, or a request for provision of information is refused or met only in part, RTÉNL shall provide the objective criteria for refusing same to the broadcast operator that made the request. RTÉNL's response shall be fair, reasonable and timely.

## **9 OBLIGATION OF NON-DISCRIMINATION**

- 9.1 RTÉNL shall have an obligation of non-discrimination as provided for by Regulation 10 of the Access Regulations.
- 9.2 Without prejudice to the generality of section 9.1, RTÉNL shall:
- (i) Apply equivalent conditions in equivalent circumstances to other broadcast operators providing equivalent services; and
  - (ii) Ensure that all services and information are provided to other broadcast operators under the same conditions and of the same quality as the services and information that RTÉNL provides for or to itself or to its subsidiaries or partners and for the avoidance of doubt for the purposes of this Decision Instrument, this includes RTÉ.
- 9.3 In particular in order that broadcast operators seeking access may be in the same position as RTÉNL or its subsidiaries or partners with respect to the provision of services and information, such services or information shall be provided at the same time as the service(s) or information is available by RTÉNL for or to itself or its subsidiaries or partners; and for the avoidance of doubt for the purposes of this Decision Instrument, this includes RTÉ.
- 9.4 For the avoidance of any doubt, the obligations set out at this section 9 apply irrespective of whether or not a specific request for services or information has been made.

## **10. OBLIGATION OF TRANSPARENCY**

- 10.1 RTÉNL shall have an obligation of transparency as provided for by Regulation 9 of the Access Regulations.
- 10.2 Without prejudice to the generality of the obligation in section 10.1, pursuant to Regulation 9 (2) of the Access Regulations, RTÉNL shall make publicly available and keep updated on its publicly available wholesale website, Reference Offer. The Reference Offer shall be comprehensive and

appropriately detailed. It shall be published within four months from the effective date of this Decision Instrument. The Reference Offer shall be sufficiently detailed so as to ensure that broadcast operators availing of such services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested, and the Reference Offer shall include at least the following:

- (i) A description of the relevant offerings broken down into components according to market needs;
- (ii) A description of the technical specifications and network characteristics of the Access being offered;
- (iii) A description of the associated terms and conditions for supply and use, including an over-view of how prices are derived;

10.3 RTÉNL shall, unless otherwise determined by ComReg, make publicly available and publish on its publicly available website at least two months in advance, or such other period as may be determined by ComReg, any proposed changes to the Reference Offer and any proposed changes to wholesale prices (including prices for new services and facilities) coming into effect. RTÉNL shall notify ComReg at least one month in advance of any such publication taking place i.e. three months prior to any changes coming into effect, unless such other period has been determined by ComReg, as described above. Proposed changes to the Reference Offer including proposed changes to prices and the application of such prices shall not be implemented without prior notification to ComReg and broadcast operators.

10.4 ComReg may issue directions requiring RTÉNL to make changes to the Reference Offer to give effect to obligations imposed in this Decision Instrument and to publish the Reference Offer with such changes pursuant to Regulation 9(3) of the Access Regulations. ComReg may issue directions to RTÉNL from time to time requiring it to publish information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices, pursuant to Regulation 18 of the Access Regulations.

10.5 Without prejudice to the generality of the obligation in section 10.1, RTÉNL shall make public information on its wholesale website, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 7, as specified by ComReg from time to time and all other information which may be reasonably required by Broadcasters.

10.6 RTÉNL shall publish all SLAs (and any updates thereto) on its publicly available website.

## **11 OBLIGATION OF ACCOUNTING SEPARATION**

- 11.1 Pursuant to Regulation 11 of the Access Regulations, RTÉNL shall have an obligation to maintain separated accounts as detailed in Appendix C attached to this Decision Instrument.

**12 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING**

- 12.1 Pursuant to Regulation 13(1) and in accordance with Regulation 13(2) of the Access Regulations, RTÉNL shall be subject to a price control obligation, in the form of an obligation of cost orientation.
- 12.2 Pursuant to Regulation 13 (1) of the Access Regulations, RTÉNL shall maintain appropriate cost accounting systems in respect of products, services or facilities referred to in section 7.

**PART IV – OBLIGATIONS AND EFFECTIVE DATE**

**13 STATUTORY POWERS NOT AFFECTED**

- 13.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument) from time to time as the occasion requires.

**14 MAINTENANCE OF OBLIGATIONS**

- 14.1 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

**15 WITHDRAWAL OF SMP OBLIGATIONS**

- 15.1 ComReg Document No. 04/47 Decision Notice: *Market Analysis – Wholesale Broadcasting Transmission Services* Decision No. D6/04 and ComReg Document No. 04/122 Decision Notice: *Wholesale Broadcasting Transmission Services Markets – SMP Obligations* Decision No. D16/04 are hereby withdrawn when this Decision shall take effect.

**16 EFFECTIVE DATE**

- 16.1 The effective date of this Decision Instrument shall be the date of its publication and notification to RTÉNL and it shall remain in force until further notice by ComReg.

**KEVIN O'BRIEN  
COMMISSIONER  
THE COMMISSION FOR COMMUNICATIONS REGULATION  
THE X DAY OF XY 2012**

**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 market for wholesale access to DTT multiplexing services (market B)**



## 12 Three Criteria Test – Market B

- 12.1 In section 5 ComReg gave its preliminary view that there is a wholesale market downstream from market A, that is, the market for wholesale access to DTT multiplexing services (market B). This wholesale market reflects demand from broadcasters for access to DTT multiplexing services. DTT multiplex operators provide broadcasters with a multiplexing service which in turn consumes terrestrial transmission from upstream market A as digital broadcasters' demand for access to multiplexing services is a derived demand for terrestrial broadcast transmission services.
- 12.2 To determine whether the market for wholesale access to DTT multiplexing services (market B) may be susceptible to *ex ante* regulation requires the application of the three criteria test.
- 12.3 Given the interrelationship between (upstream) market A and (downstream) market B as discussed in section 5, the competitive dynamics in this market B could be expected to be influenced by the competitive dynamics of market A. In this context, it is important to note that ComReg's assessment of the competitive conditions of market A led ComReg to the preliminary view that a full suite of regulatory obligations should be imposed on that market. These include an obligation of access, transparency, non-discrimination, accounting separation, and price control and cost accounting obligations. It is in this context that ComReg must now assess the competitive conditions of this related downstream market. The three criteria test for market B is thus examined in this section assuming the remedies proposed for market A in section 11 above are in place.<sup>177</sup>

### 12.1 Provisions of other legislation

- 12.4 In addition to considering whether competition law is sufficient (as part of the three criteria test assessment); the European Commission has also looked at the effect that other legislation may have on broadcasting transmission markets. For example, the European Commission pointed out that insofar as the content of a broadcast was such that it might be considered to meet a general interest objective, then it could be addressed under the "must carry" rules provided for in Article 31 of the Universal Service Directive.
- 12.5 Therefore, before considering the three criteria test itself ComReg will consider the effect other legislation may have on this wholesale market B.
- 12.6 The question arises as to whether 2009 Act provides a regulatory framework such that any competition concerns that may arise, absent regulation, would be addressed by the provisions of the 2009 Act.

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The purpose of this approach is not to pre-judge the outcome of the review of market A but this approach is consistent with the European Commission's Greenfield approach.

- 12.7 In terms of DTT, section 130 of the 2009 Act states that the Minister may direct RTÉ to employ a specific amount of digital capacity to ensure that the capacity employed by RTÉ is adequate on its DTT multiplex for the television services of TG4, the Commission of the Houses of the Oireachtas, the Irish film Board, other television services having the character of a public service as may be designated by the Minister, and the television service programme contractor (TV3). The Minister may also direct periodic payments from these television services to RTÉ for their provision on a national multiplex established, maintained and operated by RTÉ.
- 12.8 These provisions cover many of the areas that in other contexts are addressed by the electronic communications regulatory framework. For TV3, TG4, the Houses of the Oireachtas Channel, the Irish Film Channel, and any channel deemed by the Minister to have the character of a public service broadcaster as may be designated by the Minister, there would thus appear to be provisions in the 2009 Act which, may address some of the important elements of *ex ante* regulation with respect to the “national television multiplex”.
- 12.9 Similar provisions related to prescribed periodic payments and access are also found under section 130 of the 2009 Act in respect of digital radio services, and access to a national sound multiplex operated by RTÉ. It would thus appear that for FTA broadcasters (that is generally those with the character of a public service, or those who have a sound broadcasting contract with the BAI), there are legislative provisions in place that could address potential competition problems.
- 12.10 Therefore, in accordance with section 130 the 2009 Act, RTÉ must make provision in its national television multiplex for the broadcast by digital means of the television broadcast services described in the paragraphs above. Those broadcasters shall make periodic payments to RTÉ for their provision on its DTT multiplex and the Minister may direct the amount of those payments (following consultation with ComReg, RTÉ and the broadcaster).
- 12.11 The objective of the provisions of section 130 of the 2009 Act appear to be primarily focused on broadcasting services as a public good but does not necessarily appear to be focused specifically on addressing particular competition problems (where may arise) in the same context as that which would be addressed by the provisions of the electronic communications regulatory framework. That said, the susceptibility of this market to *ex ante* regulation and an examination of potential competition problems is analysed in the context of the presence of relevant provisions in the 2009 Act. This may be relevant in terms of access and pricing for some DTT broadcasters in market B.
- 12.12 *Ex ante* regulation provides NRAs with the regulatory measures to address potential failures in a market using the principles of competition law. Therefore, while section 130 provides for a particular form of price control, it may not necessarily one that would arise under the electronic communications regulatory framework. Given the particular issue of vertical integration in this sector in Ireland, this form of a price control would not be supported by appropriate cost

accounting obligations. Nor would the resulting remedy necessarily address the requirement for transparency and non-discrimination, as there would be no requirement that RTÉ charge itself in the same manner.

- 12.13 Further, application of section 109 of the 2009 Act, which sets out the general accounting procedures for “a corporation”, defined in the Act as meaning RTÉ or TG4 or both, as the case may be, would not necessarily result in transparent internal transfer pricing in relation to ECS, in the same manner as would an accounting separation direction imposed by ComReg under its regulatory framework.
- 12.14 While there are legislative provisions that may overlap with some elements of *ex ante* regulation, for example in terms of access provisions under section 130 of the 2009 Act, ComReg does not believe that these provide the necessary conditions for access which are applicable under *ex ante* regulation. For example, to counter the potential for the SMP operator to employ a tactical refusal of access ComReg can impose conditions which support the provision of timely and efficient access, such as the implementation of SLAs, and fair, reasonable and timely access. This can include the provision to have in place legally binding SLAs and to provide access to associated facilities on fair and reasonable terms.
- 12.15 ComReg proposes that to complement the 2009 Act, where RTÉ itself has specific public service obligations in relation to its PSB multiplex(es), any measures which may be proposed in this market subject to the three criteria test and SMP analysis would apply to broadcasters mentioned under section 130 (with the exception of any broadcasters that may reach agreement with RTE for broadcasting under section 130(1)(e) where, if RTE has residual spare capacity remaining after meeting all other obligations, it may seek to exploit such capacity commercially). The measures outlined in this consultation paper therefore aim to support and complement the 2009 Act taking into account RTÉ’s public service obligations under the 2009 Act.
- 12.16 Market conditions should be examined in the context of the provisions of the 2009 Act and the electronic communications framework to determine the market’s susceptibility to *ex ante* regulation and if so complement the provisions of the 2009 Act. In the context of a vertically integrated national broadcaster that provides broadcasting transmission facilities to actual or potential competitors, the provisions of the 2009 Act do not, in ComReg’s preliminary opinion, remove the requirement for *ex ante* regulation. *Ex ante* regulation has the benefit of well defined characteristics under the regulatory framework and can provide stability and assurance to a market characterised by high and non-transitory entry barriers through using a variety of approaches that are methodical, and well understood.

## **12.2 High and non-transitory barriers to entry**

- 12.17 There are a number of related issues which act as a barrier to entry to this market and these entail a more regulatory nature compared to upstream market A.

### *Legal/Regulatory Barriers*

- 12.18 In the case of DTT, a multiplex licence is required from ComReg to provide spectrum rights of use which entitle the holder to provide DTT multiplexing services for the transmission of DTT. Under the 2009 Act, ComReg can only issue a multiplex licence to provide spectrum rights of use to RTÉ and the BAI. In the case of multiplex licences issued by ComReg to the BAI, the benefit of the spectrum rights of use is passed onto a DTT multiplex operator via a contract from the BAI.
- 12.19 The spectrum used by RTÉ for DTT is licensed by ComReg to RTÉ in accordance with section 132 of the 2009 Act. ComReg issued a DTT licence to RTÉ in 2007 in respect of a single DTT multiplex. ComReg issued a second DTT multiplex licence to RTÉ in May 2011.
- 12.20 Under section 132 of the 2009 Act, ComReg is obliged to issue spectrum multiplex licences to the BAI in respect of four television multiplexes on receipt of a request for them. While the BAI remains the licensee, the BAI may enter into contracts with persons interested in establishing and maintaining a multiplex which may contain such terms and conditions as the BAI considers appropriate and specifies in the contract. Potential commercial DTT operators would need to acquire a multiplex contract from the BAI following an invitation for application for a DTT multiplex contract. If awarded a DTT multiplex contract, the multiplex contractor must then subsequently negotiate with RTÉNL for access to its broadcast transmission and distribution infrastructure (such as towers and masts and associated transmission and distribution equipment) in order to be able to provide its (commercial) DTT services to retail end-users.
- 12.21 Currently there is only one provider of PSB multiplex services in this market that is, RTÉ. In accordance with section 130 of the 2009 Act, certain broadcasters have rights of access given that they meet the criteria for public sector broadcasting and this is provided for in the 2009 Act. However, entry and expansion of any of these section 130 broadcasters is subject to Ministerial approval, to ensure adherence with State Aid guidelines and inherently, to ensure adherence with the concept of public service broadcasting.
- 12.22 It would appear that there are legal and regulatory barriers which create high non-transitory barriers to entry. On the basis of the evidence to date, it does not seem likely that effective commercial DTT could enter the market without incurring time delays and commercial uncertainties associated with the launch process of commercial DTT. Commercial entrants can only access market B through market A and by acquiring a contract from the BAI. There is no

commercial provision of multiplex services in market B at present. At this point in time ComReg is not aware of any recent express demand from potential DTT multiplex operators for commercial DTT and it is unclear when a new commercial DTT tender process will be initiated.<sup>178</sup> 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.

### *Structural Barriers*

- 12.23 There are costs in building and maintaining the infrastructure necessary together with other costs to provide a commercial DTT service which, though mostly not sunk, would still be a consideration for potential entrants taking into account the size of the market, and some costs of entry would be sunk on market exit such as marketing costs for example.<sup>179</sup> A potential entrant's ability to raise the finance necessary to enter the market in scale would be a consideration and self supply would incur significant costs for a broadcaster such as TV3 and TG4 on its own. Furthermore, entry can be a time consuming process as potential entrants would need to organise their line up of programme services, devise their marketing strategy, and undertake an assessment of the business case for entry before considering bidding for a commercial DTT contract(s).
- 12.24 The fact that RTÉ is a vertically integrated entity means that it is likely that RTÉ would continue to self supply in the event of potential entry. Therefore, in terms of structural barriers, a potential source of revenues from RTÉ's broadcasting activities is unlikely to be available to a new entrant. Similarly, the same structural barriers exist given that TV3 and TG4, by virtue of the benefits of the 2009 Act have entered into contracts with RTÉ, which would reduce the addressable market size open to potential entrants, which, if their business case was dependent on securing revenues from these broadcasters, may deter entry.
- 12.25 A further consideration relates to the ability of RTÉ's existing digital television broadcasting customers e.g. TG4 and TV3, to switch from RTÉ's PSB multiplexes to alternative commercial DTT supply or in the alternative to self supply. Both TG4 and TV3 have legal commitments which they must satisfy to be able to broadcast their programme services. TG4 must be available, as much as reasonably possible, to the whole community of Ireland on a FTA basis while TV3 must be available to circa 90% of the population on a FTA basis. Therefore, for commercial DTT to be a substitutable service it would have to

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<sup>178</sup> Though a BAI statement on the conclusion of commercial DTT multiplex licensing in 2010 stated, at that time, a competition could potentially be held in 2012 with a view to commercial DTT being operational in 2013. <http://www.bai.ie/?p=1469>

<sup>179</sup> For example, the Boxer consortium were proposing to allocate a marketing budget of €20 million over a four year period [BCI :: Digital Terrestrial Television \(DTT\)](#)

Although not directly comparable to likely costs in Ireland, for an indication of the degree of the costs associated with operating a multiplex service, according to a report commissioned by the BCI (now BAI) in 2007, the BBC's investment in Freeview was estimated at around €16 million a year largely to cover transmission, coding and multiplexing and marketing costs. [http://www.bci.ie/documents/DTT\\_research\\_UK.pdf](http://www.bci.ie/documents/DTT_research_UK.pdf)

provide for such population coverage and allow the broadcast transmission of FTA programme services. The BAI's DTT licensing policy<sup>180</sup> in 2008 stated that each DTT multiplex broadcast shall be required to provide a minimum of 90% population coverage and proposals that exceed this may be viewed favourably, for the purposes of the BAI's competition at that time. This may satisfy TV3's coverage commitments, but this may not be the case for TG4, as their coverage requirements are set out as part of its objectives in section 118 of the 2009 Act. A third party commercial DTT operator(s) would need to offer national coverage to supply the existing broadcasters which has an associated structural and financial entry cost of transmitting from all the 51 DTT sites (which will provide 98% population coverage at ASO<sup>181</sup>) from which RTÉ operates its DTT service. The incremental cost to a potential commercial DTT operator in such a case may outweigh the potential benefits of doing so. Furthermore, it is questionable whether TV3 would switch to a commercial DTT operation which may provides reduced population coverage compared to that provided by RTÉ's multiplexes via Saorview. Whether the potential loss of population coverage would be a worthwhile proposition is not clear. For TV3 Group's other programme service (3e) which also uses capacity on RTÉ's multiplex, such considerations may be less of an issue.

- 12.26 Furthermore, it is unclear whether a successful tenderer for a commercial multiplex would participate in the supply of wholesale DTT multiplexing services for these FTA broadcasters since it may well choose simply to self supply or supply solely for the purpose of distributing a package of encrypted programme services.
- 12.27 A DTT broadcaster which supplies broadcasting content to television viewers, such as TG4 and TV3 is unlikely to self supply by becoming a multiplex operator itself (the business model of a broadcaster and multiplex operator is very different). ComReg has already discussed issues that may discourage market entry in the timeframe of this review in the preceding paragraphs (e.g. costs, time involved etc.). A broadcaster such as TV3 and TG4 would need to form partnerships to be able to successfully tender for a commercial DTT multiplex contract in order to self supply. Such alliances are complex and are unlikely to manifest within the period of this review.
- 12.28 For these reasons it is ComReg's preliminary finding that market B satisfies the first criterion – "High and non-transitory barriers to entry".
- 12.29 However, ComReg proposes to keep the situation under review and if commercial DTT entry is established and operational in the timeframe of this market review i.e. three years from its final Decision date, ComReg will reassess whether this criterion remains satisfied in this market.

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<sup>180</sup> [http://www.bai.ie/wordpress/wp-content/uploads/BCI\\_dtt\\_licensing\\_policy\\_08\\_revised\\_edition.pdf](http://www.bai.ie/wordpress/wp-content/uploads/BCI_dtt_licensing_policy_08_revised_edition.pdf)

<sup>181</sup> [www.saorview.ie](http://www.saorview.ie)

### **12.3 No tendency towards effective competition over the relevant time horizon**

- 12.30 This is not a market that could be expected to tend towards effective competition over a foreseeable time horizon unless there is a significant step change in the market conditions, that is, the launch of commercial DTT multiplex(es) which would be capable of creating effective competitive market conditions in the timeframe of this review. There are commercial, structural and legal barriers which are specific to this market and which suggest that entry into this market is not straightforward. It is ComReg's view that these barriers are enduring. Given this market structure it is unlikely that this market will tend towards effective competition over the relevant time horizon.
- 12.31 As has been mentioned, potential commercial DTT operators need to acquire a commercial multiplex contract from the BAI following a tender application process to be able to negotiate with RTÉNL for access to its network infrastructure in order to be able to provide their commercial DTT services.
- 12.32 However, no recent express demand has been expressed by potential DTT multiplex operators for commercial DTT and it is unclear when a new commercial DTT tender process will be initiated. Therefore, it does not seem likely that commercial DTT entry will be established in the timeframe of this review. ComReg is not aware of any substantial representations made for commercial DTT since, as discussed in paragraph 4.43, the BAI's last multiplex negotiation process a number of years ago.<sup>182</sup> In addition to uncertainty regarding timings of the DTT licensing process, it is ComReg's preliminary view that, where relevant, the commercial case for entry may be hampered by the size of the available/addressable market (i.e. RTÉ's broadcasting activities would, more than likely, continue to be serviced by its own DTT multiplexes thus removing an important potential wholesale customer to new entrants), the need to offer coverage sufficient to satisfy Irish terrestrial broadcasters' legal requirements, administrative/transactional costs of entry on a partnership/collaborative basis, as well as other potential switching costs such as where RTÉ had contracts with existing DTT broadcasters may act as a deterrent to potential entry.
- 12.33 Therefore, on the basis of evidence to date, commercial DTT capable of constraining RTÉ is unlikely in the timeframe of this review, although ComReg proposes to keep this situation under review.
- 12.34 While capacity may be available on RTÉ's second PSB DTT multiplex capable of providing for more non-RTÉ DTT programme services, it may not be in RTÉ's interests to facilitate more retail competition which would result in a loss of market share of its viewers to other broadcasters and in turn a loss of its advertising revenues.

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As part of this market review ComReg has consulted with the BAI in this regard.



- 12.35 The entry and expansion of DTT programme services will be dependent on the capacity available on RTÉ's PSB DTT multiplex(es), and the establishment of commercial DTT multiplex(es) contracted by the BAI, if any. Such entry and expansion may also be subject to specific terms and conditions of access to these DTT multiplex(es). This, therefore, might act as a constraint on DTT programme services entry and expansion to this market.
- 12.36 In principle, commercial DTT multiplexes could act as an alternative means of terrestrial broadcast transmission for RTÉ's digital television customers and therefore they could switch from RTÉ's PSB multiplexes to commercial DTT multiplexes. However, in practical terms this may be more difficult for TV3 and particularly TG4 given their statutory obligations previously discussed. The ability of TV3 and TG4 to meet this criterion would be dependent on the commercial DTT operators being able and willing to provide comparable coverage to RTÉ's PSB DTT multiplexes and provide FTA services.
- 12.37 Furthermore, if commercial multiplex entry did occur it is possible that potential commercial DTT operators may not be inclined to want TG4, TV3 or 3e using capacity on their own DTT multiplexes, particularly as they may have to transmit from all 51 sites from which RTÉ operates as the rise in the related costs of transmission may not be worth the incremental benefit of doing so. Past DTT licensing policy<sup>183</sup> stated that there was an expectation that DTT receivers supporting the BCI (now the BAI) licensed multiplex operators shall be capable of receiving and displaying any FTA content from RTÉ and/or BCI licensed multiplexes. Commercial DTT operators may want to use technology that integrates with RTÉ's (i.e. currently DVB-T, MPEG4<sup>184</sup>) as this would allow them the ability to offer both their own programme services and those programme services from RTÉ's PSB DTT multiplexes to end-users through the same end-user equipment (e.g. set top boxes). This would thereby enable them to retain capacity on their DTT multiplexes for more (non RTÉ multiplexed) programme services while still allowing end-users to receive the programme services on RTÉ's PSB DTT multiplexes. This would allow a commercial DTT operator the opportunity to offer end-users a more diverse and attractive retail packaged offer. Therefore, a potential commercial DTT operator may not be inclined to offer capacity on its multiplex to TV3, TG4 or 3e.
- 12.38 However, it should be noted that another technology option for potential DTT multiplex operators is DVBT-2<sup>185</sup>. This would allow for more capacity than DVB-T which RTÉ employs and therefore would allow for more programme services to be made available on their DTT multiplex(es) such that they may be more inclined to offer an alternative wholesale supply to TV3, TG4 or 3e. However, RTÉ would be expected to continue to self supply and as RTÉ's

<sup>183</sup> [www.bci.ie/documents/BCI%20DTT%20Multiplex%20Licensing%20Policy%202008.pdf](http://www.bci.ie/documents/BCI%20DTT%20Multiplex%20Licensing%20Policy%202008.pdf)

<sup>184</sup> Digital Video Broadcasting – Terrestrial (DVB-T) is a standard for broadcast transmission of digital terrestrial television.

