



Commission for
Communications Regulation

Market Review

Broadcasting Transmission Services in Ireland

Non Confidential Submissions to Consultation 20/31

Submissions to Consultation

Reference ComReg 21/03s

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An Coimisiún um Rialáil Cumarsáide

Commission for Communications Regulation

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An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

1. 2RN
2. BAI
3. Virgin Media
4. RTÉ
5. TG4

2rn response to
ComReg Market Review
Broadcasting Transmission Services in Ireland

06 July 2020

Introduction

2rn welcomes the opportunity to respond to ComReg's consultation, *Market Review Broadcasting Transmission Services market in Ireland ComReg 20/31*, the consultation.

2rn are aware that ComReg have defined the relevant Markets as;

Market A: A national wholesale market where an upstream terrestrial transmission network provider supplies a transmission and distribution service via its towers/masts infrastructure and relevant associated facilities (including transmission and distribution equipment, buildings etc.) in order to enable transmission of television and radio broadcasts; and,

Market B: is a national wholesale market which is downstream from Market A, whereby a Digital Terrestrial Television ('DTT') **Multiplex Operator**, using wholesale inputs purchased (or self-supplied) in Market A, combined with carriage on its DTT multiplex supplies a managed digital multiplexing service.

ComReg proposes to retain these market definitions for the purposes of this consultation. 2rn concurs with this decision. 2rn operates in Market A only and will direct most of its comments towards issues relating to Market A. However much of 2rn's operations are adjacent to Market B and as such 2rn may comment on certain aspects of Market B.

2rn understands that the time horizon envisaged by this consultation to be three to five years. 2rn responds to the questions posed in that context. 2rn sees significant potential for changes in the relevant markets particularly in the area of competition over the longer period. As such responses and comments below should be read specifically in the context of a three to five year horizon.

ComReg asks

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

2rn response

2rn notes that it does not operate directly in the retail market for television or radio. 2rn however, does have operations which are in the adjacent wholesale market and as such has a practical interest in both retail markets.

Currently the only Free To Air (FTA) transmission market is delivered via the 2rn broadcast infrastructure. However other platforms, such as cable and pay satellite, deliver a comparable service which are in competition with the service delivered using the 2rn platform and which consumers could choose to substitute for FTA services. 2rn are of the view that it is an excessively narrow definition of the television transmission market to conclude that all pay services do not constitute an effective substitute for the current FTA offerings. Consumers wishing to substitute services delivered via the 2rn platform with alternatives, e.g. cable or satellite services, would incur a level of cost which is a point of differentiation but does not necessarily effectively put these pay services in a different market as compared to FTA television.

2rn is aware that there are FTA satellite services providing some of the broadcast services currently available via FTA terrestrial transmission services. The most comparable platform is represented by the services currently carried on Saorsat. 2rn believes that this service, and potentially other similar services, will develop over time and may ultimately become more direct substitutes for terrestrial services. However, in particular, the current limited number of channels available combined with the initial set-up costs which consumers would incur in switching mean that a switch to this technology does bring with it certain challenges such that it may not currently represent an effective substitute. 2rn is of the view that changes sufficient to create an effective substitute to terrestrial broadcasting may not occur over the period covered by this review but that sufficient uncertainty exists such that this should be kept under review.

In ComReg's consultation on the Draft ComReg BTS¹ Questionnaire to Operators ComReg notes ComReg's position in the 2013 Decision with respect to the scope of Retail Radio Broadcast Services was that:

- a) Retail radio broadcasting services broadcast from other radio BTS platforms are unlikely to act as an effective constraint on the FTA terrestrial radio BTS platform such that a broader retail market definition is not warranted; and*

2rn is of the view that the market analysis for retail radio broadcasting, as considered in 2013 remains valid.

The nature of the radio retail broadcasting markets remains stable within Ireland. 2rn acknowledges that radio broadcasting services over cable and satellite platforms are not directly and seamlessly available as substitutes in the same retail market as national terrestrial radio broadcasting and therefore are not likely to lead to perfect retail substitution to warrant a redefining of this broadcast market.

2rn does not fully agree with the preliminary conclusion of ComReg regarding the definition of the retail television and radio markets. 2rn is of the view that retail substitution, particularly in the television market, is possible and is likely to become more seamless during the period covered by the current review and consultation. 2rn believes that a broader definition of the television retail market is appropriate.

¹ Draft ComReg BTS¹ Questionnaire to Operators ("the Questionnaire") issued by the Commission for Communications Regulation ("ComReg"). 2019

ComReg asks

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

2rn response

2rn owns and operates a national terrestrial broadcasting network which provides transmission and distribution services to broadcasters in the national, and quasi-national, radio retail market and to the DTT multiplex operator. 2rn does not provide services to broadcasters who require access to the services provided by the licensed DTT multiplex operator. 2rn, therefore are of the view that a distinct wholesale market arises for these services beyond the scope of 2rn's business, which 2rn notes ComReg has characterised as Market B. Within this market the multiplex operator provides services using wholesale inputs purchased from 2rn in addition to providing certain administrative services itself, as well as allowing access to the DTT multiplexing services which it is licensed to provide.

2rn agrees that it is appropriate to define a separate market for the provision of DTT broadcasting signals to consumers.

ComReg asks

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

2rn Response

2rn considers that in the absence of regulation, Market A would be characterised by non-transitory barriers to entry. 2rn further considers that competition law may not be sufficient to address potential problems arising as a result of this market characteristic. However 2rn notes that there is not, and has not been, either during the current regulated regime or prior to regulation, any evidence of market failure caused by lack of competition.

The establishment of a national BTS system capable of supporting national DTT Multiplexes or national radio services is a capital intensive project which would take a number of years to complete. It is likely that demands for such services are finite due to technological and commercial developments and possible consequent change in Government policy. The Irish market for such services is relatively small. It is difficult to envisage a situation in which the establishment of an alternative BTS system capable of supporting national DTT Multiplexes or a national radio FM network would be an attractive proposition for a commercial investor.

Barriers to entry for other service providers would include:

- Access rights or ownership at mountain top sites to sufficiently replicate national services
- Securing planning permission to build mast and support infrastructure on mountain top sites. This will prove exceptionally difficult, particularly in mountain top areas where they have already been identified as special areas of conservation (mountain top bogs) and areas of outstanding natural beauty.
- Securing the appropriate national and international frequency coordination and licensing.

2rn is of the view that, as outlined above, (response to question 2), competition does currently exist in the terrestrial television transmission market and therefore is of the view that, while there are barriers to entry to the market, the broader market structure does tend toward competition. 2rn agrees that the first of the three criteria, the *presence of high and non-transitory barriers to entry*, and possibly the third criteria, *the insufficiency of competition law alone to adequately address the market failures concerned*, may be satisfied in Market A.

2rn disputes the conclusion that the second criteria, *a market structure which does not tend towards effective competition within the relevant time horizon*, is satisfied in Market A.

As discussed above 2rn does not operate in market B and does not offer an opinion on the 3CT in that market.

ComReg asks

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

2rn response

2rn notes that in the market for the provision of Wholesale Access to National Terrestrial Broadcast Transmission Services, Market A, as defined by ComReg, 2rn is the only supplier of services for national transmission services. However 2rn is aware that the 2014 European Commission Recommendation on relevant product and service markets within the sector susceptible to ex ante regulation does not identify BTS markets as being susceptible to ex ante regulation. 2rn considers this evidence of the reality that the BTS markets in Europe in general but also in Ireland in particular currently operate efficiently and competitively.

This has been the case since the launch of DTT in 2011. In the period covered by this review 2rn does not believe that, considering foreseeable technological developments and market/consumer behaviour, there is a significant likelihood that there will be a material change in the nature and operation of this market such that competition would be reduced.

Ireland is currently seeing the rollout of the National Broadband Plan, (NBP). This will, during the timeframe envisaged by this consultation, deliver world class broadband to substantially all homes and businesses in Ireland. The opportunities to provide services on a national scale at very competitive cost will be fundamentally disruptive to a number of existing markets including potentially the BTS markets. While it is not clear what the final outcomes may be, 2rn feels that such significant development must be given greater consideration in any consultation at this time. 2rn urges ComReg to revisit its conclusion in this respect in particular in light of such immediate ongoing developments.

2rn does not accept the assessment of ComReg that currently, and for the foreseeable future, 2rn has SMP in Market A. If ComReg does find 2rn to have SMP at this point 2rn is of the view that this should be reviewed as technology and markets develop over time in direct response to any market changes.

2rn does not operate in Market B. 2rn notes that the dynamics within Market B are significantly more fluid than those of Market A and potentially more susceptible to change. However, 2rn is not aware of the internal workings or plans of the operators and customers in Market B. As such 2rn does not offer a view as to the likely development of Market B nor the appropriateness of the designation of RTE as having SMP in Market B.

ComReg asks

Q 5. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in Market A and Market B? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

2rn response

2rn notes that ComReg states in its consultation document that

“ComReg notes that it is necessary neither to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuses in the Relevant BTS Markets. Rather, the purpose of ex ante regulation is to prevent the possibility of abuses materialising, given that undertakings have been designated with SMP in the Relevant BTS Markets, and so have both the ability and incentive to engage in exploitative and exclusionary behaviours to the detriment of competition and, ultimately, end users”. (Emphasis added).

Later ComReg notes

“As noted above, 2rn is currently regulated in Market A. Absent such regulation, ComReg considers that prices would not be set by 2rn at a competitive level. Given the ability and incentives for 2rn, as the SMP undertaking, to engage in excessive/exploitative pricing, transparency, price control and related cost accounting obligations are therefore considered justified by ComReg to ensure that prices are set at an appropriate level.”

As stated elsewhere in the consultation (Para 7.13) 2rn has operated in Market A since the initial designation of that Market by ComReg. Prior to that 2rn provided analogue television and radio broadcasting services to national and quasi-national broadcast service operators in an unregulated market. During that time there is no evidence that prices set by 2rn were not at a competitive level. Neither have there been instances nor evidence of any abuse of its position by 2rn. 2rn therefore strongly rejects ComReg’s assertion that “*absent regulation.....prices would not be set at a competitive level*”.

2rn believes that competition currently exists for Market A services and therefore does not accept that SMP exists in market A. However should ComReg designate 2rn as having SMP 2rn accepts that such a decision would make it incumbent on ComReg to impose remedies which address potential, although not necessarily actual, abuses materialising from SMP.

2rn disputes ComReg’s argument that 2rn would likely seek to abuse its position of SMP. However, notwithstanding this, 2rn agrees that the theoretical competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in Market A.

ComReg asks

Q.6 Do you agree with ComReg's proposals regarding the application of transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

2rn response

2rn does not accept that there is SMP in Market A, as such 2rn is of the view that regulation is not appropriate and concurs with the view that the BTS markets should not be identified as being susceptible to ex ante regulation.

Should ComReg designate 2rn with SMP then 2rn acknowledges the requirement placed on ComReg to impose regulation on 2rn as an undertaking which will then have been designated as having SMP in the Market specified under the consultation.

2rn notes that the level of regulatory remedies proposed are in line with those currently in place having been first imposed in 2013 following a previous consultation.

2rn wishes to make it clear that it has always been its purpose to provide a comprehensive menu of services up to and including, but not exclusively, a fully managed transmission and distribution service, which is efficiently operated and competitively priced. There is no evidence or suggestion in the past of actual market failure as envisaged in the consultation. However, mindful of the obligations placed on ComReg, 2rn has considered the proposed level of regulation, the remedies to be applied in accordance with ComReg's preliminary findings and the implications and burden which this will place on 2rn.

Having taken all the above into account 2rn understands the application of the remedies proposed represents a consistent approach to that taken to date. The suite of remedies is complimentary and the individual remedies serve to support and enhance each other.

Notwithstanding the above it is appropriate that the observed operation of the markets both pre and post regulation should be considered when imposing remedies. It should not simply be the case that existing remedies continue to be applied without due consideration. Perceived interdependencies are not sufficient to support otherwise unnecessary remedies. In particular 2rn feels that it is not necessary to apply transparency or access remedies in the BTS Markets. 2rn agrees certain other remedies are interdependent and work in tandem. 2rn believes that ComReg should not apply the remedies of access and transparency as there is no evidence of a necessity for these remedies and other proposed remedies are not undermined by the absence of transparent and access remedies.

ComReg asks

Q.7 Do you agree with ComReg's preliminary proposals regarding on the Regulatory Impact Assessment, in respect of the Relevant BTS markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

2rn response

2rn notes that it ComReg's intention based on the preliminary proposals outlined in the consultation that the obligations to be imposed should not vary materially from those currently in place and detailed in Decision Instrument published in its Market Review in 2013. ComReg 13/71 Decision: D11/13.

In those circumstances 2rn agrees with ComReg's proposals regarding the RIA.

The BAI concurs with ComReg's preliminary conclusions on the retail television and retail radio market assessment. The BAI agrees that both markets are national in scope and that effective substitutes on the demand and supply side are unlikely to become available in the timeline under consideration.

The core main transmission sites are essential for the distribution and transmission of DTT and national radio coverage. On the supply side, significant barriers to entry exist in terms of replicating a similar or alternative transmission infrastructure. Cost, timelines, site acquisition / planning consent and potential utilisation all result in a project that would not produce a return on investment having regard to the potential lifetime of terrestrial broadcasting or the potential demand for future networks using high sites for wide area coverage.

The BAI notes the legislative requirements for national free to air coverage for both radio services and content carried on DTT networks. The BAI agrees that pay platforms and OTT are complementary to but not a direct substitute for terrestrial FTA delivery. Saorsat, given its current channel line-up and more complex installation, is also not an effective substitute to terrestrial DTT transmission. The national broadband plan is unlikely to impact significantly given the timeline under consideration. The BAI would also note that changes in audience behaviour is not universal. Terrestrial radio and DTT remain key delivery platforms particularly for older audiences and note the specific demographics that apply in relation to Irish DTT only households.

The BAI accept that the definitions of Market A (**The Market for Wholesale Access to National Terrestrial BTS**) and Market B (**The Market for Wholesale Access to DTT Multiplexing Services**) as defined by ComReg are still applicable. It concurs with ComReg's findings that wholesale access to the national terrestrial BTS platform is of major commercial importance to national analogue radio and national DTT terrestrial broadcasting to such an extent that that effective demand-side substitution is unlikely to effectively constrain the price setting behaviour of a transmission / distribution infrastructure provider.

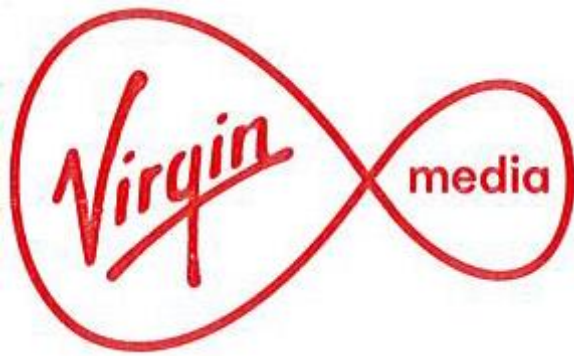
The BAI agrees that RTÉ is the sole DTT Multiplex Operator in Market B, as there are currently no alternative sources of DTT multiplexing. The BAI is of the view that, having researched the potential for alternative multiplex providers, that this situation is unlikely to change over the lifetime of the current review or any proposed SMP obligation period. ComReg's preliminary view is shared by the BAI - that demand-side substitution to other DTT multiplexing platforms is unlikely to effectively constrain the price setting behaviour of a HM supplier of a national DTT multiplexing service. Given that coverage requirements for all DTT services, the BAI agrees with ComReg's view that the geographic scope of Market B is national in scope.

The BAI also agrees with the rationale and conclusions set out by ComReg under the sections that deal with the Three Criteria Test and the Competition Analysis and Assessment of SMP. It also concurs with the proposed transparency, non-discriminatory, access, price control costs accounting, and cost separation remedies set out for both Market A and Market B. It notes and agrees with the preliminary proposals regarding the RIA in respect of the BTS markets.

In essence the BAI is of the view that the main issues in relation to Market A and Market B remain largely unchanged since the last study and the imposition of SMP and appropriate remedies.

Regards

Neil O'Brien
Senior Manager



Virgin Media response to:

Consultation: Market Review – Broadcasting Transmission Services in Ireland

ComReg 20/31

13th July 2020

Summary

Virgin Media Ireland Limited ('Virgin Media') welcomes the opportunity to respond to ComReg's Consultation ('the Consultation') on the Market Review of Broadcasting Transmission Services in Ireland ('ComReg 20/31).

Virgin Media welcomes the publication of the market review of the broadcasting transmission markets. Virgin Media currently purchases wholesale access to DTT multiplexing services as a wholesale input for the provision of retail broadcasting services to customers. We use the platform to broadcast three channels, Virgin Media One, Virgin Media Two, and Virgin Media Three to a national audience. RTÉ is the only provider of wholesale access to DTT multiplexing services in Ireland, and Virgin Media has no other way of broadcasting these channels to a national audience as required under our BAI Broadcasting licenses. As such, Virgin Media is reliant on RTÉ (2RN) for the provision of our FTA service.

The market has not changed significantly since the last Market Review in 2013¹. There is no competition in the market for wholesale access to national terrestrial BTS (Market A) or in the market for wholesale access to DTT multiplexing services (Market B). The markets are not tending towards effective competition and 2RN and RTÉ remain dominant. The existing suite of regulatory requirements must remain in place to ensure there is no detrimental impact on providers reliant on these services.

Virgin Media has responded to ComReg's Consultation questions in the following section. While much of our response focuses on RTÉ and Market B, given the fact that Markets A and B are intrinsically linked, our comments have relevance to both markets.

Response to Consultation Questions

Q.1

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

Virgin Media agrees with ComReg's preliminary conclusion on the retail television market assessment.

Q.2

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

Virgin Media agrees with ComReg's preliminary conclusions on the Relevant BTS (broadcasting transmission and distribution services) Markets assessment. There are two separate wholesale markets: the market for wholesale access to DTT multiplexing services (Market B) which is downstream from the market for wholesale access to national terrestrial BTS (Market A). This has

¹ ComReg 13/71 Response to Consultation and Decision Notice – Broadcasting Transmission Services in Ireland.

not changed since ComReg's 2013 Decision and these two markets need to continue to be assessed separately.

Q.3

Do you agree with ComReg's preliminary finding that each of the criterion of the 3CT is satisfied in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

Virgin Media agrees with ComReg's assessment that each of the criterion of the 3CT is satisfied in both markets. Our reasons for this is explained in summary under each heading below.

Presence of high and non-transitory barriers to entry

No competition has developed in either market since the last review and this is due to the presence of high and non-transitory barriers to entry. In Market A there is no likelihood of another operator developing the infrastructure to compete with 2RN. There would be very high costs to enter this market and there would likely be planning issues as the development of masts and other infrastructure would be required. With regard to Market B, effective competition will not develop. Due to the size of the market, it would not make commercial sense for another operator to enter this market and compete with RTÉ and therefore RTÉ will continue to be the sole operator providing multiplexing, distribution and transmission services. This point has been acknowledged by the BAI's review of the DTT market and assessment of appetite for Commercial DTT. Furthermore due to the size of the market in Ireland there would be little scope for other entities to enter either Market A or B and compete with the incumbents.

Market structure which does not tend towards effective competition within the relevant time horizon

Virgin Media considers that the market structure is not tending towards effective competition within the relevant time horizon (3 to 5 years). It is possible that eventually ubiquitous high speed broadband networks could be available in Ireland. If this were to occur, the channels that are currently delivered by FTA could feasibly be delivered to all Irish homes over broadband. However, this is unlikely to happen in the next 3 to 5 years. Furthermore, many customers prefer to watch the FTA service over via DTT, rather than over their broadband connection, so it is not clear that Markets A or B would ever tend towards effective competition, even with ubiquitous high speed broadband availability.

In the absence of effective competition or regulatory requirements 2RN and RTÉ would have incredible scope to influence the entire structure of the broadcasting market due to the vertically integrated nature of RTÉ. Virgin Media considers that there exists high and non-transitory barriers to entry in the market and as a result there is a lack of effective competition. This, combined with a compounding set incentives for RTÉ to raise the price of wholesale access to DTT multiplexing services above the competitive level (due in part to RTÉ's vertically integrated structure) and 2RN's incentive to act in an anti-competitive manner, indicates that regulatory intervention is necessary.

Insufficiency of competition law alone to adequately address the market failure(s) concerned

Virgin Media considers that competition law alone will not be sufficient to adequately address the market failure(s) concerned for a number of reasons.

Under a no regulation, competition law scenario there could be incentives for RTÉ to prolong and delay commercial contract negotiations. Such delays could bring about enormous uncertainty for market participants and would affect their ability to provide services to customers and to compete. There is also potential for access disputes to take a long time to resolve, during which time there is a risk that consumers would lose access to TV channels, thus breaching Licencing requirements for S70 and S71 (with designation) service. RTÉ's wholesale customers could also suffer significant financial (potentially irreparable) damage from lost advertising revenue.

Competition Law will only address any issues after an issue arises meaning 2RN or RTÉ could benefit from anti-competitive behaviour for an extended period of time. If the market was reliant on competition law alone in Markets A and B there would be serious consequences for downstream operators. Regulatory intervention in non-competitive markets can bring about a range of benefits that would not occur in a situation where there is a reliance on competition law alone.

Q. 4

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

Virgin Media agrees with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in Market A and Market B.

Markets A and B are not effectively competitive with only one entity in each market having 100% market share. As there are high barriers to entry, no other operators can exert any competitive influence on either entity. 2RN has SMP in Market A and RTÉ continues to have SMP in Market B.

Q. 5

Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in Market A and Market B? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Virgin Media agrees with ComReg's analysis. Markets A and Markets B continue to represent monopolistic, non-competitive markets. Neither market is tending towards effective competition currently and competition is not expected to develop in the coming years. There are high barriers to entry in Market A resulting in a very low likelihood of another operator developing the infrastructure to compete with 2RN. As discussed earlier, effective competition will also not develop in Market B. Due to the size of the market, it would not make commercial sense for another operator to enter this market and compete with RTÉ and therefore RTÉ will continue to be the sole operator providing multiplexing, distribution and transmission services.

As there continues to be one operator providing services in Market A and one in Market B, the existing regulatory regime must continue with the application of the full suite of regulatory remedies. In the absence of regulation effective competition would not develop and 2RN and RTÉ would be free to charge any price for the services provided. This could result in an increase in prices leading to operators in downstream markets reviewing their strategy and investment in the sector in Ireland. While Virgin Media does not directly purchase services in Market A, any change to the

regulatory regime in this market will have a direct impact on Virgin Media and other operators that purchase inputs from RTÉ in Market B.

Naturally, in the absence of access and price remedies, RTÉ would seek to profit-maximise its tariff for wholesale access to DTT multiplexing services. Since RTÉ's wholesale customers, including Virgin Media, would have no other way of achieving national coverage, RTÉ would be free to set a tariff that is above what would arise in a competitive market setting. Unlike in regular retail markets for customer services, in this case, the additional cost could not be passed on to customers through (retail) pricing. In this case, a likely outcome would be that there would be a reduction in quantity (channels or programming), or a reduction in the quality of the service offered (as broadcasters seek to reduce costs). This will result in a direct detriment to customers, either through:

- The withdrawal of channels. For example, broadcasters may choose to withdraw one or more channels from their channel offering in order to reduce cost.
- Withdrawal of content, or reduction in the quality of content. As the cost of broadcasting increases, there will be less money for Irish channels to invest in content².

In either of these scenarios, RTÉ's channel viewership and reach are likely to increase. This will in turn increase RTÉ's market power, and revenue, in the supply of Television advertising. So the anticompetitive impact is not only falling on customers, but also on advertisers (in that case the increase in the price of advertising may again be passed onto customers by advertisers).

Virgin Media would also note that a significant portion of TV viewers use the Saorview service as their primary TV service indicating that there will be a continued reliance on the Saorview platform, and by extension, the RTÉ/ 2RN network for some time to come.

One final thing to note is related to reports of RTÉ potentially considering the sale of 2RN. While this could help ensure transparency with regard to the operational and financial aspects of the provision of services in Market A and Market B, if this is actioned the regulatory regime for Market B must continue regardless of any change in ownership. Currently there is little or no transparency regarding the separation between RTÉ and 2RN and there is no data available regarding 2RN's cost model or what costs are included in the model.