MPEG4 is a standard for audio and video coding formats and related technology.

<sup>185</sup> Digital Video Broadcasting – Second Generation Terrestrial (DVBT-2) is an extension of DVB-T.



programme services attract large shares of retail market audience it may not be in the interests of commercial DTT operators to use a technology that is not compatible with RTÉ as this would not allow retail end users to view both the programme services it broadcasts and the programme services RTÉ broadcasters from the same end-user equipment i.e. set top boxes.

- 12.39 Furthermore, in an analogue context some broadcasting contracts with RTÉ NL were in place for up to ten years. Even if commercial DTT could provide an alternative for RTÉ's existing customers, commercial DTT will not happen before the ASO, and therefore, as RTÉ's existing customers have no alternative source of supply, it could be possible that they may have entered into contracts with RTÉ. In such a case, even if there were commercial DTT entry at a later date post ASO, RTÉ's customers may be unable to switch without incurring switching costs which may act as a deterrent to switching.
- 12.40 Therefore, on the basis of the evidence to date, there appear to be structural and regulatory barriers which suggest that this market is unlikely to tend towards effective competition over the period of this review.
- 12.41 Irrespective of whether access to market A is provided on the regulated terms proposed in section 11, the foregoing assessment indicates that the competitive conditions of market B would not necessarily improve in tandem. This is because RTÉ is still the sole provider of multiplexing services, and new entrants would likely face time delays and costs associated with a number of regulator/legal, structural and strategic barriers before they could gain a foothold in this market.
- 12.42 Therefore, ComReg is of the preliminary opinion that the second criterion, "No tendency towards effective competition over the relevant time horizon", is satisfied in market B.
- 12.43 However, ComReg proposes to keep the situation under review and if commercial DTT entry is likely to become established and operational in the timeframe of this market review, that is, three years from its final Decision date, ComReg will reassess whether this criterion remains satisfied in this market.

#### **12.4 Insufficiency of Competition Law alone**

- 12.44 This criterion considers whether there is a need for *ex ante* regulation in this market in light of competition law and any market relevant legislation. If *ex post* competition law remedies are sufficient then there should be no need for a separate regulatory regime. However, ComReg considers that competition law alone is insufficient to address potential failures in this market. Whereas the electronic communications regulatory framework applies *ex ante*, competition law is restricted to *ex post* investigation, analysis, and (if merited) enforcement action. Such investigations, analyses, and enforcement actions can take considerable time to complete and are of course subject to appeal. In a market such as that discussed here, where, in the preliminary opinion of ComReg, there

is not effective competition nor is effective competition likely to emerge within the relevant time period, the benefits of addressing a particular harm through *ex post* competition law may not give sufficient certainty/predictability to existing or potential market participants.

- 12.45 A court applying competition law will not normally mandate that specific prices or pricing methodologies be used, nor would the court police the evolution of these prices on an ongoing basis, as ComReg may do under the regulatory framework. Although competition law could be used to allow access to be granted, it would not be likely to deal with other forms of potential discriminatory behaviour, and most especially it would not deal with them in advance of their occurring. For these reasons, it is unlikely, in the current context, that application of competition law would enable a sufficient suite of remedies to be applied that would address the range of problems that might potentially arise.
- 12.46 It is ComReg’s preliminary conclusion that the third criterion remains satisfied in this market– “sufficiency of competition law alone”.

## **12.5 Preliminary Conclusion**

- 12.47 Based on this preliminary analysis, ComReg is of the opinion that the three criteria test is satisfied in market B as there are high non-transitory barriers to entry, the market does not tend towards effective competition over time and competition law alone is insufficient to address market failure(s).
- 12.48 Following this preliminary finding, ComReg will conduct a market analysis in section 13 of this consultation paper.

**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.**

## **13 Competition Analysis and Assessment of SMP – Market B**

- 13.2 As discussed in section 7, the European Commission in the SMP Guidelines recommends a number of criteria that may be used as a guide when measuring the power of an undertaking to behave independently of competitors, customers, and consumers.
- 13.3 For the purposes of this market analysis, ComReg sees the following factors as most relevant for assessment of this market:
- Overall size of the undertaking;
  - Control of infrastructure not easily duplicated;
  - Absence of or low countervailing buyer power;
  - Vertical integration;
  - Absence of potential competition; and,
  - Any other barriers to entry/expansion.
- 13.4 Given the potential for overlap, ComReg combines its assessment of these factors under three broad headings as follows:
- Existing competition - assesses factors such as market shares, overall size of the undertaking, and relative strength of existing competitors;
  - Potential competition - assesses control of infrastructure not easily duplicated, and whether factors such as vertical integration exacerbate barriers to entry/expansion, as well as considering the overall strength of potential competitors; and,
  - Strength of Countervailing Buying Power – assesses the ability of the buyer(s) (e.g. broadcasters) to reduce prices profitably below a level consistent with a competitive outcome or more generally, to obtain terms and conditions of supply more favourable than a level consistent with a competitive outcome.
- 13.5 Other factors which could be used to indicate market power have been considered, but are seen as less relevant in this market, for the reasons outlined below:
- Technological advantages or superiority: any advance made by a provider in this market would (from a technological point of view) likely be adopted by others. It is unlikely that technology itself could be used as a sustainable advantage in this market;

- Easy or privileged access to capital markets/financial resources: while this may be a potentially relevant factor in this market, it is less clear and predictable than other relevant factors and therefore more difficult to measure on a forward looking basis in this market;
- Economies of scale and scope: DTT multiplexes have an equally finite capacity when the same technology is employed. There are currently two PSB DTT multiplexes in operation and the potential for up to four more commercial DTT multiplexes. Furthermore, both radio and television programme services can be broadcast via any DTT multiplexes. Therefore, economies of scale and scope may not confer a particular advantage on one DTT multiplex operator over another in this market;
- Product or services diversification: this is of relatively less importance in this market as bundled offerings do not feature to a significant extent at the wholesale level; and,
- A highly developed distribution and sales network: this factor, over the medium to long term, is likely to be less of a barrier in this wholesale market as wholesale services are purchased by a relatively small number of wholesale customers.

### **13.1. Existing competition**

13.6 ComReg recognises that large market shares are not by themselves sufficient to form the basis of a finding of SMP and that other factors must also be taken into account. Nonetheless ComReg considers market shares as a useful starting point in the analysis of SMP.

#### ***Overall size of the undertaking, market shares and existing competition***

13.7 RTÉ is currently the only operator in this market. Therefore, RTÉ has 100% market share in the relevant market.<sup>186</sup>

13.8 The spectrum used by RTÉ is licensed by ComReg to RTÉ in accordance with the 2009 Act, while that used by the independent sector is licensed to the BAI, through contracts which it enters into with them.

13.9 As there has not been any award of DTT multiplex contracts, the BAI has not yet requested DTT multiplex licences from ComReg. Although the BAI entered into a negotiation process for commercial DTT contracts between

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If a broadcaster wishes to provide programme material for broadcast on RTÉ's DTT platform, there are two-stages it must go through. It must firstly engage with RTÉ as the DTT multiplex licensee and then separately with RTÉNL to have the programme material multiplexed as part of the existing DTT platform subject to the provisions of Section 130 of the 2009 Act.

2008 and 2010, there was a failure to negotiate terms and conditions to the satisfaction of both RTÉNL and potential commercial DTT providers, and so commercial DTT was not established.

- 13.10 Currently, it is only via RTÉ that a DTT broadcaster can transmit its broadcasting programme service. RTÉ has two PSB DTT multiplex licences and provides a service that allows for 98% population coverage. While capacity on one of these multiplexes for more DTT services is no longer available, capacity is available on its second DTT multiplex. Most of the programme services currently available via RTÉ's first multiplex are RTÉ's own programme services (six out of the nine available).
- 13.6 In the discussion of potential competition below, ComReg considers whether the competitive conditions of this market are likely to materially change during the period covered by this review. In this context as RTÉ is the sole operator in this market and given its vertically integrated structure, this implies the potential to limit effective access by other broadcasting programme services to its DTT multiplexes could manifest in order to hinder competition with RTÉ for audience market share and related advertising revenues.

### **13.2. Potential competition**

- 13.7 In this section ComReg assesses possible constraints posed by potential competition in market B. This assessment of potential competition considers whether entry (and expansion) in this market are likely to such an extent that they would constrain RTÉ's ability to act independently of its competitors and customers.
- 13.8 Indirect constraints which operate at the wholesale level through their effects at the retail level can be taken into account at either the market definition or the competition analysis stage. ComReg has already considered the effects of indirect constraints operating through the retail level in its market definition, and has concluded that these are insufficient for alternative platforms to be included in the relevant markets.
- 13.9 In the rest of this section ComReg considers the characteristics of the market before coming to its conclusion on whether SMP exists in this market. The criteria as set out in the SMP Guidelines are used in this context.

#### ***Control of infrastructure not easily duplicated***

- 13.10 RTÉ currently holds licences for two PSB DTT multiplexes which have been provided for under the 2009 Act. Further entry to this market is not possible without acquiring a commercial DTT multiplex contract from the BAI. There is the potential for ComReg to licence up to four, DTT multiplex licences to the BAI in this regard.

- 13.11 The BAI initiated a competitive tender process around 2008 but due to reasons stated as deterioration in the economic climate and failure to negotiate to the satisfaction of both RTÉNL and potential commercial DTT providers, commercial DTT was not established.
- 13.12 In light of no recent express demand for commercial DTT contracts and the uncertainty as to when a new process will be initiated and the time involved in such a process from completion to end, effective entry capable of constraining RTÉ would not seem likely to occur during the period covered by this market review.
- 13.13 In the event of the launch of commercial DTT, RTÉ could possibly face direct competition for its own customers (such as TG4 and TV3) in this market which could constrain its behaviour towards actual and potential customers. In principle, commercial DTT multiplex operators could act as an alternative means of terrestrial transmission for RTÉ's digital customers and therefore they could switch from RTÉ's PSB DTT multiplexes to commercial DTT multiplex operators. However, in practical terms this may be more difficult.
- 13.14 As has been discussed, it seems unlikely that a commercial DTT multiplex operator, capable of constraining RTÉ, will enter the market during the period of this review. Where a commercial DTT operator did enter the market it would have to be able to satisfy TV3 and TG4's legal commitments (for example, coverage commitments) in order to provide a possible alternative source of supply to RTÉ for these FTA broadcasters, although it may be able to provide an alternative source of supply for commercial programme services.
- 13.15 Both TG4 and TV3 have legal commitments which they must satisfy to be able to broadcast their programme services. TG4 must be available, as much as reasonably possible, to the whole community of Ireland on a FTA basis<sup>187</sup> while TV3 must be available to circa 90% of the population on a FTA basis<sup>188</sup>. Therefore, for commercial DTT to be a substitutable service it would have to provide for population coverage comparable to RTÉ and allow the broadcast transmission of FTA programme services. The business model of a broadcaster such as TG4 and TV3 is very different to that of a commercial DTT multiplex operator. It is likely that a broadcaster such as TV3 and TG4 would need to form a partnership to be able to successfully tender for a DTT multiplex contract in order to self supply its television services. Such partnerships were generally common of bidders for DTT multiplex contracts between 2008 and 2010. Such alliances would be difficult to form and would take time to implement in the context of the issues discussed above. Third party commercial DTT operators may be unwilling to operate from all the 51 DTT sites from which RTÉ operates its DTT service to provide comparable coverage, as the costs would correspondingly increase. The incremental cost in such a case may outweigh the potential benefits of doing so.

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<sup>187</sup> TG4 coverage requirements are set out as part of its objectives in Section 118 of the Broadcasting Act 2009.

<sup>188</sup> As per its contract with the BAI.

- 13.16 It is also possible that commercial DTT operators may not be inclined to want TG4 and TV3 or 3e using capacity on their own multiplexes.
- 13.17 In an analogue context some broadcasting contracts with RTÉNL were in place for up to ten years. Even if commercial DTT could provide an alternative for RTÉ's existing customers, commercial DTT will not happen before the ASO, and therefore, as RTÉ's existing customers have no current alternative source of supply, it could be possible that they may have already entered into contracts with RTÉ. In such a case, even if there were commercial DTT entry at a later date post ASO, RTÉ's customers may be unable to switch without incurring switching costs which may act as a deterrent to switching.
- 13.18 ComReg is therefore of the view that RTÉ's control of infrastructure not easily duplicated is likely to allow RTÉ to act independently of its competitors, customers and consumers.

***Financial (sunk) costs***

- 13.19 This factor looks at any significant investments in network infrastructure, technology, equipment, marketing, advertising, promotions, staff training costs, research and development, etc. that cannot be resold or recouped or can only be partially recouped on exit from the market. Investments that can be recouped on exit from the market should not be considered here.
- 13.20 It should be acknowledged that a certain level of sunk costs will always be needed to enter most markets. Furthermore, the incumbent may also have had to pay a similar level of sunk cost before it entered the market or in emerging markets all new entrants may incur a similar level of upfront investment.
- 13.21 While the costs associated with the establishment of a DTT multiplex(es) service would not be especially sunk (some of these costs such as staff or marketing may be sunk in the case where a firm exited the market) or as large as it would be for a potential entrant to market A, there are financial costs involved in such a venture which would be a consideration for any potential entrant. For example to provide for a national service comparable to RTÉ, a commercial DTT operator would need to be broadcast from as many as 51 transmission sites to cover circa 98% of the population. A potential entrant would need to negotiate the details of carriage with potential customers and devise its business plan before entry (e.g. marketing strategy, customer targets, partnerships etc.) which would take time to complete in advance of any bid for a commercial DTT contract following an initiation of a tender process. Given that some of the costs of entry would be fixed and in order to provide an attractive content package to retail end-users, it is likely that before entry a commercial DTT operator would need to have most/all of its multiplex capacity filled in order to recover its costs.
- 13.22 In addition, the maintenance and operation of such infrastructure is complex and the technological know-how required for this would mean that particular

expertise in this area would be required. For example, RTÉ's network subsidiary RTÉNL undertakes such a process for RTÉ.

- 13.23 Where access to market A is provided on regulated terms (as proposed in section 11), the costs of entry in market B would not appear insurmountable compared to market A. However, ComReg believes that the range of regulatory (e.g. contract awards processes and coverage requirements) and strategic barriers limit the scope for effective market entry and expansion in market B over the timeframe of this review. This preliminary conclusion would appear to be further supported by the lack of clear demand from potential DTT multiplex operators for commercial DTT contracts since the BAI's DTT multiplex contract negotiation process a number of years ago.

### ***Vertical integration***

- 13.24 In the context of an unregulated upstream wholesale market A it is ComReg's preliminary view that RTÉ, as a vertically integrated entity, through RTÉNL could foreclose other multiplex operators entry into this downstream wholesale market B. However, in light of ComReg's proposal to impose regulatory obligations on RTÉNL in upstream wholesale market A, it could be expected that DTT multiplex operator entry to market B could be more easily facilitated. However, the competitive conditions of market B may not necessarily improve in tandem.
- 13.25 As already mentioned, there has not been any award of DTT multiplex contracts by the BAI to date and therefore the BAI has not yet requested multiplex licences from ComReg.
- 13.26 Since the unsuccessful commercial DTT negotiation process between 2008 and 2010 there has been no recent demand expressed by potential multiplex operators for commercial DTT and it is unclear when a new commercial DTT tender process will be initiated. Furthermore, taking account of the regulatory and other barriers to entry, it does not seem likely that commercial DTT entry capable of constraining RTÉ will be established in the timeframe of this review.
- 13.27 As a vertically integrated entity where RTÉ is the sole operator in this wholesale market as well as having a significant position in the retail market it may leverage its wholesale market power (through limiting access to its multiplexes and/or engaging in discriminatory pricing practices for example) to affect the competitive conditions of the downstream retail market in its own favour to optimise its advertising revenues. Thus it would appear that RTÉ would have sufficient power to act independently of its customers and competitors. ComReg will consider this in the context of countervailing buying power below.



### **Countervailing buying power**

- 13.28 A potential constraint on an undertaking's ability to exercise market power is buying power from a purchaser of significant size or resources. Countervailing buying power can arise if, for example, a particular purchaser is sufficiently important to its supplier to influence the price or other terms and conditions of supply and are usually present where the buyer has an alternative source of supply.
- 13.29 Currently, RTÉ is the only operator in market B and for the reasons discussed above; this may be unlikely to change within the period of this review. Therefore, to provide DTT services, broadcasters must have access to RTÉ's PSB DTT multiplexes and thus any potential outside option to purchase wholesale services is limited.
- 13.30 As RTÉ will be the only supplier in this market in the lead up to ASO and as it is uncertain when potential future entry can/will occur, DTT broadcasters would be unable to credibly exert influence on their terms and conditions of supply from RTÉ, due to the lack of availability of outside options of supply.
- 13.31 The alternative for RTÉ's customers (currently TV3, 3e, TG4,) would be to threaten to cease terrestrial broadcast transmission. However, this is unlikely where so far as the DTT charges are smaller than the incremental revenues the broadcaster earns from being present on DTT. In addition, TV3 and TG4 have legal requirements (coverage and FTA broadcasting obligations) which make terrestrial broadcast transmission very important to these broadcasters meeting these requirements. If competing programme services were to cease their activities, this would likely benefit the broadcasting activities of RTÉ as it is a vertically integrated entity that competes in the downstream retail market with other broadcasters for audience market share and advertising revenues.
- 13.32 The potential for self supply in market B has also been examined, but there are a number of difficulties which were discussed in sections 5 and 12 and earlier in section 13 which make this unlikely.

### **13.3. Preliminary conclusion**

- 13.33 ComReg has considered this market in terms of existing competition, potential competition and countervailing buying power to determine whether there is SMP in the market.
- 13.34 Taken as a whole there are a number of barriers to effective entry and expansion in this market and hence there are limited competitive constraints on RTÉ. These include the process involved in acquiring a commercial DTT multiplex contract, the coverage obligations of Irish terrestrial television

broadcasters, and potential switching costs for customers of RTÉ who may have entered into contracts with RTÉ. Based on evidence to date ComReg is not aware of any express demand by potential multiplex providers for commercial DTT which would be capable of constraining RTÉ. In light of this and uncertainty as to when a new commercial DTT contract process will be initiated and time involved in such a process, effective entry would not seem likely to occur in the period of review. As the sole operator in this market and one which is vertically integrated into the retail market where it competes with other broadcasters, ComReg is of the preliminary view that RTÉ has sufficient market power to act independently of competitors, customers and consumers.

13.35 In summary, ComReg's preliminary conclusions are that:

- RTÉ has 100% share of the relevant market;
- RTÉ has acquired the licenses for the operation of two PSB DTT multiplexes. There are no alternative commercial DTT multiplex operators in this market capable of constraining RTÉ and, on the basis of the evidence to date, this seems unlikely to change during the period covered by this review;
- As a vertically integrated entity RTÉ competes with other broadcasters in the retail market and is also a wholesale supplier to broadcasters. In the absence of regulation market failure may arise where competing broadcasters may be charged excessive fees, provided with a lower quality of service, or refused access in order to weaken their competitive threat to RTÉ at the retail level; and,
- Insufficient countervailing buying power exists in the market and so DTT broadcasters do not have the ability to exert significant constraint on their cost or other terms and conditions of supply from RTÉ.

13.36 Although ComReg acknowledges that the potential for competition to develop in this market is at least in theory greater than in market A, ComReg believes that the competitive conditions of this market are unlikely to materially change during the period covered by this review for the reasons already discussed.

13.37 However, ComReg will closely monitor relevant developments (if any) in the market over the period of the current review.

#### **13.4. Designation of undertaking(s) with SMP**

13.38 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 27(4) of the Framework Regulations as having SMP on that market.

- 13.39 Having regard to the preliminary conclusions of the above market analysis, ComReg is therefore of the preliminary view that:

**RTÉ should be designated as having SMP in market B.**

- 13.40 It should be noted that ComReg is not proposing to regulate all activities of RTÉ, only those relating to market B.

**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.**

## 14 Competition Problems – Market B

- 14.1 ComReg is obliged to impose appropriate specific regulatory obligations and at least one remedy, further to Regulation 27(4) of the Framework Regulations, once it designates an undertaking with SMP. According to Regulation 8(6) of the Access Regulations, the remedies imposed must be based on the nature of the competition problems identified, and be proportionate and justified in light of ComReg’s objectives as set out in section 12 of the Communications Regulation Acts 2002-2011.
- 14.2 It is not necessary for ComReg to point to examples of actual anti-competitive activity within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and/or section 5 of the Competition Act, 2002 that have occurred or are occurring. A finding of SMP indicates the potential for competition problems to arise and this is sufficient to justify the imposition of proportionate *ex ante* regulation.
- 14.3 In determining what form of *ex ante* regulation is warranted in this market, ComReg has carried out an assessment of potential competition problems that are likely to arise assuming SMP regulation is absent from that market and taking account of the structure and characteristics of market B.
- 14.4 In the absence of regulation of this market, a dominant undertaking would have the potential ability and incentive to influence a range of competition parameters, including access, prices, and the variety or quality of goods and services provided.
- 14.5 Three broad types of competition problems may arise in this market where an undertaking has SMP:
- Exploiting customers by virtue of its SMP position;
  - Leveraging its market power into adjacent vertically related markets; and,
  - Foreclosing or excluding competitors to protect its existing dominance in the broadcasting transmission market.

### 14.1 Exploitative behaviour

- 14.6 ComReg’s preliminary view is that in the context of an operator with SMP in wholesale market B, and one that is vertically integrated into the related retail market, it would have the incentive and ability to engage in exploitative practices, such as excessive pricing and inefficiency. This is discussed below.

### **Excessive Pricing**

- 14.7 ComReg believes that, given the barriers to effective competition analysed earlier in this consultation paper, and in the absence of SMP regulation in this market, RTÉ, as the sole operator in this market which is vertically integrated into the retail market, may have the potential to price excessively to disincentivise other broadcasting programme services' market entry/expansion and reduce their ability to compete with RTÉ in the retail market. This would harm competition where excessively priced wholesale broadcasting services would make it more difficult to compete in the downstream market where broadcasters rely on the upstream input to compete. This may, in turn, lead to reduced choice and quality for consumers in the retail market.
- 14.8 It is therefore important to ensure that the potential to price excessively does not emerge and to ensure that there is a level playing field for broadcasters using RTÉ's multiplexes.
- 14.9 To address the potential for excessive pricing in the market, ComReg believes that *ex ante* regulation is required.

### **Inefficiency**

- 14.10 A firm with SMP in this market may, by virtue of the lack of effective competitive pressure, be insulated from the need to innovate and improve efficiency to stay ahead of rivals. This may limit the range of offerings for retail end-users than otherwise might occur.
- 14.11 For example, RTÉ might have a limited incentive in keeping costs to an efficient level, since higher charges would hinder the development of competition and this could potentially benefit the broadcasting activity of RTÉ. Also, it may be possible that RTÉ may have limited incentive to be as efficient as possible with the availability of capacity on its DTT multiplexes for example, in order to limit the possibility of carriage of non RTÉ programme services.

## **14.2 Leveraging of market power into vertically related markets**

- 14.12 Where an integrated operator has SMP in one market which has links with other adjacent markets either at a similar or different level in the production or distribution chain, the dominant undertaking may attempt to transfer (leverage) its market power to such vertically related markets. This could enable the SMP operator to strengthen its position in those related markets and potentially also reinforce its existing market power in the SMP market in question.

### ***Vertical leveraging***

14.13 A vertically integrated operator that is dominant in this market may have the incentive to use this power to affect the competitive conditions in the market for retail broadcasting services. RTÉ has the potential to use its upstream market power in market B to leverage into the downstream retail market . This is discussed below.

#### ***Refusal to deal/denial of access***

14.14 An example of vertical leveraging can include refusal to deal. A refusal to deal/denial of access may manifest itself as a constructive denial and not necessarily an outright and categorical refusal to supply. This could include discriminatory use or withholding of information, quality discrimination, disproportionate entry criteria as well as unreasonable terms and conditions associated with access. Further examples of potential leveraging behaviour can include creating or exploiting information asymmetries, and practices aimed generally at raising rivals' costs. ComReg considers that, absent regulation, a number of these types of issues could arise in this market.