Q. 6

Do you agree with ComReg's proposals regarding the application of transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position

Virgin Media agrees that transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies are required in Market A and Market B. We agree with the proposals of ComReg but would like to raise a number of points.

Access obligations

A range of conditions are attached to the proposed Access Obligations for both Markets A and B, most in line with existing requirements. These include the requirement to conclude, maintain and keep updated legally binding SLAs with Broadcasters.

There are a range of SLAs in place in Markets A and B and Virgin Media would like to see a more rigorous process around the achievement of these SLAs to ensure information is provided to

² [3<

impacted broadcasters in a timely manner, particularly in relation to outages that affect their network.

Obligation of Transparency

The transparency obligation in the Decision Instruments for Market A and B includes a number of conditions associated with transparency, in particular around the Reference Offer. Virgin Media notes that 2RN and RTÉ must publish any changes to their Reference Offers at least 2 months in advance of the changes coming into force. This should allow for industry consultation. The obligations should address the fact that the Reference Offer is negotiable³. Virgin Media understands that the same conditions should apply to all Broadcasters availing of services and facilities however where it is not possible to negotiate on a bilateral basis there should be a process for negotiation or for Broadcasters to make suggestions on the Reference Offer's outside of any notification of changes provided by RTÉ. Given the nature of the Reference Offer and the fact that RTÉ will not negotiate on a bilateral basis, this may need to be an open forum or discussion.

Price control and cost accounting

- Tariff model

The tariffs charged by RTÉ in Market B are set using a tariff model owned and operated by RTÉ. This tariff model has not been published as information contained within it is deemed to be commercially sensitive. While understanding that ComReg reviews the model and any changes to tariffs, it is impossible for access seekers such as Virgin Media to determine if the tariffs that are set are fair and reasonable.

ComReg states that 95% of the costs in the tariff model is associated with inputs from Market A. Therefore the regulated tariffs in Market A therefore have a significant influence on the tariffs set in Market B. Similar to Market B there is no information on the tariff model used for Market B and it is not possible for any operator to determine if the tariffs are reasonable.

- Market B approach

The current cost allocation methodology is based on the DTT capacity consumed as a percentage of the relevant total cost base. In its review ComReg did consider alternative methodologies as there is spare capacity available. However ComReg proposes to retain this cost allocation methodology. Virgin Media believe the flat rates charged by RTÉ are excessive and we suggest that if there is unused capacity the cost of this should not be shared by channels currently being carried. Unused capacity costs should be borne by 2RN which would incentivise them to sell this capacity to others or become more competitively priced.

- WACC

Virgin Media welcomes the commitment to a more regular review of the weighted average cost of capital (WACC)⁴ however notes that this is the minimum WACC that can be applied. More transparency around the actual WACC in Markets A and B would be welcome.

- Cost Accounting

³ [REDACTED]

⁴ As set out in ComReg's Notification to the European Commission.

As highlighted above, currently there is little or no transparency regarding the separation between RTÉ and 2RN and there is no data available regarding 2RN's cost model or what costs are included in the model. For example, redundancy costs.

Accounting separation

As above VMTV continues to harbour concerns in relation to the lack of transparency in the financial structure between RTÉ and 2RN and the costs that RTÉ is allowed to include when setting the access price for the 2RN network. This is an area VMTV would encourage ComReg to review.

Q. 7

Do you agree with ComReg's preliminary proposals regarding on the Regulatory Impact Assessment, in respect of the Relevant BTS markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Virgin Media agrees with ComReg's preliminary proposals regarding on the Regulatory Impact Assessment in respect of the Relevant BTS markets. A range of competition problems could occur under a 'do nothing' scenario. Similar competitive issues can occur under Options 1-3. Therefore the only possible option open to ComReg is Option 4 and for ComReg to impose transparency, non-discrimination, access, price control and cost accounting, and accounting separation obligations.

RTÉ and DTT Mux Management Response to Market Review 13/07/20

Broadcasting Transmission Services in Ireland

Consultation and Draft Decision

Reference:

ComReg 20/31

Version:

Final

Date:

11/05/2020

Next Steps

2.77

All responses should be sent by post or email to the address below to arrive on or before 17:30 on Monday 6 July 2020. ComReg is providing an 8 week period within which interested parties may respond. Responses should be marked for the attention of:

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Executive Summary

Overview

1.1

Broadcasting transmission and distribution services ('**BTS**') at the wholesale level enable retail Free-to-Air ('**FTA**') television ('**TV**') programme service providers such as RTÉ, Virgin Media and TG4 ('**Retail TV Broadcasters**') and FTA national/quasi-national radio programme service providers such as RTÉ, Today FM and Newstalk ('**Retail Radio Broadcasters**'), (together referred to as '**Retail Broadcasters**'), to broadcast their content to end users.

1.2

In its 2013 Broadcasting Transmission and Distribution Decision ('**2013 Decision**') ComReg reviewed the Broadcasting Transmission and Distribution Markets in Ireland and found that

the identified two Relevant BTS Markets ('the **Relevant BTS Markets**') warranted *ex ante* regulation:

- a) **Market A**: A national wholesale market where an upstream terrestrial transmission network provider supplies a transmission and distribution service via its towers/masts infrastructure and relevant associated facilities (including transmission and distribution equipment, buildings etc.) in order to enable transmission of television and radio broadcasts; and,
- b) **Market B**: is a national wholesale market which is downstream from Market A, whereby a Digital Terrestrial Television ('**DTT**') **Multiplex Operator**⁴, using wholesale inputs purchased (or self-supplied) in Market A, combined with carriage on its DTT multiplex supplies a managed digital multiplexing service.

1.3

The Commission for Communications Regulation ('**ComReg**') is the National Regulatory Authority ('**NRA**') responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector in the Republic of Ireland.

1.4

ComReg conducted a market analysis, and having regard to a range of identified competition problems, imposed a number of regulatory obligations on the operators identified as having Significant Market Power ('**SMP**') in the Relevant BTS Markets.

1.5

The 2014 European Commission ('**EC**') Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation does not identify BTS markets as being susceptible to *ex ante* regulation.

1.6

However, subject to certain conditions being fulfilled, National Regulatory Authorities ('**NRA(s)**') such as ComReg have the power to apply regulation in any electronic communications market no longer identified in the 2014 Recommendation, on the basis of national circumstances. In this regard ComReg must undertake a so-called Three Criteria Test ('**3CT**') to determine if continued regulation is warranted in the relevant markets (i.e. whether there are high and non-transitory barriers to entry, whether there is no tendency towards effective competition overtime and whether competition law alone is sufficient to address potential competition related market failures).

1.7

Where ComReg determines as a result of its market review that a given market is not effectively competitive, ComReg is then required 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.

1.8

Given the time that has elapsed since ComReg's previous analysis of the Relevant BTS Markets and, having regard to market developments, including the publication by the EC of the 2014 Recommendation and the 2018 SMP Guidelines, it is now considered appropriate to update the review of these markets.

1.9

In accordance with its regulatory role to review certain electronic communications markets, ComReg sets out its preliminary views on whether, ultimately, absent regulation, any Service Provider ('**SP**') has Significant Market Power ('**SMP**') in a Relevant BTS Market(s) and, if so, whether to impose appropriate obligations on such SP(s) to address any

competition problems that have arisen or could arise in the duly-defined Relevant BTS Markets, ultimately to the detriment to downstream competition.

1.10

Overall, ComReg proposes to maintain the same conclusions with respect to the market definitions, SMP assessments and remedies as set out under the 2013 Decision, with proposed regulation being a continuation of the existing regime.

Summary of Overall Preliminary Views

1.11

The following is a summary of ComReg's preliminary views arising from its analysis of the Relevant BTS Markets. This summary should be read in the overall context of this Consultation, which sets out in detail the reasoning underpinning ComReg's preliminary views.

Retail Market Assessment

Retail Market Trends and Developments

1.12

In Section 3 of this Consultation, ComReg considers the main trends and developments in retail TV and radio markets and assesses them insofar as they inform ComReg's subsequent assessment of the Relevant BTS Markets.

1.13

With regards to Retail TV Broadcasters, ComReg's focal point for its analysis is FTA TV services delivered over the Digital Terrestrial TV ('DTT') platform ('FTA DTT') known as Saorview which is operated by RTÉ.

1.14

From the perspective of national/quasi national retail radio broadcasting, ComReg notes that the main means of delivery of radio is over the national terrestrial BTS platform (masts/towers and associated facilities) operated by 2rn. As with FTA Retail TV Broadcasters, Retail Radio Broadcasters do not charge a price to end users for the viewership/listenership of their programme services.

1.15

The most notable trends and developments in the supply of and demand for the services of Retail Broadcasters include:

- a) As of January 2020 11.8% of TV homes relied solely on Irish FTA terrestrial reception for their TV viewing. This proportion has remained broadly stable since the 2013 Decision having increased slightly from 11.6% of TV Homes in April 2013.
- b) Approximately 61.6% of TV homes had a pay TV service as of January 2020, down from 70.9% in January 2015. Further, approximately 38.4% of TV homes had a FTA service as of January 2020, up from 29.1% in January 2015.
- c) Internet Protocol TV ('IPTV') (as a managed TV transmission service) is currently limited mainly to urban areas and in January 2020 had a take-up of 6% of television homes up from 0% in 2013. As higher speed broadband infrastructure is rolled out across Ireland, IPTV may become a more pervasive option for an increasing number of households. However, the proportion of TV homes relying primarily on IPTV remains relatively small compared to the other platforms and is likely to remain so for the period of this market review.

- d) In terms of radio broadcast transmission, content is primarily deployed over analogue terrestrial broadcasting networks, transmitted to in-home radio equipment or to in-car radios. More than 90% of households have an FM/AM radio, a situation which has not changed significantly since the 2013 Decision.

Retail Market Assessment

1.16

ComReg's view is that retail television and terrestrial radio are distinct markets, as the experience and attributes of the two media are very different and a substitution between the two is unlikely to meet the requirements of a radio listener or a television viewer. Therefore, Retail TV Broadcast and Retail Radio Broadcast markets are assessed separately.

Retail TV Broadcast Assessment

1.17

ComReg's preliminary assessment of Retail TV Broadcast Services is that:

- e) Pay TV services are not likely to be an effective substitute for FTA TV services;
- f) Direct-to-home ('DTH') satellite FTA TV services are not likely to be an effective substitute for FTA DTT services;
- g) Retail TV broadcasting services broadcast from other TV viewing platforms are unlikely to be an effective substitute for services delivered on the FTA DTT platform;
- h) Supply-side substitutability is not likely to be sufficiently prompt or effective (and without incurring significant costs), such that suppliers of alternative BTS platforms could credibly switch to supplying FTA TV BTS on a coverage basis equivalent to that provided by the terrestrial BTS platform (and on a basis sufficient to meet Irish downstream DTT Broadcasters' statutory/licence coverage requirements); and
- i) Retail FTA DTT broadcasting services markets are likely to be national in scope.

1.18

ComReg's preliminary view is that, within the lifetime of this BTS Review, retail substitution from the FTA DTT platform to other broadcasting platforms is not likely to be sufficiently effective to warrant the definition of a broader retail market and the FTA DTT platform is thus considered to be a distinct relevant market.

Retail Radio Broadcast Assessment

1.19

ComReg's preliminary assessment of Retail Radio Broadcast Services is that:

- a) A sufficient number of end users would not be expected to switch to other radio BTS platforms (such as cable, satellite, and Internet) in the timeframe of this BTS Review such that it would effectively constrain the terrestrial radio BTS platform;
- b) Broadcasting over other BTS platforms is not likely to be an effective supply-side substitute to a terrestrial BTS platform due to a combination of issues such as lower coverage levels (save for satellite) and the limited availability / take-up / mobility of devices / equipment for listening to radio broadcasting via such other BTS platforms; and
- c) The geographic scope of retail radio services can be distinguished on a local/regional and national basis.

1.20

ComReg's preliminary view is that, at present, retail substitution from the FTA terrestrial radio broadcast platform to other alternatives is not likely to be sufficiently effective to warrant the definition of a broader retail radio broadcasting market in this BTS review. The FTA terrestrial radio broadcast platform is therefore considered to fall within a distinct relevant market.

Wholesale Market Definition

1.21

ComReg's starting point for the wholesale market assessment relates to those defined markets in which there is SMP regulation currently in place. Therefore, ComReg considers the two separate Relevant BTS Markets as defined in ComReg's 2013 Decision (and identified below) and assess whether any changes should be made to these markets. The starting points are:

- a) **Market A:** the market for Wholesale Access to National Terrestrial Broadcast Transmission Services; and
- b) **Market B:** the market for Wholesale Access to DTT Multiplexing Services.

1.22

The relationship between Market A and Market B and their relationship with other market participants in the broadcasting value chain, is described in paragraph 1.2 above and paragraph 2.50 of this Consultation and diagrammatically in the associated Figure 1.

Market A

1.23

ComReg proposes to define a market for wholesale access to national terrestrial BTS (Market A). This is a wholesale upstream market whereby a BTS network provider supplies a transmission and distribution service via its towers/masts and relevant associated facilities including transmission and distribution equipment in order to enable:

- a) The broadcast of national analogue terrestrial radio signals to end users; and,
- b) The broadcast by a Multiplex Operator of its digital terrestrial broadcasting signals to end users (such Multiplex Operators operate downstream from this Market A).

1.24

In arriving at the above preliminary conclusion, ComReg notes that there are a number of specific considerations that constrain the ability of national/quasi-national analogue Retail Radio Broadcasters and DTT Multiplex Operators from switching their wholesale demand for terrestrial BTS to wholesale services provided on other BTS platforms:

- a) There are certain Retail TV Broadcasters (RTÉ, TG4 and Virgin Media) that are also Public Service Broadcasters ('**PSB**') that have statutory/licence obligations which effectively prevent them from switching to other alternative BTS platforms (i.e. cable, satellite and IPTV). RTÉ and TG4 are required under the 2009 Broadcasting Act to be available, as much as reasonably is possible, to the whole community of Ireland on a FTA basis. Similarly, Virgin Media 1 ('**VM1**') and Virgin Media 2 ('**VM2**') are also required to be available on a FTA basis to more than 90% of the population;
- b) For cable, satellite and IPTV to be an effective alternative for terrestrial broadcast transmission, a sufficient number of terrestrial retail end users would have to move

to such alternative platforms; this would involve the cost of purchasing and installing equipment necessary to receive their broadcasts on this different platform. As noted above, cable TV and IPTV platforms do not offer national coverage, and the costs of rolling out such networks are high (and largely sunk). ComReg also notes that effective satellite supply is likely constrained by jurisdictional restrictions regarding terrestrial Retail TV Broadcasters' programme content rights; and

- c) The ability of national analogue terrestrial Retail Radio Broadcasters to switch from the existing terrestrial BTS platform is likely to be constrained by the popularity of terrestrial radio services as a reception method at the retail level (where it is freely available nationally, at good quality, and offers mobility).

Market B

1.25

Market B is a wholesale market which is downstream from Market A, whereby a DTT Multiplex Operator, using wholesale inputs purchased (or self-supplied) in Market A, combined with carriage on its own DTT multiplex, supplies a managed digital multiplexing service to DTT Retail Broadcasters enabling the transmission of their DTT broadcasting signals to end users.

1.26

ComReg proposes to define a separate wholesale market that operates downstream from wholesale Market A. That is, the market for wholesale access to DTT multiplexing services (Market B). A DTT Multiplex Operator, using purchased wholesale inputs from Market A, combined with carriage on its own DTT multiplex, then supplies wholesale managed BTS to DTT Retail Broadcasters thereby enabling the transmission of their DTT broadcasting programme signals to end users.

1.27

A Multiplex Operator's demand for access to Market A services is derived from downstream digital Retail Broadcasters' demand (and ultimately end users') for such access and, in that context, ComReg considers the question of wholesale demand-side substitution from the position of the underlying customer i.e. a DTT Retail Broadcaster (such as RTÉ, Virgin Media, TG4). The particular statutory/licence commitments of Irish DTT Retail Broadcasters (FTA national coverage) in effect, prevent them from having the ability to credibly threaten to switch from their existing DTT Multiplex Operator's services.

1.28

ComReg notes that RTÉ is the sole DTT Multiplex Operator in Market B, as there are currently no alternative sources of DTT multiplexing.

Three Criteria Test

1.29

ComReg undertakes its assessment of the 3CT for Market A and Market B in section 5 of this Consultation.

1.30

ComReg considers that each criterion of the 3CT is satisfied in Market A and Market B respectively (i.e. there are high and non-transitory barriers to entry, there is no tendency towards effective competition overtime and, competition law alone is insufficient to address potential competition related market failures).

1.31

ComReg also considers all relevant legislation which may have had an impact on its analysis of the Relevant BTS Markets in Ireland (such as the 2009 Broadcasting Act). However, in ComReg's view the relevant legislation is insufficient to address potential competition related market failures in Market A and Market B.

Competition and SMP Assessment

Market A Competition and SMP Assessment

1.32

ComReg has considered Market A in terms of existing competition, potential competition and countervailing buying power to determine whether any SP has SMP in the market.

1.33

2rn is the sole national terrestrial network provider in Market A 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 2rn from potential competitors and insufficient countervailing buying power exists in this market.

1.34

In summary, ComReg's preliminary conclusions above are based on:

- a) 2rn has 100% market share of the relevant market and this has remained stable over time;
- b) 2rn 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;
- c) 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;
- d) 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
- e) 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 2rn.

1.35

Having regard to the preliminary conclusions of the above market analysis, ComReg is therefore of the preliminary view that 2rn, the wholly owned subsidiary of RTÉ should be designated as having SMP in Market A.

Market B Competition and SMP Assessment

1.36

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.

1.37

Taken as a whole there are a number of barriers to effective entry and expansion in this market which are largely of a legal/regulatory nature 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 have entered into contracts with RTÉ. Based on evidence to date ComReg is not aware of any express demand by potential new multiplex operators to provide commercial DTT which would be capable of effectively constraining RTÉ. In light of this and uncertainty as to whether (and if ever) 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 the ability and incentive to act independently of its competitors, customers and consumers.

1.38

In summary, ComReg's preliminary conclusions above are based on :

- a) RTÉ having a 100% share of the relevant market;
- b) 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 effectively constraining RTÉ and, on the basis of the evidence to date, this seems unlikely to change during the period covered by this review;
- c) As a vertically integrated entity RTÉ competes with other broadcasters in the retail market and is also a wholesale supplier to broadcasters; and
- d) Insufficient countervailing buying power exists and so DTT broadcasters do not have the ability to exert a sufficient constraint on RTÉ's behaviour.

1.39

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.

Competition Problems

1.40

As set out in Section 7 of this Consultation, ComReg is of the preliminary view that 2m and RTÉ has the ability and incentive to engage in exploitative and exclusionary behaviours in Market A and Market B respectively to the detriment of downstream competition and consequently negatively impact the diversity and breath of programme services available to end users in downstream retail markets. These include issues associated with the potential for constructive or actual denial of access, discrimination and pricing concerns.

Proposed Remedies

Proposed Market A Remedies

1.41

ComReg's preliminary view is that the following obligations should be imposed on 2rn in Market A, with such obligations being a continuation of those remedies imposed under the 2013 Decision.

- a) **Transparency Obligations:** requirements to publish a reference offer and service level agreements ('**SLAs**'); requirements to publish all SLAs (and any updates) on its publicly available website, network characteristics, terms and conditions for supply and use, and prices.
- b) **Non-Discrimination Obligations:** requirements to apply equivalent conditions in equivalent circumstances to Broadcast Operators.
- c) **Access Obligations:** requirements to meet all reasonable requests from Broadcast Operators for the provision of access; requirements to grant Broadcast Operators access to a fully managed Broadcast Transmission Service (including Broadcast Distribution Service) including Associated Facilities;
- d) **Price Control and Cost Accounting Obligations:** requirements that Access is provided under a cost oriented price control based on Historical Cost Accounting ('**HCA**') and Fully Distributed Cost ('**FDC**') methodology; and
- e) **Accounting Separation Obligations:** requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.

Proposed Market B Remedies

1.42

ComReg proposes to impose the following obligations on RTÉ in Market B, with such obligations being a continuation of those remedies imposed under the 2013 Decision.

- a) **Transparency Obligations:** requirements to publish a Reference Offer and SLAs. RTÉ should be required to publish all SLAs (and any updates) on its publicly available website (or such other publicly available website as may be agreed by ComReg);
- b) **Non-Discrimination Obligations:** requirements to apply equivalent conditions in equivalent circumstances to Broadcasters;
- c) **Access Obligations:** requirements to meet all reasonable requests from Broadcasters for the provision of access;
- d) **Price Control and Cost Accounting Obligations:** requirements that Access is provided under a cost oriented price control based on a HCA, and FDC costing methodology; and,
- e) **Accounting Separation Obligations:** requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.

Preliminary Conclusions on Retail Television Broadcasting

3.48

Having regard to the analysis set out in paragraphs 3.20 to 3.47 above, ComReg's preliminary conclusion is that, within the lifetime of this BTS Review, retail substitution from the FTA DTT platform to other broadcasting platforms is not likely to be sufficient to warrant the definition of a broader retail market and is thus a distinct relevant market.

Preliminary Conclusions on Retail Radio Broadcasting

3.61

Having regard to the analysis set out in paragraphs 3.49 to 3.60 above, ComReg's preliminary conclusion is that, at present, retail substitution from the FTA terrestrial radio platform is not likely to be sufficiently effective to warrant the definition of a broader retail radio broadcasting market in this BTS review such that the FTA terrestrial radio platform falls within a distinct relevant market.

Introduction to Submissions/Response by RTÉ

RTÉ acknowledges that ComReg in undertaking its review of BTS in Ireland, and in the publication of this consultation document, ComReg has assumed that no regulation is in place in the market and that many of the same assumptions made in 2013 when ComReg first published its decision to regulate the market continue to pertain. As RTÉ understands it, this is the Greenfield Modified Approach which is set out in the relevant EC Commission Recommendations as well as the 2018 SMP Guidelines on market analysis and SMP which ComReg is obliged to follow in its review. RTÉ wishes to point out that the 2014 EC Recommendation also provides that NRAs (notably ComReg in this jurisdiction) are also required to take “all reasonable measures which are aimed at achieving the regulatory objectives contained therein, *inter alia*, promoting efficient investment in an access to new and enhanced infrastructures”. With this in mind, by way of overall comment, RTÉ is disappointed to note that this consultation has not provided any opportunity to address the deficiencies of the existing regulatory regime, rather this document proposes a replication of precisely the same regime for the next three to five years.

As ComReg is aware, RTÉ has a statutory obligation to establish maintain and operate a national digital television multiplex and it has an attendant obligation to ensure the transmission of certain services on it by way of “must carry”. RTÉ notes that ComReg is of the view that notwithstanding these obligations, that the situation remains that RTÉ may engage in behaviour to advantage its own services or channels on the DTT Platform. RTÉ is seeking to adopt a reasonable but realistic approach in its responses to this submission. In this regard, RTÉ is not seeking to reverse the conclusions reached given that they are reached on a market analysis that assumes no regulation and where RTÉ and its subsidiary remain vertically integrated. However there are points which are made in this submission which ComReg is asked to take into account in terms of any future regulatory model

Given the increasingly competitive media landscape in which the DTT platform competes, it would be counterintuitive for RTÉ to favour or advantage its own services on the platform over others. Rather to the contrary over the past five years, RTÉ (through its DTT Mux Management) has sought to expand the appeal of the platform, to introduce new services (thereby seeking to reduce tariffs for all customers), and to promote this indigenous Irish platform to the benefit both viewers and broadcast customers.

In this regard, RTÉ as broadcast customer and as DTT Mux Management provided a response to the ComReg BTS Questionnaire in August, 2019. As ComReg is aware, this response was provided by RTÉ as a broadcast customer on the DTT platform and by DTT Mux Management which manages the DTT platform. In overall terms these responses were not resistant to regulation, rather they submitted that a more flexible regulatory approach would benefit all broadcast customers and enable the DTT platform to compete more effectively with pay and other platforms such as cable and satellite.