#### ***Non price issues***

14.15 Where the SMP operator is vertically integrated, non-discriminatory conditions and services can be ambiguous. A lack of transparency could make it difficult to demonstrate equivalence and provide the potential and incentive for leveraging market power.

14.16 Further, a vertically-integrated SMP operator may act to foreclose wholesale-based competition in the retail market by creating or exploiting information asymmetries.

14.17 An example of information asymmetries could include where wholesale customers require service level agreements with regard to service delivery and fault repair to view from a provisioning and service assurance perspective. Failure by RTÉ to meet such requirements could provide the potential for discriminatory behaviour and further, possibly act as a deterrent to potential entry.

14.18 Information asymmetries may also apply to future planning by the SMP operator. For example, changes by RTÉ to its wholesale services may have significant implications for DTT broadcasters using its wholesale service and a lack of information and associated uncertainty may discourage undertakings entry to the market.

14.19 It should be noted that under Sections 74 and 75 of the 2009 Act the BAI may enter into an electronic programme guide (EPG) contract which includes a condition that the holder of the contract must comply with rules which the BAI after, consultation with ComReg, may prepare. Thus, in this respect, there is

no further need to consider potential issues that could arise in the context of an EPG.

### *Pricing issues*

- 14.20 Vertical leverage may also be apparent in the use of price. RTÉ may have the potential to minimise the number of non RTÉ broadcasting programme services on its multiplexes to reduce the potential loss of its advertising revenues which might otherwise occur if more third party broadcasting programme services were made available in the retail market via terrestrial means. This could occur if, for example, RTÉ could devise a tariff structure which would discourage broadcasters' interest in accessing its multiplexes. RTÉ could favour its own digital programme services to other programme services by applying discriminatory charges. As a vertically integrated operator which has SMP at the wholesale level and provides a wholesale input on which other operators rely to compete in a downstream market it could price its upstream services in such a way as to impede effective downstream competition by excessively raising its upstream costs. It is therefore, important that tariffs are set on a transparent and non-discriminatory basis.
- 14.21 These issues highlight the importance of establishing a transparent and effective mechanism of accounting separation and transfer charges between the various RTÉ's entities so that the costs of access are efficient and its allocation to each customer (RTÉ and competitor broadcasting activities) can be transparently identified.

### **14.3 Exclusionary practices**

- 14.22 In addition to any exploitative practices and potential leveraging into vertically related markets, the SMP designate may attempt to defend its existing SMP position in the relevant market by engaging in conduct aimed at foreclosing the market.
- 14.23 Capacity on one of RTÉ's two PSB DTT multiplexes is full which consists of nine television programme services (including Aertel), six of which are RTÉ's own programme services. Under the 2009 Act RTÉ shall provide for television services under section 130 on its multiplex. The list of these television services were discussed in section 12. In this context, in 2011 the BAI published a report detailing the digital content services, which may have a public service nature and considers merit by the Minister for inclusion on RTÉ's multiplexes.<sup>189</sup> ComReg is of the view that an SMP operator may have the potential to engage in exclusionary behaviour in this market, for example, by employing a tactical refusal of access through delaying the provision of its wholesale services to broadcasters for example.

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[www.bai.ie/wordpress/wp-content/uploads/20110815\\_BAIDTTEOI\\_FINAL.pdf](http://www.bai.ie/wordpress/wp-content/uploads/20110815_BAIDTTEOI_FINAL.pdf)

[www.irishstatutebook.ie/2009/en/act/pub/0018/sec0130.html#sec130](http://www.irishstatutebook.ie/2009/en/act/pub/0018/sec0130.html#sec130)

#### **14.4 Preliminary conclusion on competition problems**

- 14.24 In summary, ComReg's preliminary view is that, absent regulation, there is the potential and incentive for an SMP operator in the wholesale market B to engage in actions which could inhibit competition and consequently negatively impact end-users in the retail broadcasting market. On a preliminary basis, RTÉ has been identified with SMP in the relevant market, and thus has both the incentive and ability to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users. Therefore, it is ComReg's view that *ex ante* regulation is needed in this market.
- 14.25 As discussed in section 12, while there are legislative provisions under section 130 of the 2009 Act which could address, at least in part, some of the potential competition concerns that may arise in this market it is likely that *ex ante* obligations are required to support the provisions of the 2009 Act should market failures arise, in particular the terms and conditions for the provision of access and the price of such access. For example, the 2009 Act would not be supported by appropriate cost accounting obligations nor necessarily would address the requirement for transparency and non-discrimination as there be no requirement that RTÉ charge itself in the same manner. Furthermore, there could be the potential to engage in behaviour which could otherwise result in a constructive refusal of supply through delaying the provision of wholesale services to broadcasters for example.

**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.**

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



## 15 Remedies – Market B

- 15.1 In section 14, ComReg identified a range of competition problems and competition/consumer impacts that, absent regulation, could arise in the relevant market B by virtue of RTÉ having SMP. In this section, ComReg now considers the imposition of appropriate and proportionate remedies to mitigate such competition problems.
- 15.2 In accordance with Regulation 8(1) of the Access Regulations, where an operator is designated as having a SMP on a relevant market, ComReg is required to impose on such an operator such of the obligations set out in Regulations 9 to 13 as ComReg considers appropriate. In this regard, the obligations that may be imposed by ComReg on SMP undertakings are those relating to:
- (d) Access;
  - (e) Transparency;
  - (f) Non-Discrimination;
  - (g) Price Control and Cost Accounting; and
  - (h) Accounting Separation.
- 15.3 In addition, Regulation 8(6) of the Access Regulations provides that any of the above obligations imposed must:
- (i) Be based on the nature of the problem identified;
  - (j) Be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Acts 2002 to 2011 and Regulation 16 of the Framework Regulations<sup>190</sup>;
  - (k) Only be imposed following public consultation and notification of the draft measures to the European Commission, BEREC and other NRAs in accordance with Regulation 12 of the Framework Regulations.
- 15.4 Regulations 12(1) and 12(4) of the Access Regulations also provide statutory criteria that ComReg must take into account before imposing access obligations on an SMP undertaking. These criteria include, inter alia, examining the technical and economic viability of using or installing competing facilities; the feasibility of providing access; the initial outlay of

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Pursuant to section 12 of the Communications Regulation Acts 2002 to 2011, ComReg's relevant objectives in relation to the provision of electronic communications networks and services are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community.

investment by the undertaking; and the need to safeguard competition in the long term.

- 15.5 The considerations set out in the paragraphs above are taken into account, as appropriate, when assessing whether and what form of obligation to impose and are also discussed in further detail in the context of the Regulatory Impact Assessment in section 10.
- 15.6 Apart from the above, in considering the imposition of remedies on SMP operator, ComReg has also taken the following into account:
- The European Regulators Group (ERG<sup>191</sup>) common position on the approach to appropriate remedies in the electronic communications networks and services regulatory framework<sup>192</sup>;
  - The comments letters issued by the European Commission pursuant to Articles 7 and 7a of the Framework Directive in its review of regulatory measures notified by Member States under the EU consultation mechanism for electronic communications services (the “Comments Letters”);
  - The European Commission’s ‘2005 Accounting Separation and Cost Accounting Recommendation’<sup>193</sup>.
- 15.7 Below ComReg sets out its proposed approach to regulation to the relevant market B.

### **15.1 Option of No Regulation**

- 15.8 ComReg has considered whether the option of regulatory forbearance is appropriate in the relevant market B.
- 15.9 Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations require ComReg to impose at least some level of regulation on undertakings designated as having SMP. In section 6, ComReg set out its view that the relevant market B is not effectively competitive (or likely to become effectively competitive within the timeframe covered by this

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<sup>191</sup> Pursuant to [Regulation \(EC\) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications \(BEREC\) and the Office](#) ERG was replaced with the Body of European Regulators for Electronic Communications (BEREC).

<sup>192</sup> Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, ERG (06)33, May 2006, available at [http://www.erg.eu.int/doc/meeting/erg\\_06\\_33\\_remedies\\_common\\_position\\_june\\_06.pdf](http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf). Please note that BEREC is currently working on up-dating this ERG Common Position. No date for completion of this work has yet been announced.

<sup>193</sup> European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC).

review). In section 14, ComReg identified a range of competition problems that could occur in this market absent regulation.

- 15.10 In view of this, absent the imposition of any remedies within the relevant market B, it is ComReg's view that this market would not likely function effectively. For example, in the context of negotiations between RTÉ and DTT broadcasters, access could be effectively refused, notwithstanding the provisions of section 130 of the 2009 Act, and/or its wholesale service prices could be set at an excessive level (even where agreement for access has been reached).
- 15.11 It is ComReg's preliminary view that the option of regulatory forbearance in the relevant market B is not, therefore, appropriate or justified. The relevant issue to be considered, therefore, relates to what form of regulation is appropriate, in particular, which of the remedies under the Access Regulations are appropriate having regard to the particular circumstances of the relevant market B and the associated competition problems. ComReg sets out its preliminary views on these issues below.
- 15.12 ComReg proposes that to complement the 2009 Act, where RTÉ itself has specific public service obligations in relation to its PSB multiplex(es), the measures proposed in this market would apply to broadcasters designated by the Minister under section 130 (excluding those addressed by section 130(1)(e) who, if spare capacity was available outside of those covered in other areas of section 130, can negotiate with RTÉ for access on a commercial basis). The measures outlined in this consultation paper therefore aim to support and complement the 2009 Act taking into account RTÉ's public service obligations under the 2009 Act.
- 15.13 The detail of the specific obligation(s) proposed is set out in the draft Decision Instrument contained in section 17 of this consultation paper. These are considered proportionate based on the nature of the actual and potential competition problems identified in this report, and justified in light of the objectives laid down in section 12 of the Communications Regulation Acts, 2002-2011.
- 15.14 ComReg proposes to closely monitor relevant developments (if any) in the market over the period of the current review, to assess whether the obligation(s) remain appropriate.
- 15.15 It should be noted that ComReg is not proposing to impose obligations over all of RTÉ services, only those relating to market B.
- 15.16 As has been mentioned earlier in this consultation paper in section 9, due to varying characteristics of broadcasting transmission services across different EU Member States, NRAs have adopted different approaches and regulation has been applied in many cases.

## 15.2 Proposed Remedies

15.17 Pursuant to Regulation 12(4) of the Access Regulations, when considering whether to impose obligations referred to in paragraphs (1) and (2) of Regulation 12 and, in particular, when assessing whether such obligations would be proportionate to the objectives set out in section 12 of the Communications Regulation Acts 2002-2011 as amended, ComReg has taken the following into account:

- *Technical and economic viability of using or installing competing facilities:* ComReg has considered the viability of competing alternatives to RTÉ's PSB DTT multiplexes. ComReg's preliminary SMP analysis in section 13 indicates that, based on the evidence to date, it does not anticipate alternative DTT multiplex operators in the timeframe of this review which would be capable of constraining RTÉ's dominance in market B.
- *Feasibility of providing access in relation to capacity available:* Capacity for the provision of terrestrial services is constrained by the finite amount of spectrum available for a national service in bands allocated to broadcasting. The spectrum used by RTÉ for DTT is licensed by ComReg and ComReg has issued two DTT multiplex licenses to RTÉ in accordance with section 132 of the 2009 Act. Capacity for more television programme services on one of these PSB DTT multiplexes is limited; however, there is capacity on the second PSB DTT multiplex for the carriage of additional programme services.
- *The initial investment of the facility owner:* As per Regulation 13(2) of the Access Regulations, ComReg's approach to imposing access remedies in the market is based on principles that, among others, allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs.
- *The need to safeguard competition:* Competition in the retail broadcasting market depends on effective regulation in the relevant wholesale market(s). ComReg believes that the range of remedies discussed in this consultation paper is needed to contribute to the development of competition and to benefit end-users, due to RTÉ's dominance in market B.
- *Intellectual property rights:* ComReg's view is that intellectual property rights are not a significant concern in this market.
- *Provision of pan-European services:* Regulation of broadcasting transmission services is dependent on national circumstances. While many NRAs have designated SMP, or found the three criteria test to be

met in part(s) of their broadcasting transmission market, other NRAs have deemed the market to be effectively competitive and thus not warranting ex-ante regulation. ComReg is of the view that the principles applied by ComReg in this consultation paper adhere to the European Commission's 2007 Recommendation on Relevant Product and Services Markets.

- 15.18 For the avoidance of doubt, where there are any conflicts between the provisions and/or definitions and the 2009 Act, the provisions of the 2009 Act will prevail.

***Obligation to provide access***<sup>194</sup>

***Obligation to meet all reasonable requests for the provision of access, including associated facilities***

- 15.19 Under Regulation 12(1) of the Access Regulations, ComReg may, in accordance with Regulation 8 of the Access Regulations, and in light of the preliminary finding of SMP and potential competition problems, impose on the SMP designate obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities. Such an obligation would be imposed where ComReg considers that the denial of such access or the imposition by operators of unreasonable terms and conditions having a similar effect, would hinder the emergence of a sustainable competitive retail market, would not be in the interests of end-users and would otherwise hinder the objectives set out in section 12 of the Communications Regulation Acts 2002-2011.
- 15.20 As DTT broadcasters are reliant on RTÉ's PSB DTT multiplexes for delivery of their programme services it is appropriate to ensure that effective access is provided.
- 15.21 This access obligation can be justified as a means of increasing competition in the retail market, but this must balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit.
- 15.22 As per Recital 19 of the Access Directive, imposition of access obligations that increase competition in the short term should not be imposed if it reduces incentives for competitors to invest in alternative facilities that will secure more competition in the long term in the relevant market. Given the high and non-transitory barriers to entry ComReg does not believe that investment in

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It should be noted that although RTÉ holds the licences for the PSB multiplex(es) it is RTÉ's network arm, RTÉNL, who maintains and operates the multiplexing process for RTÉ. If a broadcaster wishes to provide programme material for broadcast on RTÉ's DTT platform, there are two-stages it must go through. It must firstly engage with RTÉ as the DTT multiplex licensee and then separately with RTÉNL to have the programme material multiplexed as part of the existing DTT platform subject to the provisions of section 130 of the 2009 Act. It should be noted that ComReg is not proposing to impose obligations over all of RTÉ services, only those relating to market B.

effective alternative infrastructure is likely within the timeframe of this review.

- 15.23 Given the potential exclusionary behaviour as previously discussed ComReg is of the preliminary view that an access remedy is required in this market.
- 15.24 As discussed in sections 12 to 14, while there are legislative provisions under the 2009 Act which may address some elements of *ex ante* regulation ComReg does not believe that these are sufficient.
- 15.25 The legislative provisions under the 2009 Act do not provide the same necessary protections available under *ex ante* regulation such as granting access in a fair, reasonable and timely manner, or negotiating in good faith for example. If these conditions of the access obligation were not in place, there could be the potential to engage in behaviour which could otherwise result in a constructive refusal of supply through delaying the provision of its wholesale services to broadcasters for example.
- 15.26 Pursuant to Regulation 12(a) of the Access Regulations and in accordance with section 130(1) of the Act of 2009, RTE should meet all reasonable requests from broadcasters in the context of section 130 of the 2009 Act excluding section 130(1)(e) of the 2009 Act for the provision of Access (In order to support and complement the 2009 Act, taking into account RTE's public service obligations under the 2009 Act. These are residual services at RTE's discretion, based on spare capacity allowable only if, inter alia, all PSB obligations are fulfilled.), including Associated Facilities and Associated Services. ComReg proposes that, to facilitate sustainable downstream competition, an obligation be imposed on RTE to provide access to all reasonable requests to be carried on a multiplex and therefore purchase a multiplexing service in accordance with section 130 of the 2009 Act,<sup>195</sup> in a reasonable and timely manner, and on non-discriminatory terms and conditions (including charges).
- 15.27 For the avoidance of doubt, this specification is not intended to represent an exhaustive list of the services which may be subject to a reasonable request for access to services contained in market B. Furthermore, in accordance with Regulation 2 of the Access Regulations, access includes access to associated facilities.
- 15.28 Without trying to limit the scope of defining such access, the meaning which is detailed in the draft Decision Instrument in section 17 means wholesale access to any multiplex operated and maintained by RTE for the purposes of DTT and is synonymous with the market. Multiplex access means:

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<sup>195</sup> Under section 130 of the 2009 Act, programme services carriage on RTE's PSB DTT multiplexes requires Minister consent.

Access to an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public. For the purpose of this consultation paper multiplexing services are taken to have the same meaning.

15.29 The specific detail of this obligation is discussed in section 17.

### **Conditions attached to the access obligation**

#### ***Obligation to negotiate in good faith***

15.30 Given the potential for constructive refusal to supply, ComReg proposes to impose an obligation that RTÉ should negotiate in good faith with broadcasters requesting access to its multiplexing service. ComReg notes that the obligation to negotiate in good faith implies that the responsibility rests with RTÉ to demonstrate that its approach to negotiation with undertakings was done in good faith and that any unmet access requests can be shown to be unreasonable.

15.31 Recital 19 of the Access Directive states in relation to access requests to the SMP operator that “*such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity.*” ComReg therefore proposes that when an access request is refused, the objective criteria for refusal should be provided in reasonable detail and in a timely manner to the party making the access request.

15.32 In addition, ComReg proposes that an obligation to negotiate in good faith also includes, but is not limited to, negotiations in relation to the conclusion of fit-for-purpose and legally binding Service Level Agreements (SLAs).

#### ***Obligation not to withdraw access to services and facilities already granted***

15.33 The need for an obligation not to withdraw access to services and facilities already granted without the prior approval of ComReg has to balance the requirement for undertakings to have some certainty over the future of their own investments against the requirement to support network development.

15.34 Lack of information regarding changes by RTÉ relating to its wholesale service may have significant implications for its customers. This justifies an obligation under which RTÉ should not withdraw access to services and facilities already granted, and should not diminish the service level already granted, except with the prior approval of ComReg.

15.35 ComReg would propose to assess any request by RTÉ to withdraw access to such existing services/facilities on a case-by-case basis.

- 15.36 While mindful of the need to support network development, ComReg is of the preliminary view that any such withdrawal of access should be flagged sufficiently in advance so as to give broadcasters adequate notice of the impending change. The purpose of this is to allow time for alternative supply arrangements or alternative services to be put in place so as to minimise potential adverse effects on downstream competition. Another consideration for ComReg in such cases would be to minimise potential adverse impacts on end-users of services relying on the withdrawn facility.

*Obligation to grant access in a fair, reasonable and timely manner*

- 15.37 ComReg is of the preliminary view that there is the potential for RTÉ to engage in a constructive as opposed outright refusal to supply. Therefore, ComReg believes that a condition should be attached to the access obligation which would oblige RTÉ to grant access to its DTT multiplexing services in a fair, reasonable and timely manner.
- 15.38 In assessing the scope for competition problems to arise in the market in section 14, ComReg identified the potential for an SMP operator to engage in a constructive refusal to supply e.g. through disproportionate entry and unreasonable terms and conditions associated with access. ComReg thus proposes that a condition should be attached to the access obligations which would oblige RTÉ to grant access to its multiplexing service in a fair, reasonable and timely manner.

*Service Level Agreements (SLAs)*

- 15.39 To ensure that conditions of access are provided on fair, reasonable terms and in a timely manner, ComReg proposes to attach conditions to the access obligation to ensure that legally binding service level agreements (SLAs) are appropriately concluded and implemented.
- 15.40 As part of RTÉNL's regulatory obligations following ComReg's 2003/2004 market review as detailed in Decision Notice D16/04, RTÉNL had an obligation to make available to all parties with which RTÉNL has contractual arrangements and make available to ComReg, details of the technical specifications, network characteristics and terms and conditions of supply, under a service level agreement which ComReg may oblige RTÉNL to make publicly available. ComReg proposes that an obligation to provide SLAs should be imposed on RTÉ in this wholesale market.
- 15.41 ComReg proposes that, for the purpose of clarity and to provide certainty to industry, the list of parameters included as part of that SLA obligation should be included as part of the SLA obligation proposed in this market as well. These are provided in Appendix B of this consultation paper.



- 15.42 ComReg also proposes to make a specific provision that RTÉ should be obliged to negotiate in good faith with broadcasters in relation to the conclusion of legally binding and fit-for-purpose SLAs.
- 15.43 As has been noted in sections 13 and 14 of this consultation paper, RTÉ has the ability and incentive engage in anti-competitive practices to discourage downstream market entry in order to benefit its broadcasting activities. This could include issues related to quality of service, where failure to provide guaranteed quality of service may deter market entry and expansion. Therefore, ComReg has proposed that SLAs should be provided by RTÉ in this market to deter such behaviour. ComReg believes that absent regulation, RTÉ may not be incentivised to meet any conditions of an agreed SLA, without some level of compensation to wholesale customers, should the SLA be breached.
- 15.44 Therefore, ComReg proposes a specific obligation to ensure that the SLA should specify a level of compensation (service credits) that adequately compensates the customer for a breach of the SLA. For example this may occur where there is a failure to deliver or repair a service appropriately within a prescribed time as described in the SLA. This measure would provide RTÉ with an incentive to deliver and maintain its DTT multiplexing services to a pre-defined and pre-agreed level of performance or otherwise compensate its customer accordingly. The process of compensation should not be burdensome and the methodology used and calculation of SLA credits should be clearly explained by RTÉ in the SLA with examples. To ensure the effectiveness of this obligation, it is further proposed that the payment of any service credits should be made in a timely and efficient manner.
- 15.45 Given the potential competition problems identified in this consultation paper relating to discrimination, ComReg is of the preliminary view that certain quality guarantees are appropriate in respect of RTÉ's provisioning of its multiplexing services. Such assurances are also commonplace in contractual agreements between suppliers and their customers.
- 15.46 ComReg notes the ERG Common Position that *"SMP players often prefer not to be committed to supplying that product according to a particular time-scale or quality or to be committed to repairing faults within an agreed time-scale. Commitments of this kind would be normal commercial practice and it is entirely legitimate – and may be necessary for proper functioning of the market – for the NRA to require the SMP player to make reasonable commitments of that nature."*<sup>196</sup>

***Obligation to provide objective criteria for any refusal or part refusal of access***

- 15.47 ComReg also proposes that RTÉ should be obliged to provide objective criteria for refusing a request, or only partly meeting a request, to the broadcaster which has made the request. This is considered proportionate and

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<sup>196</sup> ERG Common Position on Remedies, p.67.

justified in light of the ability and incentives for the SMP provider to refuse to supply to its competitors and the associated potential competitive and consumer impacts on related markets. ComReg would thus expect that RTÉ's response should be fair, reasonable and timely.

**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.**

**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.**

**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.**

**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.**

**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.**

### ***Obligation of non-discrimination***

- 15.48 In general, non-discrimination requires that the SMP operator apply equivalent conditions in equivalent circumstances to other broadcasters providing equivalent services and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. Thus, third parties should not be treated less favourably than the SMP operator's own internal operations.
- 15.49 ComReg proposes that a non-discrimination obligation is a necessary support for access to a multiplexing service from RTÉ in this wholesale market. The aim of a non-discrimination obligation is to ensure that RTÉ does not discriminate between broadcasters, such as between RTÉ itself and other broadcasters. If RTÉ were only required to provide access, it could potentially discriminate in favour of RTÉ, for example, by providing products to broadcasters and which were not of the same quality or pricing as those supplied to RTÉ. The non-discrimination obligation therefore supports the objective of promoting the development of sustainable competition which should be to the benefit of end-users.

- 15.50 ComReg, in discussions with broadcasters has been informed that there is concern that prices they are or were proposed to be charged were excessive and at least prohibitive and it was not visible as to how the charges relate to their cost of use. It is therefore important to ensure that there is no discrimination in prices charged to actual or potential entrants, to ensure that there is not over-recovery relative to the degree of recovery from RTÉ.
- 15.51 This obligation could be imposed by itself but usually supports other regulatory obligations such as access, transparency and price control. Given the potential to discriminate between RTÉ and other broadcasters on the terms and conditions of access, quality of service, and price, the obligation of non-discrimination is required to ensure competition problems do not arise.

***Obligation to apply equivalent conditions in equivalent circumstances, and to ensure that services and information are provided under the same conditions and of the same quality***

- 15.52 ComReg recognises there may be commercial sensitivity surrounding the provision of information and services by RTÉ to broadcasters and proposes that it is reasonable to restrict the obligation regarding non-discrimination to the provision of services and information to a broadcaster who has already agreed a reference offer with RTÉ. ComReg does not consider it proportionate or justified to expect RTÉ to make available commercially sensitive information to all market players, irrespective of whether or not they rely on RTÉ supplied wholesale inputs to compete.
- 15.53 ComReg suggests that this obligation is a proportionate and reasonable approach taking into account potential commercial sensitivities surrounding the provision of information and services to other broadcasters and multiplex operators.
- 15.54 To ensure that broadcasters are in the same position as RTÉ, with respect to the provision of information and services, such information and services should be provided at the same time to RTÉ.