RTÉ notes that ComReg points out at section 2.27 of the consultation document that its review and the consultation document does not take into account existing regulation in the market, as this approach “ *avoids erroneously drawing conclusions regarding the competitive structure of a particular market .. which may be influenced or indeed premised by on, existing regulation in the market*”. RTÉ further submits that this approach in effect means that the opportunity and potential to improve the regulatory model which has been in place since July 2013 has been missed. ComReg will note that in its submission, RTÉ has drawn on its experience of existing regulation and its deficiencies. Please note that some points in this submission are made separately by DTT Mux Management and some by RTÉ as broadcast customer as relevant.

In relation to section 1.15, RTÉ would observe that IPTV market share is currently limited, but is likely to grow as a mix of FTA, FTV and pay-TV services over the coming years, following on from the rollout of rural broadband. Device makers, platforms and content providers are developing IPTV solutions that will have the effect of increasing the market share of these offerings over the next five years.

In relation to section 1.24(b), RTÉ have noted that the majority of consumer TV purchases by volume are now Smart TV products; reported by one source as 81% in the previous 12 months. This suggests that a growing number of consumers will be ready for increased adoption of IPTV services alongside FTA DTT and pay-TV. In the future, IPTV services are poised to increase their market power within the next five to seven years.

See <https://www.itu.int/itu-news/manager/display.asp?lang=en&year=2008&issue=08&ipage=31&ext=html>)

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

A1 RTÉ agrees that these preliminary conclusions remain in place. However, ComReg is asked to note and to give consideration to the following points:-

DTT Mux Management submits that data presented by ComReg in a consultation document of this nature ought to be presented in a fair manner. ComReg is also asked to note that the broadcast market is more complex than the data and commentary set out at Section 3.7 of the consultation document. The total pay TV market has reduced from 70.9% to 61.6% in the five years and the number of FTA Services homes has increased. But the FTA Services homes identified here are only a subset of the totality of the FTA Services market. The complexity of this market is better described in Table 3.

It is submitted that the approach taken in section 3.8 is over simplistic. The data and commentary provided in section 3.9 appears to compare certain platforms sectors (e.g.

Cable/IPTV/Pay TV Satellite) in their totality including cable only homes and shared platform homes, with the Irish FTA Terrestrial Only homes element of the market. There is a concern that this presentation of the data in this way provides an unfair comparison. If ComReg wishes to represent data on single platforms only homes and proceed to compare them then that approach could be adopted. Alternatively if ComReg wishes to discuss platforms in their totality, that approach could also be adopted. However it is inappropriate to mix both approaches as ComReg appears to have done.

In the event that the data at table 2 and figure 4 as well as the data at section 3.9 is to remain in the final decision document, then the correct titles should be given to the Irish FTA Terrestrial “Only” data. The title for the FTA Satellite also appears to be misleading as they represent homes with FTA Satellite without Cable/IPTV/Pay TV Satellite. The UK DTT title should also be corrected.

The commentary at section 3.10 which provides that “*the proportion of TV Homes relying solely on UK FTA Services has, however, shown a marked increase from 14.0% in January 2013 to 26.5% in January 2020*”, does not accurately reflect the market. DTT MUX Management is aware that the majority of these homes share Saorview with the UK FTA services in this regard.

DTT MUX Management further submits that the commentary which provides that “*most of this growth has involved uptake of the UK FTA satellite service which has grown from 12.5% in January 2013 to 20.5% in January 2020, and which further provides that “the UK DTT FTA service grew from 1.5% in January 2013 to 6.0% in January 2020”* again does not accurately reflect the market, as this growth is a growth of Saorview with the UK FTA services homes. In addition the wording at Section 3.11 (first sentence) should possibly read “*Within the pay TV homes market the sky/cable ratio between the providers has remained relatively stable.*”

DTT MUX Management submits that the comments at section 3.40 again may not accurately reflect the market as per the points previously set out above. DTT MUX Management believe the Irish DTT and UK DTT are not exclusive homes, rather they overlap considerably, and in addition the Irish DTT and Other Satellite homes are not exclusive homes but also overlap considerably.

DTT MUX Management submits that the first sentence in section 3.45 “*ComReg is of the preliminary view that effective supply-side substitution is unlikely due to the high cost involved in building digital terrestrial BTS networks.*” is accurate in terms of Market A but the point does not pertain to Market B.

Overall Preliminary Conclusions on Wholesale Market B Definition

4.54

Having regard to the analysis in paragraphs 4.40 to 4.53 above, ComReg proposes to define a separate wholesale market that operates downstream from wholesale Market A. That is, the market for wholesale access to DTT multiplexing services (Market B). A DTT Multiplex Operator, using purchased wholesale inputs from Market A, combined with carriage on its own DTT multiplex, then supplies wholesale managed BTS to DTT Retail Broadcasters thereby enabling the transmission of their DTT broadcasting programme signals to end users.

Q2 Do you agree with ComReg's preliminary conclusions on the Relevant BTS Markets assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

A2 In overall terms, RTÉ agrees with these preliminary conclusions however RTÉ would ask that ComReg consider the points made in its submission which advocates a more flexible regulatory approach.

Proposed Conclusion on the Three Criteria Test in Market B

5.38

Having regard to the analysis in the BTS Consultation, ComReg's preliminary view is that Market B satisfies the 3CT.

Q3 Do you agree with ComReg's preliminary finding that each of the criterion of the 3CT is satisfied in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

A3 In overall terms, RTÉ agrees with these preliminary conclusions subject to the above comment.

Preliminary conclusion on SMP in Market A

6.47

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.

6.48

2rn 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 2rn from potential competitors and insufficient countervailing buying power exists in this market.

6.49

In summary, ComReg's preliminary conclusions are that:

- a) 2rn has 100% market share of the relevant market and this has remained stable over time;
- b) 2rn 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;
- c) 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;
- d) 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
- e) 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 2rn.

SMP Designation in Market A

6.50

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.

6.51

Having regard to the preliminary conclusions of the above market analysis, ComReg is therefore of the preliminary view that 2rn, the wholly owned subsidiary of RTÉ should be designated as having SMP in Market A.

Preliminary conclusion on SMP in Market B

6.77

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.

6.78

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 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 whether (and if ever) 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.

6.79

In summary, ComReg's preliminary conclusions are that:

- a) RTÉ has 100% share of the relevant market;
- b) 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;
- c) As a vertically integrated entity RTÉ competes with other broadcasters in the retail market and is also a wholesale supplier to broadcasters; and
- d) Insufficient countervailing buying power exists and so DTT broadcasters do not have the ability to exert a sufficient constraint on RTÉ's behaviour.

SMP Designation in Market B

6.80

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.

6.81

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.

Q4 Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

A4. In overall terms, RTÉ agrees with these preliminary conclusions, however ComReg is asked to take the following points on board:-

DTT Mux Management submits that with regard to section 6.64, the time involved in completing a license process for a 3rd multiplex license is not necessarily long. This is in the gift of the BAI and outside of RTÉ's control. The fact that such a licence is available and could be procured is in itself a competitive constraint on RTÉ.

Furthermore the opening sentence of section 6.65 appears to be opinion based. Many entities outside the current Irish DTT market have shown interest in this market. Potential commercial licence owners would include other broadcasters or infrastructure or telecommunications companies.

In relation to section 6.69, DTT Mux Management would submit that any estimated sunk costs in Market B are relatively low for an infrastructure build. An additional multiplex would be easily received in the existing 39% of Irish TV homes presently receiving Saorview following a simple rescan promotion. All Market B license holders are very likely to procure similar services from 2rn in Market A though that is not a requirement. These services procured from Market A are regulated by ComReg. The RTÉ multiplexes and any additional commercial multiplexes are complementary to each other and would sit on the same platform. Any promotion costs associated with one multiplex would benefit all multiplexes.

With regard to the final sentence at section 6.75 which provides as follows “ *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.*” As previously pointed out in the Introduction above, ComReg is asked to note that RTÉ is committed to ensuring the provision of a healthy and competitive terrestrial platform both as multiplex licence holder and as the only Irish indigenous terrestrial platform provider which provides valuable market share to all broadcast channels. Any reduction in the number of channels on the platform would reduce the attractiveness of the platform, thereby decreasing its value and its total viewership. In practice, over the past five years, ComReg is asked to note that RTÉ has increased its commitment to the platform by adding channels and functionality to the benefit of all of the broadcasters and end users.

DTT Mux Management submits that ComReg needs to reconsider its regulatory approach to Market B which would permit RTÉ through its Mux Management more flexibility in offering incentives to attract potential broadcasters aside from the existing Irish DTT channels. This (repeated) request by DTT Mux Management to ComReg demonstrates RTÉ's commitment to developing and growing the platform within a regulated environment.

This request echoes the submission of RTÉ as broadcast customer to the ComReg Questionnaire in August 2019 when it outlined the following at section 7 of the response which is set out below and that point is repeated here in this submission.

“There is a clear requirement to assess whether or not the level of regulation in Market B may be excessive and over stringent. This can militate against other broadcasters or service providers taking up capacity on the DTT Multiplex. It is in all broadcasters’ interests that the platform is competitive. Increased overall utilisation of capacity by new entrants creates efficiencies for all broadcasters including RTÉ.”

Preliminary Conclusions on Competition Problems in Market A

7.29

In summary, ComReg is of the preliminary view that 2rn has the ability and incentive to engage in exploitative and exclusionary behaviours in Market A to the detriment of downstream competition and consequently negatively impact the diversity and breath of programme services available to end users in downstream retail markets.

Preliminary conclusion on competition problems in Market B

7.46

In summary, ComReg’s preliminary view is that, absent regulation, there is the potential ability and incentive for RTÉ as the SMP operator in Market B to engage in actions which could inhibit downstream competition and consequently negatively impact end users in the retail broadcasting market by engaging in exploitative and exclusionary behaviours.

Q5 Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in Market A and Market B? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

A5. DTT Mux Management submits that with regard to excessive pricing, there is no evidence to support a claim of potential excessive pricing by DTT Mux Management. To the contrary, ComReg is asked to note that RTÉ has made significant efforts to develop the DTT platform and to reduce the cost to all broadcasters. By way of direct illustration, ComReg is asked to note that an invoice of December 2014 noted that the SD channel equivalent annual carriage cost was approximately 1.1m euro annually. Some five years later in December 2019, the same channels equivalent annual carriage cost was approximately 850,000 euro. This reduction five years later represented a saving of nearly 23% to that particular broadcaster. This cost reduction was driven and made possible by the carriage of additional channels including RTÉ channels (which consume most of the share of costs).

In relation to section 7.44, it is submitted that the opening sentences fails to take into account the consequent negative effect of reducing the number of channels on the DTT platform which would divert viewers to other platforms thereby reducing the value of the platform. This would be counter intuitive as this would have the effect of also reducing RTÉ's market share for its channels and services on the platform. As previously pointed out, RTÉ has made every effort to develop the platform offering and thereby reduce the cost to other broadcasters. .

Overall preliminary conclusion on the imposition of Transparency obligations in Market A.

8.70

Having regard to the analysis set out at paragraphs 8.47 to 8.69 above, ComReg proposes that 2rn should be subject to the range of transparency obligations identified.

8.71

ComReg has also considered whether transparency obligations alone would be sufficient to address the competition problems identified in Section 7 and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a transparency obligation.

8.72

ComReg considers that the imposition of the above transparency obligations is both proportionate and justified, having regard to the competition problems identified in Section 7. ComReg therefore proposes that 2rn should have transparency obligations imposed upon them.

8.73

The Transparency Obligations are set out in legal form in of the DI in Annex: 7.

Overall Preliminary Conclusions on the Proposed Non- Discrimination Obligations in Market A

8.84

Having regard to the analysis set out at paragraphs 8.74 to 8.83, ComReg proposes to impose the identified non-discrimination obligations on 2rn.

8.85

ComReg considers that the imposition of the above non-discrimination obligations is both proportionate and justified, having regard to the competition problems identified in Section 7. ComReg therefore proposes that 2rn should have non-discrimination obligations imposed upon them.

8.86

ComReg has also considered whether non-discrimination obligations alone (or with the transparency obligations above) would be sufficient to address the competition problems identified in Section 7 and does not consider this to be the case. For example, excessive

pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a non-discrimination obligation.

8.87

The non-discrimination obligations set out in paragraphs 8.79 to 8.83 above are set out in legal form in the DI in Annex: 7

Overall preliminary conclusion on the Proposed Access Remedies for Market A.