***SLAs***

- 15.55 ComReg believes that RTÉ should also ensure that it offers SLAs to broadcasters in accordance with its obligation relating to non-discrimination.

**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.**

**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.**

***Obligation of transparency***

- 15.56 Transparency supports the monitoring of the non-discrimination obligation. In order for such remedies to be effective there is a requirement that there is transparency otherwise ComReg and industry players would have no assurance that there was no discrimination by RTÉ towards third parties.
- 15.57 In market B RTÉ could provide less favourable terms and conditions of access to downstream competitors than to itself. Furthermore, broadcasters require levels of service which may not be forthcoming or inferior to that provided to RTÉ. A lack of transparency on service levels provided to RTÉ vis-à-vis other broadcasters could make it difficult to demonstrate that discrimination is not occurring.
- 15.58 Also, RTÉ could foreclose competition in market B through exploiting information availability as uncertainty could potentially discourage investments in markets dependent on RTÉ's wholesale products.
- 15.59 A transparency obligation is also required to monitor and ensure the effectiveness of any price control obligations and to support any accounting separation obligations, as this would allow the calculation of costs and prices (i.e. internal price transfers) to be rendered visible. This would also allow ComReg and industry to monitor the compliance of RTÉ's pricing behaviour with any non-discrimination obligations, and address potential competition problems relating to excessive pricing and price discrimination.
- 15.60 As set out in Regulation 9(1) of the Access Regulations, transparency obligations may be used in relation to *“interconnection, access or both interconnection and access, requiring such operator to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices”*.
- 15.61 Transparency can be applied on its own but it usually supports other obligations. It is unlikely that the provision of a transparency measure would

be sufficient to address potential competition problems that have been identified.

- 15.62 Transparency serves the purpose of ensuring that access and pricing behaviour are observable.
- 15.63 ComReg is of the preliminary opinion that, transparency obligations are necessary, both to allow monitoring and visibility of how RTÉ is meeting its obligations, and to provide information which broadcasters may use to make a decision to enter the retail market. The specific detail of this obligation is discussed in section 17.
- 15.64 To support the proposed non-discrimination obligations and to ensure that market participants have adequate visibility of the conditions and quality of the wholesale service offered, ComReg proposes a number of publication requirements. These relate to the publication of a reference offer, publication of information about products and services, and publication of SLAs to support the access obligations.

#### **Publication of a reference offer**

- 15.65 ComReg proposes that a reference offer should be published on RTÉ's wholesale website which should contain at least a description of all relevant offerings broken down into components according to market needs, a description of the technical specifications and network characteristics of the access being offered, the mechanism for approaching RTÉ for access, and a description of the associated terms and conditions for supply and use, including prices, to RTÉ's DTT multiplexing service. It is important to note that this reference offer does not represent an exhaustive list of the services which might be the subject of a reasonable request.
- 15.66 The obligation of a reference offer gives potential entrants more detail on the supply characteristics and terms and conditions and prices of access before they approach RTÉ. This means that third parties will have an understanding of the type of services and the characteristics and prices of services on offer before negotiating with RTÉ thereby facilitating more effective and competitive negotiations between RTÉ and third parties which otherwise may be deterred from entry due to a lack of information.
- 15.67 Its purpose is to provide a sufficient degree of certainty to allow broadcasters to plan and run their operations efficiently, but does not prevent them from submitting bespoke requests or requesting additional services where circumstances suggest it.
- 15.68 Any terms not covered by the reference offer would, in the first instance, be subject to commercial negotiation with a right for either party to bring a dispute about such terms to ComReg for resolution.

- 15.69 ComReg recognises that a reference offer would require time to develop. ComReg therefore suggests that it is reasonable to allow RTÉ four months, from the date of the proposed Decision taking effect, to develop and publish its reference offer. RTÉ would then be obliged to keep the reference offer publically available and up-to-date on its wholesale website.
- 15.70 ComReg proposes that specific obligations should be placed on RTÉ regarding any changes to the reference offer. The mechanism should provide for all proposed changes, including changes to prices, and the introduction of new services and facilities to be published or otherwise communicated to broadcasters in a timely and transparent fashion.
- 15.71 To ensure the effectiveness of this transparency obligation, it is proposed that any proposed changes to the reference offer should not be implemented without prior notification to ComReg and broadcasters. Furthermore, ComReg proposes to retain flexibility to issue directions requiring RTÉ to make changes to the reference offer or to publish information from time to time where appropriate for ensuring the effective operation of this obligation. Such changes would be consulted on, and imposed pursuant to a direction in accordance with Regulation 18 of the Access Regulations.
- 15.72 RTÉ should publish proposed changes to the reference offer and any proposed changes to wholesale prices (including prices for new services and facilities) at least two months before they come into effect, and to notify ComReg of such proposed changes an additional month before publication. This would mean that ComReg would be notified at least three months before proposed changes were implemented, to be followed by publication at least two months before implementation.
- 15.73 In order to offer the greatest flexibility to RTÉ, other market players and ultimately consumers, ComReg proposes that there should also be provision for ComReg to extend or reduce this period where appropriate on a case-by-case basis. For example, in the case of significant changes to products or prices ComReg proposes to reserve the right to extend the publication and notification periods beyond the two-month period if appropriate and necessary on a case-by-case basis.

#### **Publication of information about products and services**

- 15.74 ComReg proposes that, as part of the transparency obligation, RTÉ should be required to publish any reasonable information or data which an undertaking may require in order to be able to compete effectively based on RTÉ inputs. This could include, for example, accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.

- 15.75 The need for this may arise where broadcasters require more granular information than is available via the reference offer discussed above.

### **Publication of SLAs**

- 15.76 As noted, under the proposed access obligation ComReg proposes as a condition of RTÉ's access obligation that RTÉ should be obliged to negotiate, conclude and implement SLAs. ComReg further proposes that a transparency obligation is required to ensure that SLAs are kept up-to-date and published on RTÉ's wholesale website. The justification for SLAs is in the context of the access obligation where the failure to provide an agreed level of service could act as a means to deter entry of potential competitors or as a means to discriminate against potential competitors and the transparency obligation further supports the effective application (i.e. monitoring) of this access obligation.
- 15.77 ComReg believes that publication of SLAs would provide more transparency and assurance to ComReg and industry in demonstrating equivalence. As ComReg does not believe that SLAs would contain any commercially sensitive information, ComReg believes this is proportionate.

**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.**

**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.**



**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.**

***Obligation of accounting separation***

- 15.78 This obligation is put in place to specifically support the obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations.
- 15.79 In sections 12 to 14 ComReg has identified potential competition problems associated with possible price-related leveraging such as excessive pricing. Separated accounts help disclose such possible competition problems and make visible the wholesale prices and internal transfer prices of a dominant operator's services, thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on RTÉ to maintain separated accounts.
- 15.80 The main objective of accounting separation is to make non-discrimination and cost-orientation transparent by showing cross-subsidisation between products and identifying unfair cross-subsidisation. In requiring separated accounts for the main products and services, this creates more transparency on internal transfer pricing and repartition of common and joint costs.
- 15.81 It is proposed that RTÉ should have obligations of transparency and non-discrimination in this market and it is proposed that RTÉ should also be subjected to a price control obligation and in particular the obligation of cost orientation. Therefore, the imposition of the obligation of accounting separation upon RTÉ would support these obligations.
- 15.82 As RTÉ should ensure that it conducts its commercial activities such as those of RTÉNL under market conditions it is important that the costs incurred by the commercial subsidiaries, if they did not exist, should be the minimum overhead costs allocated to the accounts of these subsidiaries.
- 15.83 ComReg notes the conditions and accounting procedures of sections 108 and 109 of the 2009 Act. These provisions are not necessarily designed to address issues of discriminatory pricing or encouraging efficient entry of access to an SMP operator's wholesale service. The aim of this accounting separation obligation is to ensure full transparency of internal pricing in the same manner as under the electronic communications regulatory framework.

- 15.84 ComReg is of the view that the current form of publicly available financial statements for RTÉ does not provide sufficient transparency or financial data of a sufficient level of granularity which would assist ComReg in its regulatory objectives.
- 15.85 It is therefore considered proportionate to impose an obligation on RTÉ to keep separated accounts (for market B) to help disclose possible competition problems which might otherwise undermine the proposed access, non-discrimination, transparency and price control obligations but only for that aspect of its broadcasting network activities associated with its PSB multiplexes.
- 15.86 It should be noted that while the PSB DTT multiplex licences are held by RTÉ, RTÉNL operates the PSB DTT multiplexes on RTÉ's behalf. RTÉNL charges RTÉ for the costs of the PSB DTT multiplexes using its broadcast transmission network infrastructure and then RTÉ, in turn, charges digital broadcasters for the capacity they use on its multiplexes.
- 15.87 ComReg has already, separately proposed Accounting Separation obligations on RTÉNL's transmission activities in market A. As RTÉ is a vertically integrated entity, ComReg requires visibility on the costs incurred by RTÉNL in relation to RTÉ's PSB multiplexes and their allocation to RTÉ. ComReg also requires visibility on how these costs are then allocated to digital broadcasters who are using capacity on RTÉ's DTT multiplexes (i.e. allocation of charges to RTÉ services and third party digital broadcasters). This will enable ComReg to ensure that there is no price discrimination by providing transparency on the allocation of costs.

### **Main proposals for Accounting Separation**

- 15.88 ComReg proposes that RTÉ submit separated accounts in a format which assists ComReg in discharging its regulatory functions. This will require financial data to be presented in a manner that reflects capacity used by programme services on RTÉ's PSB multiplexes in market B.
- 15.89 ComReg is of the preliminary view that RTÉ should submit to ComReg:
- Financial data; and,
  - Accounting Documentation.

### **Financial Data**

- 15.90 ComReg is of the preliminary view that the financial data submitted by RTÉ under its proposed Accounting Separation obligation includes:

- An income statement including an analysis of costs by functional cost category; and,
- A schedule of charges by individual broadcasters.

15.91 Due to the commercial sensitivity of this data ComReg is of the preliminary view that this data be submitted to ComReg in confidence.

15.92 ComReg proposes that RTÉ submit its Financial Data to ComReg within four months of the end of its financial year.

15.93 ComReg is of the preliminary view that the Financial Data should contain the following information:

- A statement or reference to the Regulatory Accounting Principles<sup>197</sup> followed when preparing the Financial Data; and,
- The Financial Data would be accompanied by a signed statement from the directors of RTÉ acknowledging their responsibilities for the preparation of the Financial Data and confirming their compliance with the requirements of the Decision Instrument in this respect.

15.94 ComReg considers that it is important that the Financial Data be accompanied by a RTÉ directors' responsibility statement. This will ensure that the directors acknowledge their responsibilities for ensuring that the Financial Data are compliant with the Decision Instrument.

### **Cost Accounting Documentation**

15.95 In order to aid transparency and support the obligations of non-discrimination ComReg requires RTÉ to document how it allocates costs to users of its multiplex(es). ComReg does not intend that this documentation be open-ended and therefore it will discuss with RTÉ its requirements in this regard. However, ComReg considers that at a minimum RTÉ should document how costs are allocated to different users of its multiplexes.

15.96 ComReg requires that the Cost Accounting Documentation be published within four months of the end of RTÉ's financial year.

**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.**

**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.**

***Obligations relating to price control and cost accounting***

- 15.97 As has been noted in sections 12 and 14, in terms of digital television, section 130 of the 2009 Act states that the Minister may direct periodic payments from TG4, the Commission of the Houses of the Oireachtas, the Irish film Board, other television services having the character of a public service as may be designated by the Minister, and the television service programme contractor (TV3) to RTÉ for their provision on a national multiplex established, maintained and operated by RTÉ. These provisions cover many of the areas that in other contexts are addressed by the electronic communications regulatory framework.
- 15.98 While this is a particular form of price control, it may not necessarily one that would arise under the electronic communications regulatory framework. Given the particular issue of vertical integration in this sector in Ireland, this form of a price control would not be supported by appropriate cost accounting obligations. Nor would the resulting remedy necessarily address the requirement for transparency and non-discrimination, as there would be no requirement that RTÉ charge itself in the same manner.
- 15.99 RTÉ is not currently subject to *ex ante* regulatory obligations of price control and cost accounting. However, given the persistent risk of price-related competition problems deriving from an SMP position in the market, ComReg considers that the imposition of a price control and cost accounting obligation is appropriate and proportionate.

- 15.100 For example, RTÉ would have the ability and incentive to price excessively to deter entry/expansion of potential/actual broadcasting customers. RTÉ might also have a limited incentive in keeping wholesale costs to an efficient level, since higher charges would hinder the development of competition and this could benefit the broadcasting activity of RTÉ.
- 15.101 Given the incentive to price excessively in this market, ComReg believes it necessary to impose a price control and cost accounting obligation on RTÉ (for market B) as this is the only way to ensure that prices are an actual reflection of cost and that they are non-discriminatory.
- 15.102 Regulatory intervention may be relatively light, such as an obligation that prices are reasonable or heavier such that prices are cost oriented to provide full justification for prices where competition is not strong enough to prevent excessive pricing. The method used should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and end-user benefit.
- 15.103 ComReg has aimed to ensure that this obligation is effective but also that this obligation is not unnecessarily onerous on RTÉ and so with that in mind, among the potential options for price control implementation ComReg considers cost orientation the most appropriate. When applied on its own, cost orientation would typically allow the regulated entity greater flexibility in relation to the setting of tariffs; as long as the entity can demonstrate that the tariffs are cost-reflective and are on fair, reasonable and non-discriminatory terms.
- 15.104 ComReg is mindful of Regulation 13(3) of the Access Regulations which states that any cost recovery mechanism or pricing methodology that is imposed by ComReg should serve to promote efficiency and sustainable competition and maximise consumer benefits.
- 15.105 ComReg also takes account of Regulation 13(2) of the Access Regulations which notes that, when imposing obligations under Regulation 13(1), ComReg should take into account any relevant investments made by the undertaking and allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by other undertakings while also ensuring that the SMP undertaking makes a reasonable return on its efficient investment.
- 15.106 The burden of proof to demonstrate that charges are derived from costs including a reasonable rate of return on investment rests with the SMP operator. Following a direction from ComReg as per Regulation 13(4) of the Access Regulations an operator may be required to provide full justification for its price and may, where appropriate, require prices to be adjusted. For the purposes of setting a cost oriented price in the future, ComReg has the option

to choose from a number of cost models to calculate appropriate charges so long as it promotes efficiency, competition and end-user benefit. Were ComReg to leave the choice to the SMP operator itself it would likely reduce its effectiveness, contribution to competition and end-user benefit.

- 15.107 Where a cost accounting system is mandated to support price control, a description of the cost accounting system must be made public where at least the main categories under which costs are grouped and the rules used for the allocation of costs are provided.
- 15.108 The tariffs are not currently subject to price control or cost accounting obligations. These tariffs are derived through a tariff model. The tariff model allocates costs to broadcasting customers based on a series of assumptions and calculations. The cost data for the tariff models tends to be derived from information solely from RTÉ and RTÉNL.
- 15.109 While proposed tariffs for individual broadcasting customers are published on RTÉNL's website, the tariff model underpinning these has not been subject to external regulatory review. Nor has it been provided to third party broadcasters for their own independent assessment. This tariff model contains commercially sensitive and confidential data the publication of which could have a negative impact upon RTÉ.
- 15.110 In the interests of transparency and non-discrimination it is necessary for broadcasters to understand the basis for the tariffs they are being charged. However, the setting of tariffs may be subject to a separate consultation process and is not determined as part of this consultation.
- 15.111 While certain information relating to the tariff models is provided on RTÉNL's website, broadcasters have told ComReg that they believe it provides limited visibility and there is no formal mechanism for them to query any aspect of the tariffs or the inputs and assumptions used to derive the tariffs. As a result, broadcasters have had no opportunity to query the tariffs they are being charged. Furthermore, as discussed earlier, there is no suitable alternative infrastructure available nor, based on the evidence to date, in ComReg's opinion is there likely to be capable of constraining RTÉ within the timeframe of this review. Therefore, these national digital broadcasters must accept the tariffs charged by RTÉ with no real opportunity to question their basis and if dissatisfied to switch to an alternative provider.
- 15.112 Often, ComReg includes provisions within its price control obligations to allow for interim reviews of prices during the period of a price control. This is to provide for situations where there are significant changes to underlying assumptions or input data. If significant changes are required ComReg generally issues a public consultation to ensure transparency and to continue regulatory certainty.
- 15.113 ComReg is not proposing a period for any price control in this consultation paper. The length of any price control period would be subject to public consultation as part of the price control review. Where considered necessary,

an option for interim tariff reviews could be included in any future price control period.

15.114 Pursuant to Regulation 13(1) of the Access Regulations “*The Regulator ...impose on an operator ...including obligations for cost orientation of prices and obligations concerning cost accounting systems...*”

15.115 ComReg, in accordance with Regulation 13(1) is proposing that RTÉ be subject the following obligations:

- Price control; and,
- Cost Accounting.

15.116 Although specific to national circumstances, a number of NRA’s throughout Europe have found the need to impose a price control and cost accounting obligation.<sup>198</sup>

### ***Price control***

15.117 Given the preliminary view that RTÉ holds SMP in market B, ComReg considers that there is a need for a price control obligation to ensure that RTÉ sets appropriate wholesale prices such that effective competition is facilitated.

15.118 ComReg believes that, absent an appropriate price control obligation, RTÉ would have the ability and incentives to set excessive prices in the wholesale market which would potentially harm competition from undertakings relying on RTÉ’s wholesale services. ComReg thus considers it appropriate and justified to impose a price control obligation on RTÉ to guard against such potential excessive pricing to its wholesale customers.

15.119 RTÉ’s vertically integrated structure across broadcasting activities is important when considering the pricing principles that should be followed in setting tariffs, and in determining such charges.

15.120 As a vertically integrated entity, RTÉ might engage in the following activities which *ex ante* regulation needs to address:

- RTÉ could seek to minimise the number of competing broadcasters that a digital platform (for DTT) may attract. RTÉ has an incentive to minimise the number of broadcasters on DTT to reduce the potential loss of its advertising revenues which might otherwise occur. This could occur if, for example, it could devise a tariff structure which would

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For example, a price control has been imposed in Austria, Estonia, France, Hungary, Lithuania, Poland, Portugal, Romania, Spain, and the UK. In a number of cases this was a cost orientation obligation i.e. Hungary, Portugal, Romania, Spain and the UK. Cost accounting has also been implemented in many cases i.e. Estonia, Finland, France, Lithuania, Poland, Romania, Spain and Sweden.

discourage broadcasters' interested in accessing its multiplexes. RTÉ might also have only limited incentive in keeping its costs to an efficient level, since higher transmission charges would hinder the development of competition in DTT and this could benefit the broadcasting activity of RTÉ. As new broadcasters come on the platform(s), RTÉ's incentives for cost minimisation may be reduced; and,

- RTÉ could have an incentive to favour its own digital programme services to the detriment of other programme services by applying discriminatory charges.

15.121 This highlights the importance of ensuring that tariffs are set on a transparent and non-discriminatory basis.

15.122 The pricing mechanism applied to set tariffs will need to ensure that the incentives discussed above do not become a reality, in order to ensure a level playing field for all broadcasters and so as not to disadvantage end-users.

15.123 The tariffs that RTÉ charges, both internally and externally, should be fair, transparent, reasonable and non-discriminatory.

15.124 It is important to ensure that no excessive pricing is applied by RTÉ to discourage entry and that there is a level playing field for broadcasters on RTÉ multiplexes.

15.125 Within the context of transparency and non-discrimination, there are various options for the calculation of total allowable costs and for the allocation of common costs, which could result in higher or lower charges for DTT services. While a network operator would, in general, only look at recovering costs and maximise return at the total level, in practice the way in which costs are apportioned could have significant implications for the incentives given to enter the market.

15.126 DTT broadcast transmission charges will need to be non-discriminatory, to ensure that all broadcasters compete on a level playing field, without unfair advantages for RTÉ's own programme services.

### *Pricing Methodologies*

15.127 In practice, there are several mechanisms that are generally used to determine regulated prices, which are consistent with the following

- Maximizing consumers welfare;
- Ensuring RTÉ recovers efficient costs;
- Avoiding any cost over-recovery by RTÉ;
- Encouraging efficient investment in infrastructure and not deterring incentives to deploy alternative infrastructure; and,



- Practical implementation.
- 15.128 ComReg is of the preliminary view that a price control based upon cost is the most appropriate approach to assessing compliance with the obligation while taking into account the five categories above.
- 15.129 Consumer welfare can be maximised by ensuring that the tariffs charged to broadcasters are reflective of the cost incurred by RTÉ in providing the service. This means that broadcasters' resources are not unnecessarily diverted away from broadcasting to paying for unreasonable wholesale tariffs. This allows broadcasters to provide a wider range of content to end-users.
- 15.130 By ensuring that RTÉ only recovers its efficiently incurred costs, broadcasters are not being required to pay for inappropriate investment decisions or excess costs for which there would be no benefit.
- 15.131 The avoidance of potential cost over-recoveries by RTÉ also ensure that tariffs are not excessive and that ultimately there is not a transfer of resources from the consumer to RTÉ.
- 15.132 Investment in capital intensive industries is often rewarded through a return on capital. The return on capital tends to only be applied to efficiently incurred investment. Therefore if inefficient investment is made no return is awarded.
- 15.133 Economic regulators generally use the Weighted Average Cost of Capital ("WACC") as the most appropriate measure of the returns that investors require before they will invest in a business. The WACC determines the normal level of profit that must be earned by a business if it is to continue to attract funds in a market where financial resources have many alternative uses. It represents the rate of return a company should earn on its invested capital in order to provide sufficient returns to the investors who are financing the investment. The calculation of an appropriate WACC is not part of this review.
- 15.134 The WACC is regarded as the minimum return a regulator should allow in setting the prices of regulated activities, although sometimes regulators allow returns in excess of the WACC level, to stimulate innovation / investment and to allow for regulatory risk. While the WACC is generally used as the measure of return allowed to companies which are regulated, it might not be appropriate in the case of services which are not network-based. For example, maintenance services are not capital intensive and as such the return calculated by applying only a WACC mark-up would be negligible.
- 15.135 Economic regulators tend not to use returns on operating costs as a means of financing the costs of regulated companies. Returns on operating costs would not incentivise efficiencies in regulated companies because the higher the operating costs the higher the return. One of ComReg's aims and objectives is the encouragement of efficient investment.

15.136 ComReg is of the preliminary view that this approach should be followed in this market.

15.137 The use of cost is also a practical means of setting tariffs. Most of the information that ComReg considers might be necessary to set tariffs is to be found in the accounting records of RTÉ. ComReg is of the view that the use of this data provides a robust basis for tariffs but would also be subject to further regulatory scrutiny. ComReg is also of the view that the use of RTÉ's own data minimises the regulatory burden on RTÉ.

15.138 There are a number of different methods for determining cost. These include:

- Retail minus;
- Reasonable costs; and,
- Cost orientation.

15.139 *Retail minus* is generally used where either there is regulation of a retail market or where there is effective competition in the retail market providing sufficient constraint on the potential to price excessively at the retail level. This mechanism has tended to be used for utility type regulation of wholesale prices where the retail service is identifiable with a single or few price points allowing for easy implementation. However, ComReg does not consider that the use of *retail minus* is appropriate as RTÉ is acting as a wholesale network business only for market B and there is no separately identifiable retail price point or points on which a wholesale price could be based.

15.140 *Reasonable costs* involve assessing the costs proposed by the SMP operator and determining whether or not they could be considered to be in the normal course of business reasonable. These would include both capital costs and operating costs. In assessing whether costs are reasonable, comparison with other countries and international best practice is often undertaken. Incurred costs which are clearly unnecessary, excessive or avoidable may not be deemed reasonable. However, determining reasonable costs requires a significant analysis of financial information, detailed discussion with the operator and a level of judgment. Comparisons with other countries can also prove problematic where markets, products or services do not align with those in Ireland. Reasonable cost reviews are also more appropriate to annual reviews and not for the setting of tariffs for an extended period of time. As ComReg is of the view that wholesale tariffs for broadcasting should cover more than one year it is of the preliminary view that *Reasonable Costs* is not the appropriate means to determine tariffs on a forward looking basis and may not provide sufficient transparency and confidence from the market that tariffs being charged are not excessive or discriminatory.