8.129

Having regard to the analysis set out at paragraphs 8.100 to 8.128 above, ComReg proposes to impose the above Access obligations on 2rn.

8.130

ComReg's preliminary view is that obligations to provide access to BTS services and associated facilities are both proportionate and justified. ComReg has considered whether obligations other than those relating to access would, in themselves, resolve the competition problems identified. ComReg does not consider this to be the case. The imposition of the above access obligations alone would also not resolve issues such as excessive pricing, discrimination (on price or quality grounds) or ensure transparency of terms and conditions of access.

8.131

The access obligations set out in paragraphs 8.92 to 8.128 above are set out in legal form in the DI in Annex: 7.

Overall preliminary conclusion for the imposition of the Price Control and Cost Accounting Remedies in Market A.

8.186

Having regard to the analysis set out at paragraphs 8.132 to 8.185 above, ComReg proposes to impose the following Price Control and Cost Accounting obligations on 2rn:

8.187

A price control and cost accounting obligations of cost oriented price control based on a HCA and FDC methodology. Further detail regarding the price control and cost accounting obligations are outline in Annex: 7 below. ComReg's preliminary view is that price control obligations alone would not be sufficient to address the competition problems identified in Section 7, therefore ComReg proposes an additional Accounting Separation remedy.

8.188

The Price Control and Cost Accounting Obligations set out in paragraphs 8.132 to 8.185 above are set out in legal form in the DI in Annex: 7.

Overall preliminary conclusion on the Accounting Separation in Market A.

8.255

Having regard to the analysis set out above at paragraphs 8.189 to 8.254, ComReg proposes to continue impose an accounting separation obligation on 2rn, this includes requirements to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.

8.256

The Accounting Separation Obligations set out in paragraphs 8.189 to 8.254 above also are set out in legal form in the DI in Annex: 7

Overall preliminary conclusions on the proposed non-discrimination remedies in Market B.

8.308

Having regard to the analysis set out at paragraphs 8.295 to 8.307 above, ComReg proposes to impose the following non-discrimination obligations on RTÉ:

- a) Apply equivalent conditions in equivalent circumstances to other Broadcasters providing equivalent services;
- b) Ensure that all services (including Associated Services and Associated Facilities) and information are provided to other Broadcasters under the same conditions and of the same quality as the services and information that RTÉ provides to itself or to its subsidiaries or partners;
- c) Ensure that all such services and information shall be provided to other Broadcasters at the same time as the service(s) and/or information are made available by RTÉ to itself or its subsidiaries or partners.

8.309

ComReg has also considered whether non-discrimination obligations alone would be sufficient to address the competition problems identified in Section 7 and does not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still occur in the presence of a non-discrimination obligation.

8.310

ComReg considers that the imposition of the above non-discrimination obligations is both proportionate and justified, having regard to the competition problems identified in Section 7. ComReg therefore proposes that RTÉ should have non-discrimination obligations imposed upon them.

8.311

The Non Discrimination Obligations set out in paragraphs 8.300 to 8.307 above are set out in legal form in the DI in Annex: 8.

Overall Preliminary Conclusion for the proposed Access remedies in Market B.

8.347

ComReg's preliminary view is that the proposed obligations to provide access to BTS services and associated facilities are both proportionate and justified. ComReg has considered whether obligations other than those relating to access would, in themselves, resolve the competition problems identified. ComReg does not consider this to be the case.

The imposition of the above access obligations alone would also not resolve issues such as excessive pricing, discrimination (on price or quality grounds) or ensure transparency.

8.348

The access obligations set out in paragraphs 8.316 to 8.346 above are set out in legal form in the DI in Annex: 8.

Overall preliminary conclusions on the proposed price control and cost accounting remedies in Market B.

8.438

Having regard to the analysis set out at paragraphs 8.349 to 8.437 above, ComReg proposes to impose a Price Control and Cost Accounting obligation on RTÉ, this requirement includes a cost oriented price control based on HCA, and FDC methodology. ComReg has set out further detail on the price control and cost accounting obligation in Annex: 8.

8.439

Having considered the matter, ComReg holds the view that price control obligations alone would not be insufficient to address the competition problems identified in Section 7, therefore ComReg proposes an additional Accounting Separation remedy.

8.440

The Price Control and Cost Accounting Obligations set above are set out in legal form in the DI in Annex: 8

Overall preliminary conclusions on the proposed Accounting Separation remedies in Market B.

8.465

Having regard to the analysis set out above at paragraphs 8.441 to 8.464, ComReg proposes to continue to impose an accounting separation obligation on RTÉ which includes a requirement to maintain separate accounts and provide accounting records on request to ComReg which may be subject to publication.

8.466

The Accounting Separation Obligations set out in paragraphs 8.442 to 8.464 above are set out in legal form the DI in Annex: 8.

Q6 Do you agree with ComReg's proposals regarding the application of transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

A6. In considering the proposed remedies, RTÉ would ask that ComReg notes the following:-

With regard to the comment at section 8.262, DTT Mux Management submits that it is unclear whether or not ComReg has taken into account the inter platform competitive pressures in the Irish media market. Saorview is not operating in a vacuum but is competing with various platforms including two large international platforms. This creates a competitive pressure for RTÉ as it seeks to promote a healthy competitive Irish terrestrial offering despite having a lower number of channels. Those broadcast customers that are carried on the Saorview platform experience a significant market share benefit when compared to pay and other platforms. This is true for homes with Saorview only and those that combine Saorview with other FTA services, although as one would expect, the share for Saorview only homes is the greater.

In relation to the points set out at section 8.281, DTT Mux Management is unclear on the steps involved in bringing such a dispute. It is noted that this dispute mechanism is to be available to both DTT Mux Management and the broadcaster. RTÉ submits that more clarity regarding the steps involved in any proposed dispute mechanism is required, particularly ComReg's role and responsibilities and rights of enforcement. In addition any proposed appeals mechanism also requires clarification

With regard to section 8.301, it is submitted that ComReg has not taken into account the legislative obligation identified in section 8.259 (c) of this document particularly points (v) and (vi). RTÉ is obliged to provide access to certain specified broadcasters and if this access is denied then the proposals at section 8.281 or an appeal to the Minister provide mechanisms for resolution. With regard to pricing, it is submitted that with transparency remedies in place, agreed and scrutinised by ComReg, non-discriminatory price mechanisms can be put in place. However as already pointed out, RTÉ does require flexibility in pricing so that such prices do not present a barrier to entry for new entrants to the Irish DTT market or prevent new channels from launching. The present regulatory environment is in grave danger of inhibiting sustainable competition on the DTT platform. This is demonstrated by the fact that no third party broadcaster has joined the platform during the past four years, while RTÉ has launched its channel RTÉ One +1 on a full day basis and RTÉ 2 +1 on a part basis thereby reducing the overall costs for all third party broadcasters. Greater RTÉ's presence introduces a clear cost benefit to all customers. It should also be noted that RTÉ has retained the only 2 HD channels on the platform, in an environment where HD channels consume significantly more capacity and therefore cost more when compared with SD channels.

In relation to section 8.302, RTÉ would ask ComReg to note that over the past five years DTT Mux Management has published on the RTÉ website detailed regulatory accounts. Separately but related, 2rn has also published on their website detailed regulatory accounts for Market A. ComReg as the regulator for both markets has the ability to scrutinise the accounts and the accounts are fully audited by an independent auditor. Such access to accounts is uncommon and therefore third party broadcasters are in an advantageous position relating to costs. Also, in the event that a third party broadcaster has a significant concern, it is submitted that those concerns would have been brought to ComReg's dispute resolution mechanism. Also, when one reviews how

prices have reduced over the past five years, the validity of such concerns is clearly called into question. As previously pointed out, in an Invoice Dec 2014, an SD channel equivalent annual carriage cost was circa 1.1m euro annually while in Dec 2019 the same channels equivalent annual carriage cost was circa 0.85m euro. This is a saving of nearly 23% for that broadcaster. This cost reduction was primarily driven by the addition of RTÉ channels who consume more of the cost share.

DTT Mux Management requests that ComReg reviews its position at section 8.305 and that ComReg introduce a more flexible regulatory approach which would be attractive to new entrants in the market (broadcasters and/or channels). It is submitted that such flexibility could be managed on a time basis or on a classification basis as agreed with ComReg. This could then be published in advance in a reference offer in line with existing transparency requirements. This form of regulatory approach has been adopted in other markets.

RTÉ wishes to clarify a point from section 8.317 that the second contact with 2rn is at an operational level and would not be considered as a second step, as 2rn are the service provider in Market A and are required to facilitate those services as per their contract with the Market B license holder.

We note at section 8.318(a) that “ComReg does not anticipate alternative DTT Multiplex Operators in the timeframe of this review”, it is submitted that it is a realistic possibility that an alternative DTT Multiplex Operator could be active within the timeframe of this review.

In relation to section 8.318(c), it is submitted that the final sentence is not applicable to Market B. *“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.”*

DTT Mux Management submits that the proposed non-discrimination remedies are overly restrictive and prevents the platform from providing competitive conditions of carriage, which it has at all time seeks to do.

In relation to section 8.332, DTT Mux Management are of the view that it should be clearly prescribed that broadcasters who avail of the Market B services and the SLA are subject to the terms and conditions of the reference offer until the negotiations in good faith are concluded.

DTT Mux Management notes the proposed obligation to negotiate in good faith is detailed section 8.332. DTT Mux Management request clarification on the extent allowable for any such negotiation, taking into account the other proposed remedies particularly the non-discrimination remedy.

In relation to section 8.333, DTT Mux Management submits that DTT Mux Management should have the ability to withdraw access, where the broadcaster is in material breach

of the agreement or reference offer. Appropriate notice should be provided by DTT Mux Management prior to such action and a prompt ComReg dispute resolution process could be initiated, if requested, by the broadcaster. It should be clearly identified that non-payment or substantial debt payment is a material breach.

In relation to section 8.334, this section seems to relate to Market A and not Market B. Otherwise, the meaning and implications should be explained more clearly for Market B.

In section 8.356 and 8.357, ComReg states that “*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.*” DTT Mux Management has detailed above that this assumption does not take into account other factors including Saorview’s competitive position in the wider TV market in which it competes with other platforms, the market share benefit to RTÉ of Saorview, and the cost saving which results from RTÉ’s additional channels. DTT Mux Management submits that more flexibility should be afforded to the operation of the DTT platform in Market B to allow DTT Mux Management to reduce potential barriers to entry for new channels into the Irish DTT market.

With regard to section 8.367, it is submitted that full visibility of costs and pricing models are currently provided to ComReg. The market was identified as a regulated market and the tariffs are regulated tariffs. RTÉ’s understanding of the formal mechanism for querying such pricing is firstly through discussions with the DTT Mux Management and secondly with ComReg. DTT Mux management has complied in full with all pricing related requests from ComReg and has provided significant information to broadcasters when requested. RTÉ submits that it would be reasonable to expect that ComReg would provide assurances to broadcasters with regard to the transparent evaluation of costs and pricing models, thereby addressing any concerns that broadcasters might have in this regard.

In relation to sections 8.376 to 8.379, RTÉ have already identified above that minimising the number of broadcasters on the platform would have a negative effect on the platform. It would not be logical for RTÉ to minimise the channels and would be counter intuitive.

With regard to section 8.385, and in view of the competitive pressures on Saorview as a platform, RTÉ submits that ComReg should allow DTT Mux Management develop a discounted optional pricing mechanism for new broadcasters or channels, as the success of additional channels would deliver lower transmission charges for all the broadcasters on the platform and increase the choice for end users.

In relation to section 8.391, RTE have repeatedly demonstrated a desire to strengthen the offering to the end user with additional channels. In the past five years, the platform has been enhanced by the addition of one third party TV channel (UTVI now Virgin

Media 3), one 3rd party radio channel (Radio Maria), one public service channel (Oireachtas TV), RTÉ One + 1 full time and RTÉ 2 + 1. One of the benefits of adding channels is the reduction in cost to all broadcasters with a circa 23% saving for each channel compared with year one of the five years.

In relation to section 8.405, Market B infrastructure is limited, but the ability to attract new broadcasters or channels is an important feature to the success for this platform. RTÉ have repeatedly requested the ability to offer incentive packages to new entrants into the market while not distorting the cost recovery mechanism. RTÉ would like ComReg to review this preliminary position again.

With regard to section 8.408, DTT Mux Management submit that tariffs are not updated annually in Market B and from market understanding gained from discussions with various broadcasters, DTT Mux Management believe 7 to 10 years contracts are not normal in the equivalent Market B markets, particularly for new entrants into a market. The Market B latest reference offer has taken into account the market condition and the reference offer is for the five-year model term with an exit clause on the date of renewing a BAI license.

From section 8.413, the latest reference offer published on the RTE.ie website details the Tariff Standard Fixed kbps Rate at €308.25 where a sample SD channel charge is €780,000 per year and a sample HD channel charge is €1,890,000 per year.

In relation to section 8.419, RTÉ submit that in addition to challenges (a) and (b) ComReg have not take into account a challenge (c) the reference offer fixed term as a barrier to entry for new channels. Broadcasters may be willing to launch a channel for a pilot period (possibly one to two years) and following the completion of the pilot period the broadcaster may wish to review its position in the market. Longer term contracts arguably present a barrier to entry. The impact of the term on new channel decision making is a Market B feature identified by DTT Mux Management following its discussions with a large number of potential channel owners not presently on the platform.

With regard to section 8.429, to 8.431 and 8.434, DTT Mux Management submit that there is a place for discounted offering for new channel entries into the market. Following its discussion with a large number of channels owners and representatives it is common place in other European TV markets for a new entrant to receive a negotiated short-term discounted pricing structure.

RTÉ submits that the discussion in section 8.433 does not seem relevant to the Market B discussion on discounted pricing but rather is a point for Market A. DTT MUX Management further submits that modern technology and RTÉ's significant investment in national infrastructure has reformed a dwindling analogue terrestrial TV market into a successful digital platform competing strongly in both the urban and the rural homes of Ireland. It is worth noting that an ASO cost comparison shows a significant reduction in channel carriage costs as between analogue transmission and DTT and the beneficial

impact which DTT has had on the end user experience. Saorview increased the terrestrial offering from 4 TV channels (RTE One, RTE 2, TV3 and TG4) to 11 TV channels.

Regulatory Impact Assessment

Introduction

9.1

A Regulatory Impact Assessment ('**RIA**') is a detailed consideration of the likely effect of proposed new regulations, or changes to existing regulations. A RIA seeks to establish if such proposals are necessary and, in doing so, identifies any possible effects which might result from their implementation.

9.2

A RIA identifies alternative regulatory options and ultimately establishes whether a proposed regulation is likely to have the desired impact. It is a structured approach to the development of policy, and analyses the impact of the proposed regulation, and other regulatory options, on different stakeholders. Appropriate use of a RIA should ensure that the most effective regulatory option is identified.

9.3

ComReg's approach to a RIA follows five steps the detail of which is set out in Annex: 4:

- a) **Step 1:** Describe the policy issue and identify the objectives (discussed in Annex: 4 at paragraphs A4.16 to A4.21);
- b) **Step 2:** Identify and describe the regulatory options (discussed in Annex: 4 at paragraphs A4.22 to A4.42);
- c) **Step 3:** Determine the impacts on stakeholders (discussed in Annex: 4 at paragraphs A4.43 to A4.50);
- d) **Step 4:** Determine the impacts on competition; (discussed in Annex: 4 at paragraphs A4.51 to A4.52) and
- e) **Step 5:** Assess the impacts on stakeholders and competition and choose the best regulatory option (discussed in Annex: 4 at paragraphs A4.53 to A4.58).

9.4

In Step 3 of the RIA which determines the impacts on Stakeholders (also see table 9 below), ComReg notes that the imposition of the proposed remedies will result in the same burden on the Proposed 2020 SMP BTS Operator's since the proposed remedies are the same as the existing remedies. ComReg noted in section 7 above that, the same competition problems have been identified in respect of the Proposed 2020 SMP BTS Operators.

9.5

Therefore, ComReg sees no objective reason to change the obligations, as set out in the 2013 Decision. Further, ComReg is of the view that the remedies which it is proposing to impose are necessary and proportionate, and amount to the minimum level of regulation required to promote competition and protect consumers.

9.6

Accordingly, ComReg conducts a RIA for this Consultation which is detailed in Annex: 4 below.

Q7 Do you agree with ComReg's preliminary proposals regarding on the Regulatory Impact Assessment, in respect of the Relevant BTS markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A7. In considering the preliminary proposals, RTÉ would ask that ComReg notes the following:-

With regard to section 9.5, DTT Mux Management is concerned that it is 4 years since a new 3rd party TV broadcaster has joined the platform. During this period DTT Mux Management has conducted extensive discussions with a large number of potential channel representatives, thereby seeking to attract them to join the platform. It is clear that the addition of new channels to the platform benefits everybody, the broadcaster with future lower tariffs and the end users with more choice. Consistent with this the regulatory model in Market B should seek to facilitate this, and allow the platform to develop further in the future.

Market Review Broadcasting Transmission Services in Ireland

TG4 Response

Summary

TG4 welcomes the opportunity to input to the consultation on the Market Review of Broadcasting Transmission Services in Ireland. Please find in this document, TG4's views in relation to ComReg's conclusions on Market A (wholesale access to National Terrestrial Broadcast Transmission Services) and Market B (wholesale access to DTT Multiplexing Services) Competition and Significant Market Power (SMP) assessment and proposed remedies.

TG4 supports ComReg's preliminary view, as stated in section 1.40, that "2rn and RTÉ has the ability and incentive to engage in exploitative and exclusionary behaviours in Market A and Market B respectively to the detriment of downstream competition and consequently, negatively impact the diversity and breath of programme services available to end users in downstream retail markets. These include issues associated with the potential for constructive or actual denial of access, discrimination and pricing concerns".

Under the 2009 Broadcasting Act, TG4 is required to make its service available to all households in Ireland on a free-to-air basis insofar as is reasonably practicable. In addition, under the terms of the Belfast (Good Friday) and St. Andrews Agreements, and the Memorandum of Understanding between the UK and Irish Governments, TG4 is required to be made available to viewers in Northern Ireland (NI) on a free-to-air basis insofar as is reasonably practicable.

At present, the only platform through which these obligations can be achieved, is DTT. TG4 is carried on the DTT platform in the Republic of Ireland (ROI), with the service available to over 97% of homes in the country. 94% of homes can receive TG4 in NI via overspill from ROI (Saorview) or via DTT transmission within the territory (Freeview).

RTÉ, as owner of 2rn and controller of two DTT multiplexes, provides all its television services on the platform including RTÉ One and RTÉ Two in HD, RTÉ 1 plus 1, RTÉ 2 plus 1, RTÉ News now and RTÉjr (along with a number of radio services).

As set-out in TG4's Statement of Strategy 2018-2022, our objective is to extend TG4's HD service to Saorview. At present, TG4 HD is available on Virgin Cable, Eir TV, Vodafone TV and Sky Ireland. However, to date, because of the DTT Tariff Model, and not due to a scarcity of spectrum, TG4 has been unable to extend its HD services to the DTT platform. The proposed carriage charge is too expensive. In addition, TG4 is also effectively prohibited from providing

a TG4 plus 1 channel and a dedicated Cúla4 channel (Irish language children's service) on the DTT platform because of transmission charges from 2rn.

As RTÉ develops its own services on DTT, it can be argued that it is paying its allocated share of transmission costs under the Tariff Model. However, these are being indirectly subsidised by third parties such as TG4 and Virgin Media because RTÉ's expenditure on DTT services is offset by 2rn profits which are consolidated back to RTÉ Group.

TG4 is of the view that, while the DTT Tariff Model takes the costs incurred, adds a margin and apportions these across all users, there is no impetus to control costs or to generate efficiencies as would be the case in a competitive marketplace. The fundamental weakness of a cost-plus Tariff Model has resulted in the cost of DTT continuing to present a real barrier to the development of broadcasting services on the platform. At present, the model encourages the creation of value for RTÉ's services but inhibits the creation of broader public and audience value. This is evidenced by the lack of broadcasters seeking DTT carriage, apart from those with regulatory or contractual obligations regarding free-to-air availability in Ireland.

TG4 supports ComReg's proposals regarding the application of transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies in Market A and Market B. In particular, we support requirements to meet all reasonable requests from broadcasters for the provision of access.

A critical remedy we also believe to be necessary, is the case for TG4 DTT carriage to be included as a Public Service Obligation. As TG4 is defined in legislation as Ireland's Irish language Public Service Broadcaster (PSB), the service should be carried on DTT in a manner which is no different to the carriage of RTÉ, Ireland's other designated PSB.

2rn should be required, as a Public Service Obligation, to provide a level of carriage to TG4 equivalent to the level it extends to RTÉ services. In the case of TG4, this would mean carriage of the following services, at a cost equivalent to that paid by RTÉ Group (reflecting profit transfer from 2rn back to Group):

1. TG4 HD service.
2. TG4 HD plus 1 service.
3. A standalone TG4 Cúla4 channel.

Underpinning this, is an essential requirement is to have clear transparency around 2rn costs and allocation of costs and to ensure that bit-rate allocations and service priorities on each multiplex are fair and equitable, and demonstrated as such. In addition to a 2rn Public Service Obligation on TG4 DTT carriage, TG4 would like to see an independent review of 2rn costs with a view to reducing charges. This needs to be addressed as part of this consultation process by way of an independent audit of the underlying asset base and other costs and work practices.

Response to ComReg Consultation Questions

As TG4 is a national public television service, this response focuses on DTT. However, any general points are equally applicable to national and quasi-national radio transmission. In addressing the questions raised in the consultation document, it is important to set out the context within which TG4 has framed its position on DTT in Ireland.

As set-out in the summary, under the 2009 Broadcasting Act, TG4 is required to make its service available to all households in Ireland on a free-to-air basis insofar as is reasonably practicable. In addition, under the terms of the Belfast (Good Friday) and St. Andrews Agreements, and the Memorandum of Understanding between the UK and Irish Governments, TG4 is required to be made available to viewers in Northern Ireland (NI) on a free-to-air basis insofar as is reasonably practicable. At present, the only platform through which these obligations can be achieved, is DTT. TG4 is carried on the DTT platform in the Republic of Ireland (ROI), with the service available to over 97% of homes in the country. 94% of homes can receive TG4 in NI via overspill from ROI (Saorview) or via DTT transmission within the territory (Freeview).

DTT uses the UHF Bands to carry its signals. In the world of analogue, UHF television signals occupied Bands IV & V of the electromagnetic spectrum- 490-870MHz. The 800MHz Band was cleared in 2012 and the 700MHz Band has now been cleared in ROI and NI. The cleared 700MHz spectrum will be auctioned for mobile telecommunications purposes. In the coming years, the continued use by DTT of the 500MHz and 600MHz bands will more than likely be questioned by governments and regulators. It is inevitable therefore, that demand for further spectrum for mobile telecommunications will lead to the demise of DTT once broadband becomes universally available. It should be noted that universally available broadband forms part of the Programme for Government. TG4 is of the view that DTT will cease as a television delivery technology in the period 2030-2035.

From the above, the following points emerge:

1. There will be no new entrants to occupy the remaining four multiplexes. A technology with an estimated remaining 10-year lifespan would not attract the level of investment required to roll-out a commercial subscription service. In addition, the relatively modest level of data capacity would be unable to carry a broad range of television services of sufficient video quality (SD only) to make it attractive to consumers. This is particularly the case when faced with competition from streaming services such as Netflix, Disney +, and Amazon Prime. It is highly likely that DTT in Ireland will, therefore, remain a two multiplex network. In view of this, there is no possibility of a new entrant into the DTT multiplexing market.
2. For Broadcast Transmission Services, the present transmission sites have been coordinated internationally so any attempt to use alternative locations would require re-coordination in

the first instance and a completely new national frequency plan. Planning and environmental considerations would make it extremely difficult to develop and build new sites to replace existing locations. Migrating to new sites would mean that viewers would have to engage aerial installers to realign antennas or even install second antennas. Whether viewers would be prepared to incur such costs or whether transmission providers would have to pay for this, are key questions. In view of the above, there is no possibility of a new entrant into the broadcast transmission market.