15.141 *Cost orientation* tends to be the most widely used means of determining the appropriate wholesale tariffs to be charged. Cost orientation allows the SMP

operator to recover its efficiently incurred costs and a regulated rate of return on the appropriate capital base. ComReg uses cost orientation to regulate many wholesale tariffs in other regulated industries. It is also commonly used by other regulators for the same purpose.

15.142 Two principle types of cost orientation are available:

- Benchmarking; and,
- Cost based.

15.143 *Benchmarking* costs requires using the costs of similar industries or competitors in Ireland or abroad to determine an appropriate wholesale tariff for the SMP operator. Benchmarking can prove problematic where there are not similar industries or competitors. For example, RTÉ currently does not have any comparable competitors in Ireland operating multiplexes. ComReg does not consider that the use of international benchmarks would be appropriate either. For example, Arqiva in the UK is an independent network company which is not vertically integrated into the retail market unlike RTÉ.

15.144 The use of an appropriate *cost base* requires an assessment of the costs of the SMP operator. This includes both capital costs and operating costs. Adjustments to these costs can be made to reflect efficiencies and to remove potential legacy issues.

15.145 In accordance with Regulation 13 of the Access Regulations when imposing cost orientation regulators should take into account the investment made by the SMP operator and allow a reasonable rate of return on the capital. Regulation 13 also requires the SMP operator to prove that the tariffs are derived from cost. To support this, a description of the cost accounting systems is required to be published. When considered necessary compliance can be verified either by the regulator or by a suitably qualified independent body. ComReg has adopted this approach with Eircom<sup>199</sup>.

15.146 ComReg has set out its preliminary views above that prices charged by RTÉ for market B should be cost oriented and as outlined above is of the view that they be cost based.

15.147 There are a number of options available to ComReg in terms of the costing methodologies used to determine the appropriate regulated wholesale prices under the cost orientation principle.

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<sup>199</sup> See ComReg Document No. 10/67 “Accounting Separation and Cost Accounting Review of Eircom Limited”

**Figure 15: The four possible costing methodologies for the setting charges in Market B**

	Top-down		Bottom-up	
	Historic costs	Current costs	Historic costs	Current costs
FL - LRAIC		TD LRAIC		BU LRAIC
FDC	HCA	CCA		

15.148 In sections 12 to 14 ComReg has given its preliminary view that there is little likelihood of infrastructure being replicated capable of constraining RTÉ during the timeframe of this review. This has implications for how ComReg determines which costing methodology it considers would be most appropriate for setting charges in market B.

15.149 Aligned to this are the relevant regulatory objectives (as noted by ComReg above) that it must take into account when applying remedies.

15.150 ComReg has a number of options available to it in terms of achieving its regulatory objectives which takes into account the current demand and supply situation in the relevant market, technological advancements and the data available to ComReg. ComReg is of the view that the relevant options to determine an appropriate costing methodology can be summarised as follows:

1. Historic costs or current costs;
2. Top-down (“TD”) model, bottom-up (“BU”) model or hybrid model; and,
3. LRIC or fully distributed costs (“FDC”).

***1. Historical Costs or Current costs:***

15.151 A key regulatory decision to consider in determining wholesale regulated charges is the cost base to adopt, i.e. historic costs or their current cost equivalents.

15.152 Under the historic cost basis, the operator recovers costs incurred in providing the products, services or associated facilities, plus a normal rate of return on the investment. The historical cost accounts (“HCAs”) are based upon the reported financial results of an operator for a given period which has expired. The results from the HCAs should be directly reconcilable with the statutory financial statements of the operator. A potential issue with the HCA accounts is the lack of granularity of the data contained within them. However, as RTÉ is not selling numerous services (unlike in the telecoms or postal sectors) significant additional granularity is not required from the accounts currently prepared by RTÉ which are on the basis of historical costs. However, as noted

above, a certain level of granularity beyond that contained in the published financial statements is required for regulatory purposes.

- 15.153 Current cost accounts “CCA” tends to be used by regulators as cost base when incentivising investment while at the same time accounting for the cost of modern equivalent assets (“MEA”). It is often applied when promoting wholesale competition. In some cases it may also be necessary where there is little or no information available on the initial cost of investments, for example most utility companies have been in place for decades and financial records may not be what they are today. In such cases it is necessary to make assumptions of the likely cost of equivalent assets at today’s market values. Many of the assets associated with this market are not subject to significant technological change. While elements of these might be subject to some technological change this tends to be on a stepped/once off basis and not an incremental/ongoing basis. For example, the move from analogue to digital transmission could be considered as a stepped/once off change whereas the technology associated with certain combiners or generators has not changed in many years. Therefore there is little necessity to use MEA on an ongoing basis.
- 15.154 The historic cost basis has the advantage that there is no risk of an undertaking being paid for services it did not provide, nor being paid more than it spent on assets required to provide the regulated services.
- 15.155 RTÉ has invested in DTT related equipment in recent years. As such the material costs are readily available and therefore the actual cost incurred can be used.
- 15.156 Generally, ComReg would propose the use of CCA for market B as it attempting to foster competition within this market. ComReg considers that the assets deployed in market B would have relatively short asset lives. It considers that the asset lives would be consistent in length to those of Eircom<sup>200</sup>. Furthermore, investment in DTT has only incurred in recent years. Therefore, ComReg considers that revaluing assets on a CCA basis would not provide materially different results to assets accounted for on a HCA basis.
- 15.157 ComReg is of the preliminary view that given the recent emergence of DTT in Ireland there is likely to be little difference in the value of DTT assets valued on a CCA basis compared to a HCA basis, and therefore HCA is a reasonable basis upon which to value assets for market B when determining tariffs.

## ***2. Top down or Bottom up:***

- 15.158 Another key regulatory decision to consider in determining wholesale regulated charges is the most appropriate modelling approach to use. This choice is interlinked with the choice of the cost valuation base and the cost

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<sup>200</sup> See ComReg document 09/65 – Main Category 11 – Information Technology Systems

accounting methodology, and in turn depends on the regulatory objectives given the current and prospective situation in the market.

15.159 Traditionally the choice of cost models has been between a Top Down (“TD”) and a Bottom Up (“BU”) approach.

15.160 In TD models the starting source of information for estimating the costs of services is normally the costs incurred by the operator. The main disadvantage of the TD approach is that, depending on the services to be modelled, it could require a significant amount of detail from the operators accounting systems and on the inventory of the operator’s network. The TD information relies heavily on the robustness of the data provided by the operator. As RTÉ does not offer numerous services a lesser level of granularity than would be required for postal or telecoms regulation is possible. Also, the information that would be required of RTÉ is primarily sourced from its statutory financial statements with a certain level of disaggregation for regulatory purposes. Capital expenditure should be sourced from its fixed asset register and operating costs should reflect the ongoing costs of operating and maintaining the network.

15.161 TD models can be developed with either a current cost or a historic cost base. Similarly, both FDC and LRIC are compatible with a TD approach. However, the TD approach implies that the reference point is the operator’s actual set of accounts. An issue in this regard is that there will always be some legacy issues by which the model is inevitably constrained in the analysis. The TD approach is not, and cannot easily be converted into, a forward-looking approach. Equally, TD models might provide the SMP operator with incentives to over-invest, since incurred costs are generally allowed to be recovered.

15.162 However, when using TD models adjustments can be made to reflect certain efficiencies or adjust for legacy issues identified. As RTÉ has recently deployed its DTT network this is likely to be at an optimum or near optimum level and will not contain any legacy issues. Operating costs could also be assessed to ensure that only the relevant and reasonable costs of operating and maintaining the network are included.

15.163 On the other hand, the advantages of using a TD approach stem from the same aspect of the model, i.e. the starting point of the analysis is the statutory accounts of an existing operator. As a consequence:

- All incurred costs are accounted for (critics of BU models argue that certain cost categories are erroneously ignored); and,
- TD models manage to avoid disincentives for the SMP operator to invest, since incurred costs are generally allowed to be recovered.

15.164 The starting point of BU models is forward-looking demand data; this is used to dimension, through economic, engineering and accounting principles, an

efficient network capable of serving that demand (hence its name). The Gross Replacement Costs (“GRC”) of the network is then estimated and annualised. Service/product costs are then estimated by allocating the costs of the different network components to the services/products which use them.

- 15.165 Given that BU models do not depend as heavily as TD models on complex accounting data, BU models better reflect the choices of a hypothetical, forward-looking efficient operator from both a technical and an operational point of view, as network legacy cost issues are less of a problem than in a TD context. For the same reasons, they are easier to develop and maintain.
- 15.166 BU models are often used to model the costs of a potential new entrant into the market. As RTÉ has deployed its DTT assets only recently the development of a BU model is unlikely to yield materially different results to a TD model.
- 15.167 ComReg is of the preliminary view that a TD model is likely to be more compatible with the use of historic costs as the relevant cost base. This is because the material proportion of the capital costs have been incurred in recent years.
- 15.168 The TD model also uses as its starting point information contained within the audited financial statements of RTÉ. While any model developed for tariff setting is likely to go to a level below the audited financial statements (for example efficiency adjustments, likely future changes) its results will still be reconcilable.
- 15.169 ComReg is of the preliminary view that TD data is the appropriate choice for this cost model.

### **3. *LRIC or FDC:***

- 15.170 Another key regulatory decision to consider in determining wholesale regulated charges is the cost accounting approach to adopt. ComReg considers that LRAIC cost accounting methodology and the fully distributed cost (“FDC”) methodology (also known as fully allocated costs) are relevant in this regard.
- 15.171 ComReg is of the preliminary view that the most appropriate cost accounting approach to adopt is FDC. The FDC methodology allocates all the operator’s costs from their financial information to all the services, products or regulated operations of the company. ComReg believes that the FDC approach is appropriate as it is based on historic accounting information. While the use of historic costs does not incentivise efficiency, adjustments can be made for this.
- 15.172 FDC data is also open to a level of subjectivity from a regulated entity where it has multiple markets, services and products such as in the telecoms industry. However, as previously noted RTÉ does not offer services to the same extent as in telecoms and postal markets by Eircom or An Post for example, and

therefore the level of subjectivity in allocating costs under FDC is greatly reduced.

15.173 ComReg is of the view that an alternative to the FDC cost accounting is the use of various forms of Long Run Incremental Cost accounting. This cost accounting methodology includes all of the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned, plus an apportionment of joint and common costs. These include:

- Long Run *Average* Incremental Cost (“LRAIC”); and,
- Long Run Average Incremental Cost *plus* (“LRAIC plus”).

15.174 LRIC, and its variations, can be used where an additional service is added to an existing network and the new service only pays for its incremental costs as other tariffs (regulated and unregulated) are already covering the other costs (including common costs) of the network.

15.175 LRIC calculates the cost of providing a defined increment of output, on the basis of forward looking costs incurred by an efficient operator. It identifies the range (between the incremental cost ‘floor’ and stand-alone cost ‘ceiling’) between which a pricing signal could be considered rational. It therefore helps NRAs in setting prices that neither encourage inefficient investment nor discourage efficient investment.

15.176 LRAIC is the average efficiently incurred variable and fixed costs that are directly attributable to the activity concerned over the long-run. This however does not include an apportionment for common costs.

15.177 ‘LRAIC plus’ includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ‘LRAIC plus’ is a mark up to allow recovery of fixed and common costs typically using an equi-proportionate mark up (“EPMU”). The LRAIC cost accounting methodology does not include a mark-up for joint and common costs.

15.178 LRAIC plus is more commonly used in the telecoms industry where there is a high level of indirect (duct and cables) and common costs (exchange buildings) which require allocation to multiple services (line rental, broadband, voice calls).

15.179 As noted above pure incremental cost accounting does not allow for the recovery of common costs. If it were used other services apart from the new service would have to cover the costs of these common assets. For example, if LRIC were used for the introduction of DTT it would only bear the cost of the new DTT assets. On the basis of non-discrimination all users of DTT (RTÉ and third party broadcasters) would be charged the incremental cost only. Other services, such as analogue radio and non-broadcast services would be



required to cover the common costs. This is despite DTT, analogue radio and non-broadcast services all using the same common assets.

15.180 For the reasons already set out ComReg is of the preliminary view that a FDC approach combined with a TD costing model is the most appropriate method to set charges in market B.

15.181 ComReg is of the preliminary view that FDC is the preferred cost accounting methodology for the setting of prices combined with a TD cost model (with appropriate efficiency adjustments). It is recommended that this approach is used as the basis of setting tariffs in market B as it mirrors the price that RTÉ incurred in rolling out its infrastructure.

15.182 In setting the timeframe for tariffs ComReg must reflect the necessity for RTÉ to recover its efficiently incurred costs while at the same time providing certainty on the tariffs that purchasers' of wholesale services will be charged. When doing so ComReg bases the regulated tariffs on financial data adjusted for certain economic forecasts. This is to avoid possible fluctuations in the tariffs. These economic forecasts cover both supply and demand factors.

15.183 ComReg must determine the likely usage of RTÉ's infrastructure over the timeframe of the review including new users or possible exits from the market by service providers using the infrastructure. If the timeframe is too short regular updating of tariffs would be required creating uncertainty for all.

15.184 ComReg must also dimension the expected expenditure on the network over the timeframe of the review. For capital expenditure ComReg must dimension what level of investment would be required over the timeframe of the review; the shorter the timeframe the lower the likelihood of significant capital expenditure. However, if there a consecutive short term reviews there may come a point where significant expenditure is required causing a spike in tariffs. Aligned to this is the need to have appropriate asset lives applied to the capital expenditure. Where asset lives are too short investment would be recovered over too short a period resulting in higher tariffs. Where asset lives are too long RTÉ would be required to wait too long to recover its investment and this may affect further investment in its network.

15.185 Operating costs must also be considered to ensure that they reflect the costs of operating the network over the period of the review. This ensures that fluctuations in costs are removed.

15.186 As mentioned elsewhere in this document RTÉ currently updates its tariffs annually whereas the BAI tends to grant contracts for a period of 7 to 10 years. When determining timeframes for other regulated industries ComReg often allows for interim review periods. These take account of possible unforeseen fluctuations in underlying data and assumptions used to determine tariffs.

15.187 ComReg also notes that a significant input into wholesale tariffs will be the wholesale input from market A. As noted in section 9 ComReg is of the

preliminary view that this wholesale input is also based on FDC combined with a TD cost model. As both elements of the tariff for market B will be based on the same principles this will ensure that the five categories as the terms of reference for assessing the various allocation methodologies are met.

### *Cost accounting*

- 15.188 The obligation to maintain appropriate cost accounting systems generally supports the obligations of price control and accounting separation, and can assist ComReg in monitoring the obligation of non-discrimination. ComReg proposes to oblige RTÉ to maintain appropriate cost accounting systems in respect of wholesale products, services or facilities. This proposes to oblige RTÉ to maintain appropriate cost accounting systems in relation to its PSB DTT multiplexes. This is instead of imposing the obligation of cost accounting on all of RTÉ as those activities are beyond the scope of this consultation.
- 15.189 To support the effective operation of a price control obligation, it is necessary for RTÉ to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. A key part of this process is the stage which identifies those parts of the underlying activities or network components that directly support, or are consumed by, those particular services or products. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product.
- 15.190 The division of services and products, and the corresponding costs, capital employed and revenues between the different services and products should be reflected in costing systems, and coherence and integrity of information should be assured. Where such particular costs form part of the cost of an SMP service, ComReg needs to have visibility as to the basis of and amount of allocation across all services.

**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.**

**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.**

**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.**

## 16 Regulatory Impact Assessment – Market B

- 16.1 As discussed in section 10, the RIA is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have a desired impact. It is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- 16.2 ComReg’s approach to RIA follows five steps:
- Step 1: Describe the policy issue and identify the objectives.
  - Step 2: Identify and describe the regulatory options.
  - Step 3: Determine the impacts on stakeholders.
  - Step 4: Determine the impacts on competition.
  - Step 5: Assess the impacts and choose the best option.
- 16.3 The consideration of regulatory impact provides a discussion of options, and the RIA should therefore be integrated within the overall preliminary analysis. This is the approach which ComReg is following in this market review. The RIA will be finalised in the final decision paper, having taken into account all the responses to this consultation paper and any comments from the European Commission and the Competition Authority.

### 16.1 Step 1 – Describe the policy issue and identify the objectives

- 16.4 The transition from analogue terrestrial television to DTT will be completed on 24 October 2012. The 2009 Act provides for two PSB DTT multiplex licences to RTÉ and the potential for up to four other commercial DTT licences to be issued to the BAI, to enable the broadcast transmission of digital broadcasting signals to end-users. With the move to DTT ComReg believes that a market for DTT multiplexing services has been created which requires *ex ante* regulation i.e. market B.
- 16.5 In this review, ComReg has carried out a preliminary analysis of competition which indicates a high market share of 100% for RTÉ in this market. In addition, RTÉ’s ability to act independently of its customers is not sufficiently constrained by factors in the market, such as potential competition or countervailing buying power. ComReg’s preliminary conclusion is that RTÉ has SMP in this market. Following a finding of SMP, ComReg is obliged to impose at least one regulatory obligation. Not imposing a regulatory obligation is not an option under the Framework Regulations or under the Access Regulations.

- 16.6 ComReg does not believe the competitive conditions of this market will be substantially altered in the timeframe of this review. RTÉ has the ability and incentives, notwithstanding section 130 of the 2009 Act, to engage in exploitative behaviour in this market in order to protect its audience share of the retail market and in turn the commensurate advertising revenues it can command. As RTÉ is the only operator in this market, digital broadcasters have no alternative to RTÉ for a multiplexing service. This may mean that quality and choice is restricted in the retail market for end-users.
- 16.7 It is therefore, necessary and appropriate to impose regulatory obligation(s) on RTÉ in order to facilitate greater choice and quality to end-users and to ensure a level playing field at the wholesale level.
- 16.8 ComReg will keep the Irish broadcasting market under review to determine whether such remedies continue to be justified and proportionate in light of relevant developments (such as commercial DTT entry) if any, in the market.
- 16.9 For the reasons set out below, ComReg believes that it is necessary to impose remedies on RTÉ in this market.
- 16.10 There are a number of considerations to take into account which ComReg considers require the introduction of these obligations. These include:
- The Broadcasting Act, 2009 and Analogue Switch Off; and,
  - Concerns expressed by broadcasters.

### **The Broadcasting Act, 2009 and Analogue Switch Off**

- 16.11 The 2009 Act introduced a market demand for DTT in light of ASO. Analogue terrestrial television transmission will cease on 24 October 2012. The Act provides for two PSB DTT multiplex licences to be issued by ComReg directly to RTÉ, and also provides for up to four commercial DTT multiplex licences to be issued to the BAI in order to allow for the provision of DTT services.
- 16.12 RTÉ is a vertically integrated entity and as such it is active in both retail and wholesale markets. RTÉ is the sole operator in this wholesale market. ComReg believes it has the means and incentive to act in favour of its own interests at the expense of actual and potential customers and competitors.
- 16.13 With digital broadcast transmission the potential for carriage of more broadcasters has increased. With the potential for more competition from a greater number of broadcasters and broadcasting content, RTÉ would be concerned that this would dilute its own retail audience market share and the related commercial revenues RTÉ can command. The greater the number of competing broadcasting programmes services in the downstream retail market,

the further RTÉ's commercial revenues will be diluted. As, RTÉ is the sole DTT multiplex operator in market B, RTÉ would have the ability to foreclose digital broadcasters entry and expansion in the retail market by limiting access to its own DTT multiplexes.

16.14 ComReg considers it unlikely that an alternative comparable terrestrial transmission source capable of constraining RTÉ will develop in the timeframe of this review and so existing DTT broadcasters are likely remain dependent on access to RTÉ's PSB DTT multiplexes in order to provide their own retail market services.

16.15 It is therefore important to ensure that access to RTÉ's PSB DTT multiplexes is not foreclosed or limited and that access is appropriately priced as there are currently no alternative supply options available and therefore negotiation of reasonable prices by commercial means may be less likely.

### **Concerns expressed by broadcasters**

16.16 In recent years concerns have been expressed to ComReg from some broadcasters regarding the pricing of RTÉ's broadcast distribution and transmission services. There are concerns that there is no transparency on broadcast transmission costs, and there are concerns that the charges for carriage and use of the terrestrial broadcast transmission network are not related to costs. None of these tariffs have been subject to independent review. Such concerns could also occur in a digital context as well.

16.17 The introduction of the obligations of price control and cost accounting would enable ComReg to assess the validity of any future complaints and provide transparency and/or assurances that the calculation of tariffs by RTÉ is reasonable.

16.18 Having regard to the types of actual and potential competition problems identified in the market, ComReg is of the preliminary view that regulation is required in this market as discussed below.

## **16.2 Step 2 – Identify and describe the potential regulatory options**

16.19 Under Article 31 of the Universal Service Directive, if content of a broadcast was such that it might be considered to meet a general interest objective then it could be addressed under "must carry" rules.

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

ordination arrangements may include rules for apportioning the costs of facility or property sharing.

- 16.21 In addition, there are legislative provisions made in the 2009 Act which may overlap with some elements of *ex ante* regulation.
- 16.22 In terms of digital television, section 130 of the 2009 Act provides for periodic payments for access to an RTÉ national multiplex, to be set by the Minister, and ensuring that the capacity employed by RTÉ is adequate to carry other broadcasters' content. For TV3, TG4, the Houses of the Oireachtas Channel, the Irish Film Channel, and any channel deemed by the Minister to have the character of a public service broadcaster which has a contract with the BAI, there would thus appear to be provisions in the 2009 Act that may confer some of the important elements of *ex ante* regulation with respect to the "national television multiplex".
- 16.23 Therefore, it would appear that for FTA broadcasters, those with the character of a public service or those who have a sound broadcasting contract with the BAI, there are legislative provisions in place that confer rights of access which overlap with some of the important elements of *ex ante* regulation.
- 16.24 However, while this may overlap with some of the important elements of *ex ante* regulation ComReg is of the opinion that these are not sufficient to cover the conditions or range of potential problems that may arise in the market such as transparency and non-discrimination. For example, to counter the potential for the SMP operator to employ a tactical refusal of access ComReg can impose conditions which support the provision of timely and efficient access, such as the implementation of SLAs, and fair, reasonable and timely access. This can include the provision to have in place legally binding SLAs and to provide access to associated facilities on fair and reasonable terms. In addition, while section 130 provides for a particular form of price control, it may not necessarily be one that would arise under the electronic communications regulatory framework. Given the particular issue of vertical integration in this sector in Ireland, this form of a price control would not be supported by appropriate cost accounting obligations. Nor would the resulting remedy necessarily address the requirement for transparency and non-discrimination, as there would be no requirement that RTÉ charge itself in the same manner.
- 16.25 ComReg recognises that regulatory measures should be kept to the minimum necessary to address the identified market failure in an effective, efficient and proportionate manner. There are a range of potential regulatory options available to ComReg to address the competition problems in this market.
- 16.26 In this regard, regulation can be considered to be incremental, such that only obligations are imposed which are necessary and proportionate to the competition problems which have been identified. The lightest measure that can be imposed is the obligation of transparency. Should this be insufficient to address competition problems on its own, ComReg may apply a non-discrimination obligation. If this is still not sufficient, ComReg may next

consider the imposition of an access obligation, generally supported by accounting separation obligations. The final measure to be considered is the imposition of a price control and cost accounting remedy.

16.27 The question of regulatory forbearance and the incremental imposition of one or more of the above obligations are considered below.

### *Forbearance*

16.28 In sections 12 to 14 ComReg set out its view that this market is neither effectively competitive nor likely to become effectively competitive within the timeframe covered by this review.

16.29 As such, absent the imposition of any remedies, it is ComReg's preliminary view that this market would not be likely to operate in an effectively competitive manner. It is ComReg's preliminary view that the option of regulatory forbearance in this market is not, therefore, appropriate or justified.

### *Transparency Obligations*

16.30 Following ComReg's review of potential competition problems in sections 12 to 14 ComReg is of the preliminary view that a transparency obligation is necessary in this market to facilitate the development of effective downstream competition.

16.31 However, ComReg is of the view that transparency obligations on their own are not sufficient. While transparency obligations allow monitoring and observation of actions, they do not directly affect the actions/ behaviour of an SMP operator itself.

### *Non-Discrimination Obligations*

16.32 In light of the competition problems identified in sections 12 to 14 ComReg is of the preliminary view that a non-discrimination obligation should be imposed on RTÉ. A non-discrimination remedy requires that RTÉ ensures broadcasters being provided with the same wholesale terrestrial services are not treated differently, for example in a different manner to the services which RTÉ provides to itself.

16.33 The transparency obligation is complementary to this non-discrimination obligation as it provides the means of observing that discrimination is not occurring. In view of potential issues of discriminatory treatment (on price or non-price terms), transparency obligations alone would not address such issues. Furthermore, a non-discrimination obligation itself (or coupled with transparency) does not specifically address what type of product or service should be offered, or how it should be offered. Recourse to a non-



discrimination obligation tends to be on an *ex post* basis, so that an undertaking alleges a breach after the event.

16.34 Thus, the operation of the non-discrimination and transparency obligations alone are considered inadequate by ComReg as a means of ensuring *ex ante* that RTÉ provides access, including requests for different types of access in a fair, reasonable and timely manner.

### *Access Obligations*

16.35 In its review of the potential competition problems in sections 12 to 14, ComReg identified issues related to denial of access. While a non-discrimination obligation would be a necessary supporting obligation to address these issues, it is ComReg's preliminary view that it would not on its own, or coupled with transparency obligations, be sufficient.

16.36 An access obligation gives broadcasters the right to request access and establishes the principles on which the relevant products and services should be made available. ComReg is of the preliminary view that, an access remedy relating to the requirement to provide access, and to do so in a fair, reasonable and timely manner (and to provide objective reasons where requests for access are refused); the requirement to negotiate in good faith; the requirement not to withdraw access to facilities already granted is required in this wholesale market.

16.37 In an open competitive market there should be no restrictions that prevent undertakings from negotiating access as such agreements would be on a commercial basis and negotiated in good faith.

16.38 However, as discussed in this consultation paper such access may not be granted in this market.

16.39 ComReg believes that this access obligation is not imposing an unreasonable burden on RTÉ. In a competitively functioning market RTÉ would have the incentive to attract as many customers as possible to increase its revenues. The imposition of an access obligation is not at the denial of RTÉ's rights to be allowed a reasonable return reflective of the costs it has incurred in granting access.

16.40 In view of the competition problems identified in relation to a potential refusal to supply access, ComReg proposes that, it is justifiable to oblige RTÉ to meet reasonable requests for access, in accordance with section 130 of the 2009 Act excluding section 130(1)(e) of the 2009 Act, to a multiplexing service. The aim of the access remedy is to ensure that broadcasters can access wholesale products/services which will allow them to compete effectively in the retail broadcasting market.

16.41 It is ComReg's preliminary view that the absence of such obligations would hinder the development of effectively competitive retail markets by restricting or distorting competition to the detriment of end-users.

16.42 Access obligations are therefore considered necessary and appropriate in achieving the objectives of section 12 of the Communications Regulation Acts 2002-2011 and Regulation 16 of the Framework Regulations, namely the promotion of competition, and protecting the interests of end-users.

#### *Accounting Separation Obligations*

16.43 ComReg is of the preliminary view that RTÉ should ensure its wholesale prices and its internal transfer prices are transparent in view of the potential competition problems identified in sections 12 to 14.

16.44 Separated accounts would make visible the wholesale prices and internal transfer prices of RTÉ's services, thereby facilitating transparency as regards any potential misallocation of costs across different services. It is therefore considered proportionate to impose an obligation on RTÉ to keep separated accounts to help disclose possible competition problems which might otherwise undermine the proposed access, non-discrimination, transparency and price control obligations.

#### *Price Control and Cost Accounting Obligations*

16.45 In light of the review of competition problems in sections 12 to 14 ComReg is of the preliminary opinion that it is necessary to ensure that wholesale charges for access should be subject to price control and cost accounting obligations. ComReg has proposed imposing requirements that access is cost oriented, where the detailed nature of the specific costing methodology may be subject to a separate pricing consultation paper.

16.46 It is ComReg's preliminary view that RTÉ has SMP, there is limited constraint offered by actual competition, potential competition and countervailing buyer power and as a consequence, RTÉ's wholesale prices are not likely to be appreciably constrained in the absence of regulation. ComReg is of the view that transparency, non-discrimination and access obligations combined are not sufficient to address this potential market failure and therefore a price control and cost accounting obligation is necessary to address the potential for discriminatory pricing.

### **16.3 Steps 3 & 4 – Determine the Impacts on Stakeholders and Competition**

16.47 ComReg has proposed that regulatory forbearance is not an option and so it can be discounted when considering impacts on stakeholders.

16.48 ComReg will now identify the incremental impact of each obligation on stakeholders.

### ***Impact on RTÉ***

#### ***Access Obligations***

- 16.49 ComReg's preliminary view is that services voluntarily provided by RTÉ may not exist in some cases absent regulation. Absent regulation, RTÉ would have the ability and incentives to refuse to supply access to its DTT multiplexes tacitly or to supply them on discriminatory or unreasonable terms and conditions to its downstream competitors.
- 16.50 Therefore, ComReg has proposed access obligations be imposed on RTÉ. These relate to reasonable requests from DTT broadcasters (subject to the provisions of section 130 of the 2009 Act excluding section 130(1)(e) of the 2009 Act) for the provision of access to RTÉ's PSB DTT multiplex(es) for the purpose of a multiplexing service which is required for sustainable downstream competition.
- 16.51 Given the range of potential competition issues discussed in this consultation paper ComReg believes that the conditions of this obligation are proportionate and justified.
- 16.52 RTÉ is a vertically integrated entity and therefore it is relevant to consider the impact of this obligation on both its upstream and downstream operations. At the retail level RTÉ has the most viewed and listened to national television and radio programme services. RTÉ generally operates on a 50:50 public broadcasting model. This means that approximately 50% of their revenues are derived from commercial activities. Commercial revenues in the broadcasting sector are generally related to the amount and type of viewers/listeners a broadcaster can reach i.e. based on every 1,000 population and type reached.
- 16.53 From a retail perspective, it could be expected that RTÉ may face more competition in the retail market. This could have the effect of reducing some of RTÉ's programme services viewing time, though the degree of impact depends on a number of factors such as the number of new entrants, and the type of content offered by a new entrant. For example, according to a report by Athena Media in 2010 (Irish Broadcasting Landscape: Economic and Environmental Review for the BAI), RTÉ television programme services had a 70% market share of viewers on the analogue terrestrial platform in 2010 and 27.1% on cable and satellite platforms which have a greater number of competing programme services. However, DTT is unlikely to be able to provide anywhere near the number of programme services which are available via cable and satellite. The initial line up on DTT includes nine television programme services compared to hundreds on cable and satellite platforms. In any case, some reduction of viewership time would likely translate to a

reduction in commercial revenues for RTÉ. However, given its popularity due to its position as the national public service broadcaster, its access to key content such as certain live sports and the fact that circa 50% of its revenue stream is publicly provided, the revenue impact on RTÉ is likely to be less than would otherwise be the case.

- 16.54 From a wholesale perspective, RTÉ should experience an increase in revenue streams from the addition of more non RTÉ programmes services using its multiplexes. This means the net revenue impact on RTÉ would be lower. Furthermore, RTÉ's own costs may fall due to a greater sharing of common costs across the network.
- 16.55 While ComReg acknowledges that the conditions of this access obligation, such as the requirement to provide SLAs might impose a burden on RTÉ in terms of time and other resources required to meet these conditions, ComReg does not believe these are unwarranted in the context of the need to ensure that RTÉ provides an agreed quality service to undertakings.
- 16.56 ComReg does not believe that the need to seek approval from ComReg before withdrawal of services, nor the need to negotiate in good faith, grant access in a fair and timely manner or the need to provide objective criteria for any refusal of access to undertakings are inappropriate or unjustified in the context of the competition problems that may arise in this market. These conditions are proposed to ensure that RTÉ operates in a fair and reasonable manner towards third parties.

#### *Non-discrimination Obligations*

- 16.57 ComReg proposes that an obligation of non-discrimination should be imposed on RTÉ to ensure that it applies the same conditions in equivalent circumstances to broadcasters as it does to its own operations. The provision of relevant information on services is only proposed to apply to DTT broadcasters who have agreed a reference offer with RTÉ as such information may be commercially sensitive and such information should be provided within a specified timeframe.
- 16.58 The collation and provision of relevant information to broadcasters may consume RTÉ time and other resources but ComReg does not see this as placing a majorly unnecessary burden on RTÉ. Imposing this condition means that potential discriminatory behaviour by RTÉ towards its network users is reduced.

*Transparency Obligations*

- 16.59 A lack of transparency in the market could make it difficult to demonstrate equivalence and present the opportunity for RTÉ to leverage its market power to prevent competition.
- 16.60 ComReg proposes that RTÉ should publish information or data which an undertaking may reasonably require to compete effectively based on RTÉ's wholesale services. Publication of SLAs will provide assurance to potential entrants that RTÉ will treat them to an agreed standard of service which is not discriminatory. Given the potential for RTÉ to provide a lesser quality of service to downstream competitors than to itself, ComReg considers it proportionate and justified that the range of SLAs provided by RTÉ to other undertakings should be observable.
- 16.61 These conditions are likely to place some costs of compliance on RTÉ in terms of time and resources dedicated to implementing these obligations but ComReg views these as necessary to ensure a level playing field in the market. Given that RTÉ is a vertically integrated entity it is only under these conditions that one can ensure non-discrimination.

*Accounting Separation Obligations*

- 16.62 As already discussed, there may be potential competition problems in this market due to RTÉ's pricing behaviour. Separated accounts help to reduce this potential problem by making wholesale prices and internal transfer pricing visible facilitating transparency. ComReg believes that an obligation such as this is necessary and proportionate in the context of a vertically integrated entity like RTÉ. Otherwise RTÉ could engage in cross subsidization unless there is a robust accounting system that allocates costs, revenues and transfer charges in a clear and transparent manner.
- 16.63 This is likely to impose some cost burden on RTÉ in terms of its implementation but it will help ensure that RTÉ does not behave in a discriminatory manner in terms of pricing by providing transparency to ComReg and the market. ComReg is proposing that RTÉ prepares accounting documentation describing the cost accounting systems for this market. It is also proposing that RTÉ submits financial information to it on the allocation of costs in this market. However, ComReg considers that much of the underlying information is already available in the books and records of RTÉ and therefore the cost burden should not be significant.

***Price Control and Cost Accounting Obligations***

- 16.64 In light of the potential competition problems relating to discriminatory pricing behaviour discussed in sections 12 to 14 ComReg proposes to implement a price control and cost accounting obligation on RTÉ to prevent possible price discriminatory practices. As RTÉ competes with other broadcasters in the retail market it may be concerned that it would lose audience market share to other broadcasters and therefore lose the related advertising revenues it could otherwise command. Therefore, RTÉ has the incentive and, as the sole operator in this wholesale market, has the ability to engage in practices to minimise this potential competitive threat. RTÉ could reduce other broadcaster's ability to compete with RTÉ for content and talent and retail audience market share by engaging in discriminating pricing practices. This may also have the added effect of deterring potential market entry and expansion.
- 16.65 Cost accounting supports the obligations of price control and accounting separation. A price control obligation will ensure that RTÉ sets appropriate wholesale prices to enable effective competition. ComReg believes that these obligations are necessary and appropriate in the context of the ability and incentive of RTÉ to engage in price discrimination which would harm competition in the retail market and therefore negatively impact end-users.
- 16.66 The impact of such a move on RTÉ is that it would constrain its ability to harm actual or potential competitors by linking prices to actual costs and stopping the potential for excessive pricing. This therefore has the potential to reduce the amount of revenues RTÉ might otherwise acquire were such an obligation not in place but allow a reasonable return to RTÉ based on its efficient investment.
- 16.67 ComReg is mindful of facilitating the emergence of effective competition without compromising desirable investments at a network level as well as the need to ensure the incumbent should recover its efficiently incurred costs. ComReg considers that the aim of a price control is to maintain prices at an efficient level to the benefit of consumers and at a level which encourages ongoing efficient entry and investment decisions by undertakings while also ensuring that the SMP operator makes a reasonable return on its efficient investment.

***Impact on competition***

***Access Obligations***

- 16.68 The proposed access obligation should improve the conditions for market entry and expansion which may otherwise be restricted due to the actions of RTÉ arising from perceived competitive threats. By imposing this obligation

the potential for entry and expansion of non RTÉ programme services is increased thus improving the potential for competition among broadcasters in the downstream retail market to the benefit of end-users. For example, by offering the potential for a more diverse range of content.

- 16.69 A condition of acting in good faith would mean that RTÉ would be required to demonstrate that its approach to negotiations was in good faith and that any unmet access requests can be shown to be unreasonable. This helps to give greater confidence and assurance to the market that RTÉ will not have the potential to behave in such a manner as to be deliberately unreasonable in negotiations for access in order to foreclose the market.
- 16.70 A condition not to withdraw access to existing services prior to approval of ComReg helps to ensure that RTÉ does not withdraw services upon which third parties rely for their business operations without valid reasoning for doing so and this, therefore, gives a level of protection to undertakings reliant on RTÉ's wholesale services.
- 16.71 Granting access in a fair, reasonable and timely manner will help to ensure that there are no unnecessary delays in providing access which could otherwise constrain third party activity in the market.
- 16.72 Provision of SLAs will help to ensure a defined quality of service provided to third parties. This is important because a reduced/inferior quality of service to third parties could affect their ability to compete at the retail level.

#### *Non-discrimination Obligations*

- 16.73 It is important that third parties are not discriminated against in either price or non-price terms by RTÉ as this would reduce their ability to compete effectively in the market and be a major consideration to any potential entrants and as such could contribute to foreclosing market entry and expansion. As already discussed RTÉ may discriminate against potential competitors. A non-discrimination obligation would help to ensure that RTÉ treats both itself and third parties in a similar manner, thereby helping promote competition in the market.

#### *Transparency Obligations*

- 16.74 Transparency obligations act as support for other obligations by ensuring that any potential anti-competitive behaviour contravening such obligations can be easily observed and therefore, allow appropriate enforcement action to be taken if needed. This reduces the ability for anti-competitive behaviour by RTÉ. ComReg believes such an obligation tied to other obligations will ensure that competition is promoted in this market.
- 16.75 Publication of a reference would allow for a degree of certainty to enable undertakings to plan and run their operations efficiently, enabling broadcasters

to observe the detail of the wholesale offerings made available by RTÉ. Publication of information or data which undertakings would require in order to compete in the market would further promote transparency and thereby help to encourage market entry and expansion.

- 16.76 Publication of SLAs will ensure that service level guarantees to all market players reliant RTÉ's infrastructure equipment is observable and provide assurance to industry that there is no discrimination among market players in this area.
- 16.77 Transparency in relation to the proposed obligations will provide clarity of services and costs to potential entrants and therefore should help to encourage market entry and expansion.

### *Accounting Separation Obligations*

- 16.78 In a vertically integrated market where possible price related problems may arise, accounting separation is very important as it ensures transparency in regards to allocation of costs across different services thereby ensuring that they are allocated correctly. This means that inappropriate pricing behaviour can be observed independently and reduces the potential for such practices.
- 16.79 This obligation supports the obligations of transparency and non-discrimination. It also supports implementing price control and cost accounting obligations. As RTÉ is a vertically integrated entity, it should ensure that RTÉ makes transparent its wholesale prices and its internal transfer prices.
- 16.80 ComReg has identified potential competition problems related to price discrimination. Separated accounts help disclose these competition problems and make visible the wholesale prices by facilitating transparency with regard to any potential misallocation of costs across different services. It is therefore considered justified to impose an obligation on RTÉ to maintain separated accounts.
- 16.81 This should help to promote the development of entry and expansion and in the retail market as entrants can be assured that price related discriminatory practices are observable.

### *Price Control and Cost Accounting Obligations*

- 16.82 Given the risk of price-related competition problems in this market, as identified in sections 12 to 14 of this consultation paper, ComReg considers that the imposition of a price control and cost accounting obligation on RTÉ is



appropriate as this is the only way to ensure that prices are an actual reflection of cost and that they are non-discriminatory.

- 16.83 A price control will ensure that RTÉ sets appropriate wholesale prices at the appropriate level as there is the potential for RTÉ to engage in excessive pricing. Cost accounting supports the obligations of price control and assists in monitoring non-discrimination. For a price control, cost accounting identifies and attributes relevant costs to services and products based on agreed accounting principles. The imposition of regulated prices should therefore ensure a level playing field during negotiations between RTÉ and other broadcasters.
- 16.84 ComReg is mindful that any cost recovery mechanism or pricing methodology that is imposed by ComReg should serve to promote efficiency and sustainable competition and maximise consumer benefits.
- 16.85 These conditions should enable the promotion of competition in the market as they would prevent an SMP operator from engaging in price discrimination in the market. This, in turn, may enable broadcasters to provide greater quality of services and products and encourage broadcasters to compete to a greater extent in the market.

### ***Impact on consumers***

- 16.86 Consumer satisfaction in the retail market is driven by price, quality and choice. The transition to DTT should allow for more and better quality content to end-users. However, as has been already discussed, competition may be curtailed in this market such that the end-user could suffer due to a lower level of quality and choice.
- 16.87 In proposing these obligations ComReg has taken the impact on end-users into consideration and believes that without the appropriate obligations listed above, end-users would be worse off due to a lack of competition in the market.
- 16.88 Each of the obligations outlined above is complementary to each other and in ComReg's view merited in this market. Each obligation helps to support the other, promoting market entry and expansion by ensuring that the market does not tend towards foreclosure or other anti-competitive practices. This means that the utility of end-users should be increased through greater choice and quality of products/services.

#### **16.4 Steps 5 – Assess the impacts and choose the best option**

- 16.89 ComReg has taken full account of its obligations under Regulation 8(6) of the Access Regulations (including that any proposed remedies are to be based on the nature of the problem identified), as well as its relevant objectives as set out under section 12 of the Communications Regulation Acts 2002 to 2011.
- 16.90 Based on SMP assessment, the potential competition problems and ComReg's belief that there is a lack of effectiveness to current regulation, ComReg proposes that the imposition of a full suite of remedies is appropriate and justified in market B. The option of imposing no remedies does not apply in this market because, when there is a (preliminary) finding of SMP, ComReg is obliged to impose at least one remedy. Section 17 provides more detail on the regulation ComReg believes is necessary in this market.
- 16.91 ComReg has assessed the potential impact of the proposed obligations on RTÉ, on competition and on retail consumers. The proposed obligations are considered proportionate and justified based on the range of competition problems identified in this consultation paper. While these obligations may impose costs on RTÉ in terms of time and resources dedicated to complying with these proposed obligations, it is ComReg's view that such obligations will promote competition in the market to the benefit of end-users, thereby exceeding any costs associated with their implementation.
- 16.92 ComReg will keep the Irish broadcasting sector under review to determine whether such remedies continue to be justified and proportionate in light of relevant developments, if any, in the market.

**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.**

## 17 Draft Decision Instrument

**[Note the following text is in draft form only, being a draft measure in relation to which ComReg is required to consult upon pursuant to Regulation 19 of the Framework Regulations].**

### STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (Decision Instrument) is made by the Commission for Communications Regulation (ComReg) and relates to the market for wholesale access to DTT multiplexing services as satisfied by the three criteria test in ComReg Document [12/77] as required by the European Commission in its Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation<sup>201</sup> and as defined by ComReg in ComReg Document [12/77].

- xi. Having had regard to sections 10 and 12 of the Communications Regulations Act, 2002 to 2011<sup>202</sup> and Regulation 16 of the Framework Regulations<sup>203</sup> in particular;
- xii. Having taken account of its functions under Regulation 6(1) of the Access Regulations<sup>204</sup>;
- xiii. Having had regard to, where appropriate, Regulation 25 of the Framework Regulations;
- xiv. Having had regard to, where appropriate, the Broadcasting Act, 2009<sup>205</sup>;
- xv. Having, where appropriate, complied with the Policy Directions made by the Minister further to section 13 of the Communications Regulation Act 2002<sup>206</sup>;

<sup>201</sup> European Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services – OJ L 344/65.

<sup>202</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

<sup>203</sup> S.I. No. 333 of 2011 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (“Framework Regulations”) which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended.

<sup>204</sup> S.I. No. 334 of 2011 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (“Access Regulations”) which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, as amended.

<sup>205</sup> Broadcasting Act, 2009, No. 18 of 2009.

<sup>206</sup> Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

- xvi. Having taken the utmost account of the European Commission's Recommendation of 17 December 2007 and the European Commission's Guidelines on market analysis and the assessment of significant market power<sup>207</sup>;
  - xvii. Having had regard to the three criteria test, market definition, market analysis and reasoning conducted by ComReg in the Consultation [Market Review: Broadcasting Transmission Services in Ireland];
  - xviii. Having taken account of the submissions received in relation to [Market Review: Broadcasting Transmission Services in Ireland];
  - xix. Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations;
  - xx. Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 13 of the Framework Regulations and having taken the utmost account pursuant to Regulation 13(6) of the Framework Regulations of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State in accordance with Article 7(3) of the Framework Directive<sup>208</sup>
  - xxi. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations.
- 1.2 The provisions of Consultation document 12/77, and Response to Consultation and Final Decision DX/12 shall, where appropriate, be construed with this Decision Instrument.

## **PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)**

### **2 DEFINITIONS AND INTERPRETATION**

2.1 In this Decision Instrument:

“**Access**” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time; for the purposes of this

<sup>207</sup> European Commission Recommendation of 17 December, 2007 on Relevant Product and Service Market; European Commission Recommendation on regulated access to Next Generation Access Networks, 20 September 2010, (2010/572/EU); and European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services of 11 July 2002 – OJ C 165/03.

<sup>208</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

Decision Instrument access shall include Associated Facilities where appropriate;

**“Access Regulations”** means the European Communities (Electronic Communications and Network Services) (Access) Regulations, 2011 (S.I. No. 334 of 2011), as may be amended from time to time;

**“Act of 2009”** means Broadcasting Act, 2009, No.18 of 2009

**“Act of 2002”** means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).;

**“Associated Facilities”** shall have the same meaning as under the Framework Regulations,

**“Associated Services”** shall have the same meaning as under Regulation 2 of the Framework Regulations;

**“Authorisation Regulations”** means the European Communities (Electronic Communications and Network Services) (Authorisation) Regulations, 2011 (S.I. No. 335 of 2011), as may be amended from time to time;

**“BEREC”** means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

**“Broadcaster”** shall have the same meaning as under section 2 of the Act of 2009 and for the purposes of this Decision Instrument, the broadcaster shall have the necessary statutory basis or Ministerial consent consistent with section 130 of the Act of 2009 excluding section 130(1)(e) of the Act of 2009;

**“Broadcast Distribution Service”** means the delivery of programme material (television and/or radio) from where it is compiled to a network of broadcast transmission sites;

**“Broadcast Transmission Service”** means the delivery of programme material (television and/or radio) via a terrestrial network for consumption by the public;

**“Broadcasting Service”** shall have the same meaning as under section 2 of the Act of 2009;

**“ComReg”** means the Commission for Communications Regulation, as established under section 6 of the Act of 2002;

**“DTT”** means Digital Terrestrial Television;

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, (S.I. No. 333 of 2011), as may be amended from time to time;

**“Multiplex”** means an electronic system which combines programme material and related and other data in digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public, the term “multiplexing services” shall have the same meaning;

**“Multiplex infrastructure”** means, but is not limited to, the electronic system which combines the programme material, related other material and other data in a digital form;

**“Programme material”** shall have the same meaning as under section 2 of the Act of 2009;

**“RTÉ”** means Raidió Teilifís Éireann its subsidiaries, and any undertaking which owns or controls it, and its successors, affiliates and assigns;

**“Related material”** means material and other data directly related to, and associated with, the programme material;

**“Service Level Agreements (SLAs)”** are legally binding contracts between RTE and broadcasters in relation to the service levels which RTE commits to from time to time;

**“Significant Market Power (SMP) obligations”** are those obligations set out in Regulation 8 to 13 of the Access Regulations, as may be amended from time to time;

**“Transmission”** shall have the same meaning as under section 2 of the Act of 2009;

**“Third Party”** means any party acting on behalf of a broadcaster seeking access to a multiplex operated and maintained by RTÉ in accordance with RTÉ’s obligations under section 114 (1)(i) of Act of 2009;

**“Television multiplex”** shall have the same meaning as under section 129 of the Act of 2009;

**“Terrestrial”** shall have the same meaning as under section 2 of the Act of 2009;

**“wholesale access to DTT multiplexing services”** means the market for wholesale access to DTT multiplexing services and, for the avoidance of doubt is wholesale access to any multiplex operated and maintained by RTÉ for the purposes of DTT and is synonymous with the Market;

- 2.2 For the avoidance of doubt, where there are any conflicts between the provisions and/or definitions of this Decision Instrument and the Act of 2009, the provisions of the Act of 2009 will prevail.

### **3 SCOPE AND APPLICATION**

- 3.1 This Decision Instrument applies to RTÉ in respect of activities falling within the scope of the Market defined in section 4 of this Decision Instrument.
- 3.2 This Decision Instrument is binding upon RTÉ and RTÉ shall comply with it in all respects.

### **4 MARKET DEFINITION**

- 4.1 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's Recommendation, and taking utmost account of its Guidelines on market analysis and the assessment of significant market power and in accordance with the principles of competition law, the product market in this Decision Instrument is defined as the market for wholesale access to multiplexing services.
- 4.2 Pursuant to Regulation 26 of the Framework Regulations, taking the utmost account of the European Commission's Guidelines on market analysis and the assessment of significant market power and the European Commission's Explanatory Note<sup>209</sup> and in accordance with the principles of competition law, the relevant geographic market is defined as Ireland.

### **5 DESIGNATION OF UNDERTAKING WITH SMP**

- 5.1 Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations and consistent with the European Commission's Guidelines on market analysis, the completion of the three criteria test and the assessment of significant market power, having determined that the market is not effectively competitive, RTÉ is designated as having SMP on the Market.

## **PART II – SMP OBLIGATIONS**

### **6 SMP OBLIGATIONS**

- 6.1 ComReg is imposing certain SMP obligations on RTÉ in accordance with and pursuant to Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations, as detailed further in sections 7 to 12 below.

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<sup>209</sup> Commission Staff Working Document Explanatory Note accompanying document to the European Commission's Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation SEC (2007) 1483/2, 13 November 2007.

## **7 OBLIGATIONS TO PROVIDE ACCESS**

- 7.1 Pursuant to Regulation 12(a) of the Access Regulations and in accordance with section 130(1) of the Act of 2009, RTE shall meet all reasonable requests from broadcasters in the context of section 130 of the Act of 2009 excluding section 130(1)(e) of the Act of 2009 for the provision of Access, including Associated Facilities and Associated Services.
- 7.2 Pursuant to Regulation 12 (2) of the Access Regulations and without prejudice to the generality of section 7.1, and notwithstanding the provisions of section 7.3, RTÉ shall grant all reasonable requests for Access to broadcasters, in accordance with section 130 of the Act of 2009 excluding section 130(1)(e) of the Act of 2009, to a multiplexing service, which can then be distributed via a broadcast distribution service and transmitted via a broadcast transmission service as part of a television multiplex.
- 7.3 Without prejudice to the generality of sections 7.1 to 7.2, RTÉ shall meet all reasonable requests for Access from broadcasters in accordance with section 130 of the Act of 2009, excluding section 130(1)(e) of the Act of 2009:
- (vi) Pursuant to Regulation 12 (2) (a) of the Access Regulations, give third parties access to specified multiplex infrastructure elements or facilities;
  - (vii) Pursuant to Regulation 12 (2) (b) of the Access Regulations, negotiate in good faith with broadcasters requesting Access;
  - (viii) Pursuant to Regulation 12 (2) (c) of the Access Regulations, not withdraw Access to services and facilities already granted, without the prior approval of ComReg;
  - (ix) Pursuant to Regulation 12 (2) (e) of the Access Regulations, grant open Access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services;
  - (x) Pursuant to Regulation 12 (2) (f) of the Access Regulations, provide co-location or other forms of associated facilities sharing where relevant.

## **8 CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS**

- 8.1 Without prejudice to the generality of section 7, RTÉ shall, in relation to the obligations set out under section 7, grant Access to the Market and Associated Facilities and Associated Services, pursuant to Regulation 12 (3) of the Access Regulations in a fair, reasonable and timely manner.
- 8.2 Without prejudice to the generality of section 8.1, RTÉ shall:
- (i) Conclude, maintain or update, as appropriate, legally binding SLAs that shall include, but shall not be limited to the SLA requirements as



set out in Appendix B, which maintain the current SLA's as imposed by Decision D16/04;

- (ii) Negotiate in good faith with broadcast operators in relation to the conclusion of legally binding and fit-for-purpose SLAs;
  - (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter of negotiation between RTÉ and broadcast operators and recovery of service credits shall be in the first instance, a matter for the individual broadcast operators and RTÉ;
  - (iv) Ensure that SLAs detail how service credits are calculated, to include the provision of an example calculation;
  - (v) Ensure that payment of service credits, where they occur, shall be made in a timely and efficient manner.
- 8.3 Where a request for provision of Access, or a request for provision of information is refused or met only in part, RTÉ shall provide the objective criteria for refusing same to the broadcaster which made the request. RTÉ's response shall be fair, reasonable and timely

## **9 OBLIGATION OF NON-DISCRIMINATION**

- 9.1 RTÉ shall have an obligation of non-discrimination as provided for by Regulation 10 of the Access Regulations.
- 9.2 Without prejudice to the generality of section 9.1, RTÉ shall:
- (iii) Apply equivalent conditions in equivalent circumstances to other broadcasters providing equivalent services; and,
  - (iv) Ensure that all services and information are provided to other broadcasters under the same conditions and of the same quality as the services and information that RTÉ provides for or to itself or to its subsidiaries or partners and for the avoidance of doubt for the purposes of this Decision Instrument, this includes RTÉ.
- 9.3 In particular in order that broadcast operators seeking access may be in the same position as RTÉ or its subsidiaries or partners with respect to the provision of services and information, such services or information shall be provided at the same time as the service(s) or information is available by RTÉ for or to itself or its subsidiaries or partners.
- 9.4 For the avoidance of any doubt, the obligations set out at this section 9 apply irrespective of whether or not a specific request for services or information has been made.

## 10. OBLIGATION OF TRANSPARENCY

- 10.1 RTÉ shall have an obligation of transparency as provided for by Regulation 9 of the Access Regulations.
- 10.2 Without prejudice to the generality of the obligation in section 10.1, pursuant to Regulation 9 (2) of the Access Regulations, RTÉ shall make publicly available and keep updated on its publicly available wholesale website, Reference Offer. The Reference Offer shall be comprehensive and appropriately detailed. It shall be published within four months from the effective date of this Decision Instrument. The Reference Offer shall be sufficiently detailed so as to ensure that broadcasters availing of such services and facilities are not required to pay for services or facilities which are not necessary for the service or facility requested, and the Reference Offer shall include at least the following:
- (i) A description of the relevant offerings broken down into components according to market needs;
  - (ii) A description of the technical specifications of the Access being offered;
  - (iii) A description of the associated terms and conditions for supply and use, including prices, this shall include a description of the tariff model and the prices therein.
- 10.3 RTÉ shall, unless otherwise determined by ComReg, make publicly available and publish on its publicly available website at least two months in advance, or such other period as may be determined by ComReg, any proposed changes to the Reference Offer and any proposed changes to wholesale prices (including prices for new services and facilities) coming into effect. RTÉ shall notify ComReg at least one month in advance of any such publication taking place i.e. three months prior to any changes coming into effect, unless such other period has been determined by ComReg, as described above. Proposed changes to the Reference Offer including proposed changes to prices and the application of such prices shall not be implemented without prior notification to ComReg and broadcasters.
- 10.4 ComReg may issue directions requiring RTÉ to make changes to the Reference Offer to give effect to obligations imposed in this Decision Instrument and to publish the Reference Offer with such changes pursuant to Regulation 9(3) of the Access Regulations. ComReg may issue directions to RTÉ from time to time requiring it to publish information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices, pursuant to Regulation 18 of the Access Regulations.
- 10.5 Without prejudice to the generality of the obligation in section 10.1, RTÉ shall make public information on its wholesale website, such as accounting

information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 7, as specified by ComReg from time to time and all other information which may be reasonably required by Broadcasters.

- 10.6 RTÉ shall publish all SLAs (and any updates thereto) on its publicly available website.

## **11 OBLIGATION OF ACCOUNTING SEPARATION**

- 11.1 Pursuant to Regulation 11 of the Access Regulations, RTÉ shall have an obligation to maintain separated accounts as detailed in Appendix D attached to this Decision Instrument.

## **12 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING**

- 16.2 Pursuant to Regulation 13(1) and in accordance with Regulation 13(2) of the Access Regulations, RTÉ shall be subject to a price control obligation, in the form of an obligation of cost orientation.

12.1

- 12.2 Pursuant to Regulation 13 (1) of the Access Regulations, RTÉ shall maintain appropriate cost accounting systems in respect of products, services or facilities referred to in section 7.

## **PART IV – OBLIGATIONS AND EFFECTIVE DATE**

### **13 STATUTORY POWERS NOT AFFECTED**

- 13.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument) from time to time as the occasion requires.

### **14 MAINTENANCE OF OBLIGATIONS**

- 14.1 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

### **15 EFFECTIVE DATE**

- 15.1 The effective date of this Decision Instrument shall be the date of its publication and notification to RTE and it shall remain in force until further notice by ComReg.

**KEVIN O'BRIEN  
COMMISSIONER  
THE COMMISSION FOR COMMUNICATIONS REGULATION  
THE X DAY OF XY 2012**

**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.**

## 18 Submitting Comments

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

The consultation period will run from 13-07-2012 to 24-08-2012, during which the ComReg welcomes written comments on any of the issues raised in this paper.

Having analysed and considered the comments received, ComReg will review its market analysis and draft decision on broadcasting transmission services and anticipates publishing a report in Q4 2012 on the consultation which will, inter alia summarise the responses to the consultation.

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

### **Please note**

ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful.

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

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

## Appendix A – Parameters for inclusion in the proposed SLA obligation - Market A

The scope of the SLA and details of the duration and negotiation of the SLA;

1. The objective of the SLA;
2. Broadcaster operators' business support;
3. Fault incidents;
4. Fault management
5. Fault response;
6. Escalation process;
7. Network monitoring centre;
8. Service requests;
9. Business continuity management;
10. Routine meetings;
11. Reports;
12. A dispute resolution procedure to be used between parties;
13. Provisions regarding confidentiality of non-public parts of the SLA;
14. A description of the network access to be provided, including technical information;
15. The locations of the points of network access;
16. The technical standards for network access (including any usage restrictions and other security issues);
17. The conditions for access to ancillary and supplementary services;
18. Details of traffic and network management;
19. Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
20. Details of quality metrics;
21. Details of measures to ensure compliance with requirements for network integrity; and,
22. Rules of allocation between the parties when supply is limited.

## Appendix B – Parameters for inclusion in the proposed SLA obligation - Market B

The scope of the SLA and details of the duration and negotiation of the SLA;

23. The objective of the SLA;
24. Broadcasters' business support;
25. Fault incidents;
26. Fault management
27. Fault response;
28. Escalation process;
29. Network monitoring centre;
30. Service requests;
31. Business continuity management;
32. Routine meetings;
33. Reports;
34. A dispute resolution procedure to be used between parties;
35. Provisions regarding confidentiality of non-public parts of the SLA;
36. A description of the network access to be provided, including technical information;
37. The locations of the points of network access;
38. The technical standards for network access (including any usage restrictions and other security issues);
39. The conditions for access to ancillary and supplementary services;
40. Details of traffic and network management;
41. Details of maintenance and maintenance objectives, any ordering and provisioning procedures, details of interoperability tests;
42. Details of quality metrics;
43. Details of measures to ensure compliance with requirements for network integrity; and,
44. Rules of allocation between the parties when supply is limited.

## Appendix C – Detail of proposed Accounting Separation obligation - Market A

### 1. Definitions and Interpretation

1.1 In this Appendix C, unless otherwise indicated:

“Accounting Documentation” refers to the description of policies and methodologies used to produce the financial information contained within the Regulated Accounts and the Additional Financial Data.

“Accounting Policies” means the specific policies and procedures used by a company to prepare its Regulated Accounts.

“Additional Financial Data” means the data that shall be provided by RTÉNL, as determined by ComReg, on an annual basis.

“Agreed Upon Procedures” means procedures agreed between relevant parties pursuant to a letter of engagement.

“Attribution Methods” refers to the methods employed to allocate and apportion revenues, costs and capital employed to the Market or Service levels.

“Auditor(s)” means a firm(s) which is/are authorised to conduct the audit of financial statements of companies registered in Ireland.

“Cost Component” means the accumulation of various costs (direct, indirect, and common) through the various cost allocation stages within the cost accounting system from initial input layer through to final Services.

“Equi-Proportional Mark Up” means the method of allocating the joint or common costs to a Service in proportion to the costs already assigned.

“External” means the supply of Services to parties outside of RTÉNL.

“Fixed Asset” means tangible and intangible items that are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes and which are expected to be used during more than one period.

“Functional Cost Categories” means the various expense categories as set out in section 4.3.2 of this Appendix C.

“Income Statement” means a statement showing all items of income and expense recognised in a period.

“Integrated Business Divisions” or “IBD” means the separate divisions within RTÉ organised and managed separately according to the nature of the services and products provided.

“Internal” means the supply of Services between RTÉNL and other RTÉ IBD’s.

“Market A” (wholesale access to national terrestrial broadcast transmission services) means the market for wholesale access to national terrestrial broadcast transmission services and, for the avoidance of doubt, includes both



wholesale broadcast distribution services, broadcast transmission services and sound broadcasting services, and is synonymous with the Market.

“Primary Accounting Documentation” means those documents containing the information set out at section 5.2.1 of this Appendix C.

“Regulatory Accounting Principles” establish the key doctrines to be applied in the preparation of regulatory accounting information. They should include, but not be limited to, the principles of cost causality, objectivity, transparency and consistency of treatment.

“Regulated Accounts” means those accounts as described in section 3.2 of this Appendix C.

“Separated Accounts” refers to the financial information referred to in section 3.1 of this Appendix C.

“Secondary Accounting Documentation” means those documents containing the information set out at 5.2.2 and 5.2.4 of this Appendix C.

“Service(s)” for the purposes of this Appendix C shall mean access to all of RTÉNL’s network, including but not limited to all antennae, towers, masts, buildings, licensed multiplexes, associated facilities and associated services.

“Statutory Accounts” means the accounts of RTÉNL Transmission Limited, and its successors, which RTÉNL Transmission Limited is required to prepare pursuant to the Companies Acts.

- 1.2 Where a definition of a term is not provided and is defined in the Appendix, the definition in the Decision Instrument shall prevail.

## **2. Fundamental Requirements of SMP Obligations**

- 2.1 RTÉNL’s financial records and accounting systems shall be sufficiently detailed and supported by sufficient data to ensure that:
  - a) RTÉNL is in a position to comply with the transparency, non-discrimination, accounting separation, price control, and cost accounting obligations imposed on it by the Decision Instrument for Market A; and
  - b) RTÉNL is in a position to prepare Separated Accounts which shall be maintained for Market A and, where specified, for Services.

## **3. Reporting and Transparency**

### **3.1 Separated Accounts**

- 3.1.1 Without prejudice to the generality of section 2, RTÉNL shall prepare Separated Accounts annually.
- 3.1.2 RTÉNL’s Separated Accounts shall contain:
  - a) Regulated Accounts (section 3.2);
  - b) Additional Financial Data (section 3.3);

- c) Accounting Documentation (section 5).

### **3.2 Regulated Accounts**

3.2.1 RTÉNL's Regulated Accounts will consist of Historical Cost Accounts ("HCA").

3.2.2 RTÉNL's Regulated Accounts shall contain:

- a) A statement or reference to the Regulatory Accounting Principles followed when preparing the Regulated Accounts which shall include but not be limited to the following terms:

- cost causality;
- objectivity;
- transparency;
- consistency of treatment.

b) Income Statement and balance sheet

c) Notes to the Regulated Accounts as required:

d) RTÉNL's Regulated Accounts shall be accompanied by:

- (i) A signed statement from the directors of RTÉNL acknowledging their responsibilities for the preparation of the Regulated Accounts and confirming their compliance with the requirements of the Appendix C in this respect.
- (ii) A report and opinion by an Auditor on the Regulated Accounts and RTÉNL's compliance with the requirements of this Appendix C, in respect of the preparation of the Regulated Accounts.

3.2.3 The Regulated Accounts shall be prepared in accordance with Regulatory Accounting Principles and Accounting Policies. These Regulated Accounts shall show data for RTÉNL's last complete financial period as well as the previous financial period and where these figures are not comparable, as a result of (for example) a material change in Accounting Policy, cost attribution methodology or material error, the figure for the preceding financial period must be adjusted to the extent that it is reasonable to do so.

3.2.4 The Regulated Accounts shall include a reconciliation to the Statutory Accounts and contain (where relevant) a description of adjustments made between the Statutory Accounts and the Regulated Accounts

3.2.5 RTÉNL shall publish its Regulated Accounts on its website no later than four months after the end of the financial period (or as allowed by ComReg).

3.2.6 RTÉNL shall include the report and opinion of the Auditor with the published Regulated Accounts.

### **3.3 Additional Financial Data**

- 3.3.1 Such Additional Financial Data shall be prepared as required by ComReg in a format as requested by it (from time to time) and may include the following:
- a) HCA Income Statements for each Service. RTÉNL shall provide comparative prior period data, where possible and where it is reasonable to do so.
  - b) Schedule of charges for Services. RTÉNL shall provide comparative prior period data where possible and reasonable to do so. The Services required to be included in the schedule of charges shall be determined annually by ComReg prior to the end of the financial period and notified to RTÉNL.
- 3.3.2 Income Statements shall distinguish between External and Internal revenues and costs.
- 3.3.3 RTÉNL's Additional Financial Data shall follow the same Regulatory Accounting Principles as applied in the preparation of the Regulated Accounts.
- 3.3.4 RTÉNL shall submit its Additional Financial Data to ComReg, and, when required by it, the related opinion(s) of the Auditor or the report(s) from a qualified independent body, no later than four months after the end of the financial period.
- 3.3.5 RTÉNL shall submit a copy of the fixed asset register as reconciled to the fixed asset note per the statutory financial statements.
- 3.3.6 The format and level of detail shown in the Additional Financial Data shall be determined by ComReg on an annual basis prior to the financial period end.

## **4. Accounting Principles**

- 4.1 The collection of data and the basis on which it is to be allocated and apportioned between regulated and unregulated markets and Services are detailed under the following headings:
- Cost allocation and apportionment principles (section 4.2);
  - Cost allocation and apportionment rules (section 4.3);
  - Internal segment transactions (section 4.4); and
  - Survey techniques (section 4.5).

### **4.2 Cost allocation and apportionment principles**

- 4.2.1 RTÉNL shall allocate costs to each Service on a fully allocated cost basis, in the following manner:
- a) Where possible, costs which can be directly assigned to a particular Service shall be so assigned.
  - b) Common costs, which are costs that cannot be directly assigned to a particular Service, shall be allocated as follows:

- Whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
- When direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible, the indirect linkage shall be based on comparable cost structures; and
- When neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of an Equi-Proportional Mark up, computed by using the ratio of all relevant expenses directly or indirectly assigned or allocated, to each Service.

### **4.3 Cost allocation and apportionment rules**

4.3.1 RTÉNL shall ensure that costs are apportioned between the various Cost Components on the basis of factors/drivers which reflect the different impact of each item on the Functional Cost Categories. Where survey techniques are applied for the apportionment of costs the principles outlined in section 4.5 shall be followed.

4.3.2 At a minimum and where relevant, RTÉNL shall ensure that the hierarchy of costs to be applied shall enable the cost of the following cost categories to be calculated:

- Employee costs
  - Wages and salaries
  - Social Welfare costs
  - Pension costs and Life Assurance
- Other Personnel related operating costs
- Network electricity
- Maintenance costs
- Rent and rates
- Central shared services costs
- Other operating costs
- Depreciation and amortisation

4.3.3 There shall be consistency in definitions of Functional Cost Categories between the Regulated Accounts and the Additional Financial Data.

4.3.4 ComReg reserves the right to amend this list as required from time to time.

### **4.4 Internal segment transactions**

4.4.1 RTÉNL shall comply with the following transfer charging principles:

- a) Transfer charges (revenues and costs) shall be attributed to Cost Components, for regulated and unregulated Services, in accordance

with the activities, which cause the revenues to be earned, or costs to be incurred.

- b) The attribution shall be objective and not intended to benefit any Service (regulated or unregulated).
- c) There shall be consistency of treatment of transfer charges from period to period.
- d) The transfer charging methods used shall be transparent. There shall be a clear rationale for the transfer charges used and each charge shall be justifiable (with supporting calculations available).

#### **4.5 Survey techniques**

4.5.1 RTÉNL shall ensure that survey data is based on either generally accepted statistical techniques or other appropriate methods. This shall result in a fair and objective allocation of revenue (including transfer charges), costs (including transfer charges), assets and liabilities. In this regard, any survey techniques used shall take account of the following:

- The survey data is unbiased and objective;
- Where appropriate, the survey size has been assessed in a statistical manner and is statistically significant;
- The survey data is representative of the entire population;
- The survey data is not obscured by seasonal or other factors; and
- The survey data is updated annually.

4.5.2 Where survey techniques are employed the material surveys used shall be updated on a regular basis.

### **5. Accounting Documentation**

5.1 RTÉNL's Accounting Documentation shall be sufficiently transparent and shall explain, but not be limited to, the regulatory principles used and the methodologies applied, for the purpose of preparing:

- The Regulated Accounts;
- The Additional Financial Data.

5.2 The Accounting Documentation shall consist of two principal documents:

5.2.1 'Primary Accounting Documentation' which shall include details on:

- An explanation of the basis of preparation of the Regulated Accounts, including an explanation of the key Accounting Policies adopted by RTÉNL. This shall include, but not be limited to, details of RTÉNL's income recognition policy, depreciation policy, capitalisation policy, and its approach

to dealing with issues such as cost allocation, prior period adjustments and changes in Accounting Policies.

- A description of RTÉNL's business, explaining the main activities and functions performed
- Definitions in relation to Functional Cost Categories.
- Overview of the regulatory accounting systems, in terms of the underlying principles and the conceptual flow of costs and revenues from source financial systems.
- Overview of the basis of calculation of any internal segment transactions.
- An overview of the key cost allocation methodologies employed.
- Details of material period on period changes to the form and content of the Regulated Accounts and changes to cost allocations methodologies having a material impact.

5.2.2 'Secondary Accounting Documentation' which shall set out details of the systems, processes and procedures, material methodologies (i.e. those having a material impact on any of the financial statements specifically those used for deriving or calculating the costs, revenues, assets and liabilities (including details of attribution methodologies, valuation methodology and other relevant methodologies) used to prepare the Regulated Accounts and the Additional Financial Data.

5.3 RTÉNL shall:

5.3.1 Review and update the Accounting Documentation annually.

5.3.2 Publish the Primary Accounting Documentation on its website following ComReg's approval.

5.4 Without prejudice to the generality of section 5.2.2, the Secondary Accounting Documentation shall contain at least the elements listed below:

- a) An explanation of how the underlying financial records supporting RTÉNL's business activities and functions are grouped to provide the costs, revenues, assets and liabilities used within the internal system to apportion costs, revenues, assets and liabilities to Functional Cost Categories and Services.
- b) A description of the process of allocation/apportionment of each cost category at the Service level. This shall also include an analysis of all material activities associated with each cost category together with its treatment as direct, indirect or common cost. Details and explanation of choice of cost driver shall also be disclosed.
- c) The means by which RTÉNL identifies how costs are found to be directly or indirectly attributable or common including:
  - How costs are directly allocated to Services;

- How indirect costs have been apportioned on the basis of the associated cost driver; and
  - How common costs have been allocated on the basis of an Equi-Proportional Mark-Up.
- d) Details of cost driver definitions (i.e. basis of allocation) and calculations used in the preparation of the Regulated Accounts-
- e) Details of the internal safeguards that are implemented to ensure that the cost allocation system is free from material error.
- f) The means by which RTÉNL reviews, updates and verifies cost allocation drivers together with a description of changes in basis of allocation/apportionment from period to period, which have a material impact on the Regulated Accounts.
- g) Details of the survey techniques employed, including the design, scope, objectives, methodology, and why these are considered appropriate.
- h) Details of when surveys were last updated, frequency of updating, reasons for updating.
- i) Details of the basis of calculation of any Internal segment transactions.

5.5 RTÉNL shall:

5.5.1 Submit to ComReg (in confidence and by email), for approval, an annual edition of the Accounting Documentation, detailing any amendments to the prior period versions.

5.5.2 Where it considers that one off or exceptional adjustments are required for the preparation of the Regulated Accounts, submit its proposals in this regard in advance to ComReg for consideration and approval. This shall detail any amendments to the relevant section of the Accounting Documentation, together with supporting files and/or workings where necessary. RTÉNL shall inform ComReg of these proposed adjustments in sufficient time to allow for them to be reviewed. These one off or exceptional adjustments shall include (for example):

- a) Changes to study methodologies resulting in prior period adjustments;
- b) Changes to study methodologies resulting in significant changes to cost allocations; and
- c) Changes in Accounting Policies, methodologies and estimation techniques.

5.5.3 RTÉNL shall submit its Accounting Documentation to ComReg as follows:

- For the financial period commencing on or after 1 January 2013 a draft copy of the Accounting Documentation shall be submitted by 30 June 2013;

- For the financial periods commencing on or after 1 January 2014 a draft copy of the Accounting Documentation (detailing any amendments to the prior period version) shall be submitted within four months of the end of the financial year.

## **6. Review and Confirmation of Compliance**

### 6.1 RTÉNL shall:

- a) Submit a statement signed by the directors of RTÉNL acknowledging their responsibilities for the preparation of the Separated Accounts and confirming RTÉNL's compliance with the requirements of this Appendix C. This signed statement shall be submitted to ComReg four months after the end of the financial period.
- b) Engage an Auditor to perform an audit of the Regulated Accounts, including considering compliance of the Regulated Accounts with this Appendix C, in accordance with International Standards on Auditing (UK and Ireland) and the principles and guidance set out by bodies' representative of the Irish accountancy professions from time to time. Such an audit opinion should be:
  - On a "Fairly presents in accordance with ..." basis in respect of the Regulated Accounts as a whole;
- c) Provide a report from a qualified independent body based on work conducted through "Agreed Upon Procedures" in respect of Additional Financial Data, where notified by ComReg from time to time.
- d) Consult with ComReg before the appointment/reappointment of the Auditor and provide assurance that its preferred Auditor has the necessary expertise.
- e) Procure a qualified independent body, to provide an appropriate opinion or report on the compliance of RTÉNL's Regulated Accounts, or part thereof, with the Appendix C, as required by ComReg from time to time. ComReg's requirements in this regard will be notified to RTÉNL in advance of its financial year end, or in exceptional circumstances where such an opinion or report is required.

### 6.2 RTÉNL shall ensure:

- a) That the Accounting Documentation is subject to review by a qualified independent body annually; and
- b) That the processes and procedures used by RTÉNL be subject to a review by a qualified independent body on an annual basis.

### 6.3 RTÉNL shall prepare and submit draft Regulated Accounts schedules and Additional Financial Data to ComReg within four months of the Effective Date of this Appendix C for ComReg's review. RTÉNL and ComReg shall endeavour to agree these schedules insofar as possible. ComReg however



reserves the final right to determine and amend these schedules from time to time where agreement cannot be reached.

6.4 In this section, references to a qualified independent body may include an Auditor.

## Appendix D – Detail of proposed Accounting Separation obligation - Market B

### 1. Definitions and Interpretation

1.1 In this Appendix D, unless otherwise indicated:

“Accounting Documentation” refers to the description of policies and methodologies used to produce the Financial Information.

“Accounting Policies” means the specific policies and procedures used by a company to prepare its Financial Data.

“Agreed Upon Procedures” means procedures agreed between relevant parties pursuant to a letter of engagement.

“Attribution Methods” refers to the methods employed to allocate and apportion revenues, costs and capital employed to the Relevant Market, Service and Product levels.

“External” means the supply of Services to parties outside of RTÉ.

“Financial Information” refers to the financial information referred to in section 5.1 of this Appendix D.

“Functional Cost Categories” means the various expense categories as determined from time to time by ComReg.

“Income Statement” means a statement showing all items of income and expense recognised in a period.

“Integrated Business Divisions” or “IBD” means the separate divisions within RTÉ organised and managed separately according to the nature of the services and products provided.

“Internal” means the supply of Services and Products between RTÉ and its subsidiaries and/or its Integrated Business Divisions.

“Market B” means (wholesale access to DTT multiplexing services) the market for wholesale access to DTT multiplexing services and, for the avoidance of doubt is wholesale access to any multiplex operated and maintained for the purposes of DTT, and is synonymous with the Market;

“Regulatory Accounting Principles” establish the key doctrines to be applied in the preparation of regulatory accounting information. They should include, *inter alia*, the principles of cost causality, objectivity, transparency and consistency of treatment.

“Service(s)” for the purposes of this Appendix D shall mean access to (a) multiplex(s) operated and maintained by RTÉ in accordance with its obligations under section 114(1)(i) of the Act of 2009.

1.2 Where a definition of a term is not provided and is defined in the Appendix, the definition in the Decision Instrument shall prevail.

## **5. Fundamental Requirements and Further Specification of SMP Obligations**

- 2.1 RTÉ's financial records and accounting systems shall be sufficiently detailed and supported by sufficient data to ensure that:
- c) RTÉ is in a position to comply with the transparency, non-discrimination, accounting separation, price control, and cost accounting obligations imposed on it by the Decision Instrument for Market B; and
  - d) RTÉ is in a position to prepare Financial Information which shall be maintained for Market B and, where specified, for Services.

## **3. Reporting and Transparency**

### **3.1 Financial Information**

- 3.1.1 Without prejudice to the generality of section 4, RTÉ shall prepare Financial Information annually.
- 3.1.2 RTÉ's Financial Information shall contain:
- d) Financial Data (section 3.2);
  - e) Accounting Documentation (section 5).

### **3.2 Financial Data**

- 3.2.1 RTÉ's Financial Data will consist of Historical Cost Accounts ("HCA").
- 3.2.2 RTÉ's Financial Data shall contain:
- e) Income statement including an analysis of costs by Functional Cost Category.
  - f) Schedule of charges by individual broadcaster. This shall also be reconciled to the income per the Income Statement in section 3.2.2 (a).
  - g) RTÉ's Financial Data shall be accompanied by:
    - (iii) A signed statement from the directors of RTÉ acknowledging their responsibilities for the preparation of RTÉ's Financial Data and confirming their compliance with the requirements of the Appendix D in this respect.
- 3.2.3 RTÉ's Financial Data shall be prepared in accordance with Regulatory Accounting Principles and Accounting Policies. RTÉ's Financial Data shall show data for RTÉ's last complete financial period (for regulated services) as well as the previous financial period and where these figures are not comparable, as a result of (for example) a material change in Accounting Policy, cost attribution methodology or material error, the figure for the preceding financial period must be adjusted to the extent that it is reasonable to do so.
- 3.2.4 RTÉ shall submit Financial Data to ComReg no later than four months after the end of the financial period (or as allowed by ComReg).

- 3.2.5 The format and level of detail shown in RTÉ's Financial Data shall be determined by ComReg on an annual basis prior to the financial period end.

## 4. Accounting Principles

- 4.1 The collection of data and the basis on which it is to be allocated and apportioned between broadcasters is detailed as follows:
- 4.1.1 RTÉ shall comply with the following transfer charging principles:
- e) Transfer charges (revenues and costs) shall be attributed to broadcasters on the basis of appropriate cost drivers.
  - f) The attribution shall be objective and not intended to benefit any broadcaster.
  - g) There shall be consistency of treatment of transfer charges from period to period.
  - h) The transfer charging methods used shall be transparent. There shall be a clear rationale for the transfer charges used and each charge shall be justifiable (with supporting calculations available).

## 5. Accounting Documentation

- 5.1 RTÉ's Accounting Documentation shall be sufficiently transparent and shall explain, *inter alia*, the regulatory principles used and the methodologies applied, for the purpose of preparing RTÉ's Financial Data.
- 5.2 The Accounting Documentation shall consist of one document which shall contain:
- A statement or reference to the Regulatory Accounting Principles followed when preparing RTÉ's Financial Data which shall include but not be limited to the following terms:
    - a) cost causality;
    - b) objectivity;
    - c) transparency;
    - d) consistency of treatment.
  - Information of the sources of financial data
  - Details on the cost drivers used to allocate costs
  - Details on the services offered and the associated capacity required on the Multiplex
- 5.3 RTÉ shall review and update the Accounting Documentation annually.
- RTÉNL shall publish the Accounting Documentation annually on its website following ComReg's approval.

- 5.4 RTÉ shall submit its Accounting Documentation to ComReg as follows:
- For the financial period commencing on or after 1 January 2013 a draft copy of the Accounting Documentation shall be submitted by 30 June 2013;
  - For the financial periods commencing on or after 1 January 2014 a draft copy of the Accounting Documentation (detailing any amendments to the prior period version) shall be submitted within four months of the end of the financial year.

## **6. Review and Confirmation of Compliance**

6.1 RTÉ shall:

- f) Submit a statement signed by the directors of RTÉ acknowledging their responsibilities for the preparation of RTÉ's Financial Data and confirming RTÉ's compliance with the requirements of this Appendix D. This signed statement shall be submitted to ComReg four months after the end of the financial period.
- g) Provide a report from a qualified independent body based on work conducted through "Agreed Upon Procedures" in respect of RTÉ's Financial Data, where notified by ComReg from time to time.
- h) Procure a qualified independent body, to provide an appropriate opinion or report on the compliance of RTÉ's Financial Data, or part thereof, with the Appendix D, as required by ComReg from time to time. ComReg's requirements in this regard will be notified to RTÉ in advance of its financial year end, or in exceptional circumstances where such an opinion or report is required.

6.2 RTÉ shall ensure:

- c) That the Accounting Documentation is subject to review by a qualified independent body annually; and
- d) That the processes and procedures used by RTÉ be subject to a review by a qualified independent body on an annual basis.

6.3 RTÉ shall prepare and submit draft Financial Data schedules to ComReg within four months of the Effective Date of this Appendix D for ComReg's review. RTÉ and ComReg shall endeavour to agree these schedules insofar as possible. ComReg however reserves the final right to determine and amend these schedules from time to time where agreement cannot be reached.

## Appendix E – Process to Date

As input to ComReg’s review of the broadcasting transmission services, ComReg issued a questionnaire to a number of broadcasters, broadcasting transmission providers and other relevant parties. Responses were received from the following:

- RTÉ (Raidió Teilifís Éireann) – the national public service broadcaster, and RTÉNL (RTÉ’s wholly owned subsidiary) – the terrestrial transmission network provider
- TG4 – Irish FTA television broadcaster
- TV3 – FTA television broadcaster
- UPC – cable network provider
- Magnet – IPTV provider
- Today FM – national radio broadcaster
- Newstalk – national radio broadcaster
- Eircom Ltd on behalf of the OneVision consortium who was involved in the bidding process for commercial multiplexes
- Sky Ireland – satellite broadcaster and intermediary wholesale reseller of broadcasting services

Furthermore, ComReg discussed with Real Digital TV potential plans for provisions of broadcasting services to Irish end-users(if any), and ComReg also held a discussion with the BAI on this market review.

## Appendix F – Legislation

### **Role of the Broadcasting Authority of Ireland**

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

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

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

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

The BAI has a contract with a national independent television programme service (TV3), national and quasi-national radio broadcasting services (Today

FM and Newstalk), four regional radio stations (Beat FM, Spin South West, iRadio Northwest, iRadio Northeast and Midlands), two multi-city services 4FM and Spirit FM, and fifty-five local, community, community of interest, special interest, institutional, radio stations.

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

### **Role of the Minister for Communications, Energy and Natural Resources**

section 130(1) of the 2009 Act provides that RTÉ shall establish, maintain and operate a “national television multiplex” (“NTM”) which shall provide for the broadcasting of RTÉ 1, RTÉ 2, TG4, an Oireachtas Channel and an Irish Film Channel (if required by the Minister) by means of digital transmissions, and such other television services having the character of a public service as the Minister may designate. Sub-sections 130(2)–(9) essentially provide that TG4 and any of the other potential television services shall make periodic payments to RTÉ for use of its NTM. In this regard, the Minister may “direct” the amount of such payments after the Minister has consulted with ComReg, RTÉ, and the particular user of the NTM.

In addition, sub-sections 130(10)–(12) of the 2009 Act deal with the specific situation where the Minister may direct RTÉ to make provision in its NTM for the broadcasting of the television services of a “television programme service contractor”<sup>210</sup> and again the Minister, after consultation with ComReg, RTÉ and the “television programme service contractor”, may direct the amount that such a party shall pay to RTÉ for access to its NTM. These provisions were written with specific regard to TV3.

In all of the above possible situations, it is the Minister who may “direct” the payment that shall be made to RTÉ for access to its NTM, following consultation with ComReg, RTÉ, and the particular party that shall make the payment. This power of the Minister is not necessarily equivalent to a price control remedy under the electronic communications regulatory framework, which may include an obligation for a price to be cost-oriented. Moreover, pricing remedies imposed by ComReg under the Electronic Communications Framework must be based on the nature of the problem identified (SMP in a relevant market) and must be objective, transparent, proportionate and non-discriminatory. The provisions of the 2009 Act do not provide that any such control on prices is set in order to minimise the risk that they are set at an

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



excessive rate or that they do not allow a squeeze on competitor's margins. So although this may appear on the face of it to be a form of *ex ante* regulation in which the Minister may, following consultation, set access tariffs to RTÉ's NTM, it has very different characteristics than the form of price control that may be imposed by ComReg under the Electronic Communications Framework.

### **Other legislation relevant to this analysis**

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

When undertaking this market analysis, it is necessary to consider whether there are any other laws in place which would be sufficient to address any failure(s) in the Irish broadcasting transmission market. If there are, then intervention by ComReg under the 2003 Electronic Communications Framework may not be necessary.

#### *Universal Service Directive:*

Article 31 of the Universal Service Directive<sup>211</sup> allows Member States to impose reasonable "must carry" obligations on undertakings under their jurisdiction which provide ECNs for the distribution of radio or television broadcast programme services to the public, where a significant number of retail end-users use those ECNs as their principal means to receive radio and television content. Such obligations may only be imposed where they are necessary to meet clearly defined general interest objectives, as defined by each Member State, and they must be proportionate and transparent and subject to periodic review.

Article 31 of the Universal Service Directive is not reflected in the European Communities (Electronic Communications) (Universal Service and Users' Rights) Regulations 2003<sup>212</sup>, which is the main piece of legislation transposing said Directive into Irish law. However, Article 31 is reflected in certain provisions of the 2009 Act.

#### *Broadcasting Act 2009:*

For the purposes of this consultation, the relevant provisions of the 2009 Act would appear to begin with section 77 which provides for must-carry and must-offer obligations in respect of any "appropriate network", defined as "an electronic communications network provided by a person ("appropriate

<sup>211</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0051:0077:EN:PDF>

<sup>212</sup> S.I. 308/2003, as amended by S.I. 374/2007.

network provider”) which is used for the distribution or transmission of broadcasting services to the public.”

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

However, section 77 only goes so far as to provide that any “appropriate network provider” shall ensure the re-transmission through his or her network of the free-to-air television services provided by RTÉ, TG4, TV3 and in the case of where the appropriate network is a digital system, the Houses of the Oireachtas Channel and the Irish Film Channel. Section 77 specifically does not apply to digital multiplexes, multipoint microwave distribution (MMD) networks, broadcasting contractors operating with the permission of the BAI pursuant to section 59 of the 2009 Act, and RTÉ.

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

Section 115 of the 2009 Act provides that the Minister may, at the request of the BAI and after consultation with RTÉ, require RTÉ to co-operate with a

holder of a “sound broadcasting contract”<sup>213</sup> in the use of any mast, tower, site or other installation or facility needed to provide transmission facilities for sound broadcasting services. The sound broadcaster shall pay RTÉ such amount as the Minister may direct (again following consultation with RTÉ and the BAI). This provision appears to empower the Minister to impose certain *ex ante* access obligations on RTÉ. However, the provision is specific to radio and to RTÉ and it may not be applied to other operators of radio broadcast infrastructure. In addition, there is no equivalent provision for television broadcasting. Section 130 of the 2009 Act provides for access by certain parties to RTÉ’s digital television multiplex(es) but does not provide for access to other key infrastructure such as towers and masts.

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

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

Sub-sections 130(1) (d) & (e) state that, in addition to the services that RTÉ must carry on its NTM, RTÉ may use any spare capacity on its NTM to broadcast other programme material on a commercial basis. .

#### *Access Directive:*

Article 5(1) (B) and Article 6(1) of the EU Access Directive<sup>214</sup> provide for the imposition of obligations on conditional access operators to offer technical services allowing broadcasters’ services to be received by viewers and listeners on a fair, reasonable and non discriminatory basis and to keep separate financial accounts regarding their activity as conditional access<sup>215</sup> providers. In addition the Directive provides for access to application program interfaces<sup>216</sup> (APIs) and electronic programme guides<sup>217</sup> (EPGs) for digital

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<sup>213</sup> A “sound broadcasting contract” is defined in Section 58 of the 2009 Act, by reference to Section 63 of the 2009 Act which states that the BAI shall enter into sound broadcasting contracts “with persons (“sound broadcasting contractors”) under which the sound broadcasting contractors have ...the right and duty to establish, maintain and operate sound broadcasting transmitters serving the areas specified in the sound broadcasting contract ...”

<sup>214</sup> Directive 2002/19/EC, as amended by Directive 2009/140/EC

<sup>215</sup> Conditional Access is the protection of content by requiring certain criteria to be met before granting access to this content.

<sup>216</sup> An API is an interface implemented by a software programme which enables it to interact with other software to perform a particular function.

<sup>217</sup> An EPG is an on-screen listing of all programming and descriptive content for the viewer. EPGs are a feature of digital television systems.

broadcasting. Regulations 6 and 7 of the Access Regulations 2003<sup>218</sup> provide more detail on the accessibility and rules in relation to conditional access systems<sup>219</sup> while regulation 28 of the Framework Regulations sets out the rules regarding the interoperability of digital interactive television services.

*Framework Directive:*

Under Article 12 of the Framework Directive 2002<sup>220</sup>, where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health or public security or to meet town and country planning objectives, Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network. Such sharing or co-ordination arrangements may include rules for apportioning the costs of facility or property sharing.

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<sup>218</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. 305/2003) as amended by S.I. European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. 373/2007)

<sup>219</sup> [http://www.dcenr.gov.ie/NR/rdonlyres/8C475F35-2AD6-4D25-8DEC-9AA58474C625/0/CommsReg\\_Access\\_final.doc](http://www.dcenr.gov.ie/NR/rdonlyres/8C475F35-2AD6-4D25-8DEC-9AA58474C625/0/CommsReg_Access_final.doc)

<sup>220</sup> [http://www.dcenr.gov.ie/NR/rdonlyres/30A1B6C4-04A2-47DF-BED2-9E62E20F058E/0/CommsReg\\_Framework\\_final.doc](http://www.dcenr.gov.ie/NR/rdonlyres/30A1B6C4-04A2-47DF-BED2-9E62E20F058E/0/CommsReg_Framework_final.doc)

<sup>220</sup> Directive 2002/21/EC, as amended by Directive 2009/140/EC

## Appendix G – 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...55
- 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. .... 78
- 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. ....88
- 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. .... 103
- 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. 110
- Q. 6. Do you have evidence/examples of competition problems in this market? Please provide all relevant factual evidence supporting your position. .... 110
- 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. .... 120
- 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. .... 120
- 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. .... 121
- 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..... 121

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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. ....	128
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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. ....	140
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. ....	155
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- 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. .... 171
- 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. .... 182
- 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. .... 193
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- Q. 29. ComReg has proposed an access remedy to RTE’s multiplexes including associated facilities. What services/facilities do you consider should RTE 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. .... 217
- 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. .... 217
- Q. 31. ComReg has proposed that the list of parameters included in the SLA obligation previously imposed on RTE<sup>2</sup> 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. .... 218
- 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. .... 218

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. ....219

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. ....220

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. 223

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. ....223

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. ....224

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. ....227

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. ....227

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. ....241

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. ....242

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. ....242

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. ....257

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.....267

## Appendix H – Glossary and Definitions

### Definitions

The definitions in this glossary shall apply to this Consultation and Draft Decision Document as a whole.

Where a term in this glossary is defined by reference to a definition in a section or paragraph and the explanation of that term is provided in this glossary, the latter explanation is for convenience only and reference should be made to the appropriate part of the document for the definitive meaning of that term in its appropriate context.

Any reference to any provision of any legislation shall include any modification re-enactment or extension thereof.

Any reference to an Interested Party shall include that Interested Party's successors and assigns.

Terms defined in this draft Decision shall, unless the context otherwise requires or admits, have the meaning as set out below.

Table 1: Definition of Terms

Term	Definition
Broadcast Contribution	The exchange of broadcast content among (but not limited to) production sites, studios, mobile news gathering and broadcast centres as part of the programme making process.
Broadcast Distribution	The delivery of programme content (television and/or radio) from the studio to a network of broadcast transmission sites.
Broadcast Transmission	The delivery of programme content (television and/or radio) via a network (terrestrial, cable, satellite, IP) for consumption by the public.
Free-to-air (FTA)	A broadcasting service available for reception to the public by terrestrial means of which no charge is made by the entity providing the broadcasting service.
Free-to-view	A broadcasting service available for reception to the public via a satellite transponder of which no charge is made by the entity providing the broadcasting service.
Terrestrial	Relates to the transmission of a broadcasting service, by means of wireless telegraphy (other than by MMDS or a satellite transponder).

### European and Governmental Bodies, Regulatory and Standardisation Organisations

Term	Organisation
BAI	Broadcasting Authority of Ireland
BEREC	Body of European Regulators for Electronic Communications
ComReg	Commission for Communications Regulation
DCENR	Department of Communications, Energy and Natural Resources
EC	European Commission
EU	European Union
ITU	International Telecommunications Union
NRA	National Regulatory Authority
Ofcom	UK Regulator

### Other Organisations

Term	Organisation
RTÉ	Raidió Teilifís Éireann
RTÉNL	RTÉ Transmission Network Limited
TG4	Teilifís na Gaeilge
TV3	Television programme service contractor as per section 70 of the 2009 Act.

### Primary and Secondary Legislation

Term	Definition
SI	Statutory Instrument
2002 Act	The Communications Regulation Act 2002 (No. 20 of 2002), as amended <sup>221</sup>
2003 Recommendation	EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services
2007 Recommendation	EU Commission Recommendation of 17 December, 2007

<sup>221</sup> Includes the Communications Regulation (Amendment) Act 2007 and the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.

	on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (second edition)
2009 Act	Broadcasting Act 2009 (No. 18 of 2009)
Access Regulations	European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 ( <a href="#">S.I. No 334 of 2011</a> )
Access Directive	Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, as amended by Directive 2009/140/EC
Act of 1926	The Wireless Telegraphy Act 1926 (No. 45 of 1926) as amended
Authorisation Regulations	European Communities (Electronic Communication Networks and Services) (Authorisation) Regulations 2011 ( <a href="#">S.I. No 335 of 2011</a> )
Framework Directive	Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC
Framework Regulations	European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 ( <a href="#">S.I. No 333 of 2011</a> )
The Minister	Minister for Communications, Energy and Natural Resources
SMP Guidelines	European Commission guidelines on market analysis and assessment of Significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03)
Universal Service Directive	Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal services and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC

**Glossary of technical terms**

<b>Term</b>	<b>Definition</b>
ASO	Analogue Switch-off (the switch-off of analogue TV transmissions to be replaced by DTT)
DTT	Digital Terrestrial Television
ECN	Electronic Communications Network as defined under the Framework Regulations
ECS	Electronic Communications Service as defined under the Framework Regulations
EPG	Electronic programme guide
IPTV	Internet Protocol Television, used for the delivery of television programme content via an internet connection (usually via broadband phone line) for reception by a suitable to a television receiver.
HD	High Definition, refers to high resolution television programme services.
MHz	Megahertz (1,000,000 Hertz)
MMDS	Multipoint Microwave Distribution Service
MoU	Memorandum / Memoranda of Understanding
NTM	National television multiplex
PSB	Public service broadcasting
SD	Standard Definition refers to standard resolution television programme services.