3. TG4 is carried on DTT in NI as well as in ROI. The engineering philosophies of the two systems are different. In the UK as a whole, television transmission is carried on a very large number of sites. There is a high level of redundancy, particularly on main sites. For example, at Brougher Mountain which carries TG4, each transmission chain has full redundancy with two transmitters, two combiners, and separate antenna systems, each mounted on a different structure. In ROI, transmitter chains on main sites operate in an N+1 configuration with a single antenna system configured in two halves such that a transmitter can operate at full power into a half antenna stack. ROI operates as a “stretched” network of a small number of high powered main sites augmented by lower powered relays. In light of this, there can be no direct comparison of transmission charges between the two systems as the engineering philosophies are different with a much higher level of redundancy engineered into the systems in the UK when compared with that deployed in ROI.
4. Properly maintained transmitters should have a lifespan to 20-25 years. As the current ROI transmitters entered service in 2012, they should last until c. 2035 as long as they are maintained according to the manufacturers’ maintenance schedules. TG4 is of the view that DTT is unlikely to continue as a primary delivery mechanism beyond 2030-2035, the current transmitters will not need replacing and this should be reflected in the Tariff Model.

Q1 Do you agree with ComReg’s preliminary conclusions on the retail television and retail radio market assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

1.1 TG4 broadly agrees with ComReg’s preliminary conclusions on the retail television and retail radio market assessment. In addition, we would make the following points:

1.2 TG4 agrees with the use of Nielsen/TAM Establishment Survey figures for penetration of each platform in 3.7-3.10. We concur that less than 12% of homes now rely solely on FTA reception of Irish television services.

In 3.29-3.32, ComReg discusses Saorsat and its unique reception requirements. It should also be noted that, in most instances, Saorsat reception will require a 1m solid diameter dish which is much larger than a standard 0.6m mesh dish used to receive Astra at 28.2°. The larger solid dish will create a greater wind loading on the wall/structure on which it is mounted.

The option to reduce the quality of TG4’s programming offering in response to an increase in the charge levied by a BTS operator as outlined in 3.38 is not something that TG4, or any broadcaster, could countenance.

TG4 agrees with ComReg’s assessment in 3.44 of the time-frame of three-to-five years before demand-side substitution comes into play with the roll-out of broadband networks nationally.

Q2 Do you agree with ComReg’s preliminary conclusions on the Relevant BTS Markets assessment? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 broadly agrees with preliminary conclusions on the Relevant BTS Markets assessment. In addition, we would make the following points:

TG4 agrees with ComReg’s assertions in 4.19 & 4.20 that neither DTH satellite nor cable is a substitute for free-to-air DTT in the Irish market.

Until broadband is universally available in Ireland, we agree with ComReg’s argument in 4.21, that the public internet is not a substitute for DTT.

There is a further barrier to entry to be considered in relation to 4.32. In addition to the high level of sunk costs a new entrant would incur when entering the BTS market, the likely cessation in the period 2030-2035 of DTT as a platform further diminishes the attractiveness of terrestrial transmission as a business opportunity.

In relation to 4.44, TG4 is of the view that, as DTT will only operate for a further 10-15 years, the possibility of a new entrant into Market B is extremely unlikely given that the entrant would only have a limited period of time to recover the substantial investment required and to make a reasonable profit. The limited bandwidth available on four multiplexes compared to the capacity available on cable or satellite suggests that the range and quality of services that could be carried is limited and would not be an attractive proposition to consumers.

The conclusion reached by ComReg in 4.45 is, therefore, reasonable.

There is little possibility of a national broadcaster obtaining a multiplexing contract from the BAI in any reasonable timeframe as noted in 4.51. It would take a significant period of time to go through the tender process with the BAI. Unless RTÉ decided to relinquish one of its multiplex licences and revert to single multiplex operation, the operator of the new multiplex would be obliged to contract with 2rn for a separate transmission contract for a set of new transmitters. This again would take time to agree and, given the time-limited nature of DTT as a future platform, would be an even more expensive multiplexing and transmission solution.

In 4.52, ComReg notes that retail TV broadcasters could reduce quality when confronted with expensive BTS costs. This is essentially what TG4 has been forced to do. Because of the high cost of multiplexing and transmission, TG4 cannot afford carriage in HD given the very high increase in charges this would attract. Because of the SMP of 2rn and RTÉ's control of multiplexing, DTT is the only platform on which TG4 is carried solely in SD.

TG4 agrees with 4.53. Market B is national in scope. There is no local or regional market for television multiplexing.

Q3 Do you agree with ComReg's preliminary finding that each of the criterion of the 3CT is satisfied in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 largely agrees with ComReg's preliminary findings that each of the criteria of the 3CT is satisfied in Market A and Market B. In addition, TG4 makes the following points:

In addition to the points raised in 5.5-5.12 regarding Barriers to Entry to Market A, the creation of a separate network of transmission sites would lead to a requirement to realign or even replace receive antennas at viewers' homes. If the remaining four multiplexes were established on a set of new sites, it might even be the case that a significant number of viewers would require two receiving antennas (an existing one pointing at a 2rn site and a separate one aligned with a different site) to receive the four commercial multiplexes. This would not be an attractive option for viewers.

With respect to the likelihood of Effective Competition over the Relevant Time Horizon for Market A in 5.13-5.16, no rational entity would commit the time and resources to developing an alternative transmission network for a technology with, at most, a ten year lifespan post installation.

TG4 agrees with ComReg's conclusion that Market A is susceptible to *ex ante* Regulation.

With respect to Market B, TG4 agrees that there are high Barriers to Entry. RTÉ holds a licence for two multiplexes and is obliged to offer carriage to other national television broadcasters. A national television service provider could apply to the BAI for a multiplex content contract but, even if the application was successful, the cost of implementing a multiplex and the associated transmission costs would be enormous. In addition, as noted in 5.26, TG4 and Virgin Media have existing contracts with RTÉ and would incur penalties in the event of early termination.

As is the case for BTS, Market B is also time limited as DTT will cease in 2030-2035 leaving a very narrow time window to recover the investment required by an alternative market entrant. TG4 is of the view that there is no Tendency Towards Effective Competition in Market B over the Relevant Time Horizon.

TG4 agrees with ComReg's position that Market B satisfies the 3CT.

Q4 Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 broadly agrees with ComReg's preliminary conclusions on the competition analysis and assessment of SMP in Market A and Market B. We also present the following points:

In addition to the conclusions reached by ComReg regarding Market A in 6.49, TG4 notes that the time-limited nature of DTT suggests that there is no possibility of any new service provider entering the market within the relevant time horizon. A new entrant could not recover the substantial sunk costs over the remaining lifetime of DTT.

With respect to Market B, TG4 agrees with ComReg's position that RTÉ has SMP. As with Market A, the time-limited nature of DTT suggests that there is no possibility of any new service provider entering Market B within the relevant time horizon. A new entrant could not recover the substantial sunk costs over the remaining lifetime of DTT.

Q5 Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in Market A and Market B? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

TG4 broadly agrees with ComReg's analysis of possible competition problems in Market A and Market B. In addition, TG4 presents the following points:

With reference to 7.15, TG4 has a concern that there is no incentive to 2rn to achieve efficiencies. This is evidenced by the fact that the current Tariff Model for both Market A and Market B takes the company's existing costs, adds a profit margin, and distributes these across all users of the system. While the allocation of costs is transparent, there is no incentive to control costs and seek efficiencies. This needs to be addressed.

TG4 agrees with ComReg's assertion in 7.16 regarding the absence of any incentive to achieve efficiencies. The Tariff Model simply adds a margin to the existing cost base and apportions these across all users. TG4 suggests that a rigorous independent examination of costs and work practices be undertaken to validate 2rn's existing cost structure.

With respect to 7.40, TG4 has a concern that discriminatory behaviour could arise with respect to the allocation of bit-rates on each multiplex. As statistical multiplexed is deployed to maximise technical efficiency, fixed bit rates are not allocated to each service on a multiplex. This could potentially lead the service provider to prioritise the services of its parent's over other users of the system. TG4 is of the view that independent oversight of the dynamic allocation of bit rates by ComReg is desirable.

Q6 Do you agree with ComReg's proposals regarding the application of transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies in Market A and Market B? Please explain the reasons for your answer, along with all relevant factual evidence supporting your position.

TG4 broadly agrees with ComReg's proposals regarding the application of transparency, non-discrimination, access, price control and cost accounting, and accounting separation remedies in Market A and Market B. In addition, we make the following points:

With respect to the point made in 7.12 and 7.13 regarding excessive pricing in Market A, TG4 is of the view that the price level set by 2rn remains excessively high as there is no incentive to strictly control costs. A Tariff Model based on the apportionment of incurred costs plus a profit margin encourages inefficiency and, therefore, excessive charges. The higher the costs

attributable to BTS in Market A, the greater the level of profit this creates. While it can be argued that RTÉ is paying its allocated share of transmission costs under the Tariff Model, this is offset by the substantial profits generated by adding a margin to costs as 2rn's profits are consolidated into the RTÉ Group accounts. This could be deemed to be comparable to the practice of transfer pricing by some multinational corporations.

TG4 is of the view that the absence of a competitor negates the need to generate efficiencies, which further exacerbates the tendency to excessive pricing. This reflects ComReg's position as set out in 7.15, 7.16 & 7.17.

The absence of competition coupled with a Tariff Model which does not seek to control costs supports and rewards inefficiency in terms of tariffs. This can only be addressed through a root and branch review of the existing operation with a view to generating efficiencies in labour costs and other inputs. This needs to be addressed as part of this consultation process by way of an independent audit of the underlying asset base and other costs and work practices.

For Market B, TG4 notes ComReg's position in 7.34-7.36 regarding excessive pricing. Again, the "cost plus a margin" nature of the Tariff Model and the absence of competition rewards inefficiency. As with Market A, TG4 would like to see an independent review of practices and costs in 2rn with a view to reducing charges.

With respect to non-price issues as set out in 7.40, TG4 is concerned that a situation could arise whereby 2rn favours its parent's channels and prioritises bit-rate allocations to the detriment of TG4's picture quality. This is particularly a concern as RTÉ's two primary services are carried on HD which demands greater bandwidth and TG4 which is carried in SD.

The remedies proposed for Market A in 8.29 should also include reference to an independent review of costs incurred (both fixed and incremental) and their allocation. Consideration should also be given to the imposition of an "efficiency factor" when considering annual CPI increases where these apply.

In TG4's view, ComReg's proposed Transparency Remedies as set out in 8.47 – 8.55 do not go far enough. There is a need for full visibility of how costs are incurred and how these are attributable to the service provided. For example, are operational costs efficiently incurred? Were fixed costs efficiently incurred? How are overheads and other management costs attributed?

While the requirement for 2rn to publish a Reference Offer, the Tariff Model requirements set out in 8.58 does not seek to examine or provide an overview as to how costs are incurred and how efficient these costs are? An examination of costs and their fair apportionment does not address the possibility that these are inefficient. If 2rn's costs are found to be inefficient, then the company is generating excessive profits.

TG4 has a concern that RTÉ does indeed have an incentive to price Market A services excessively as detailed in 8.137. 2rn purchased transmission and combining equipment for a six multiplex DTT network at the time its parent, RTÉ, was one of the three consortia competing for the BAI contract to operate four a multiplex retail platform.

With respect to 8.138, TG4 suggests that ComReg introduces an efficiency factor in the calculation of future tariffs to encourage 2rn to generate efficiencies in its operations.

TG4 does not agree with the suggestion that a cost-orientation approach be adopted in this instance. A cost-orientation approach might work in some cases of SMP but not one where 2rn's parent is its major customer and can effectively recover excessive transmission charges by way of consolidation of 2rn's profits in the Group accounts.

As noted in 8.146, customers do not have full visibility of the Market A Tariff Model. TG4 is particularly disadvantaged as it has no direct contractual relationship with 2rn for transmission charges. TG4 does however, pay a portion of RTÉ's transmission charge as part of the Market B tariff it pays for access to one of the two multiplexes. While the Tariff Model apportions costs, it does not regulate the actual cost inputs, which potentially facilitates inefficiencies.

Price control based on costs as set out in 8.166 is a good option but TG4 wishes to see an independent review of the existing fixed asset base, and a review of operational practices and staffing levels to determine the appropriate level of other costs. At present, costs and cost drivers are unknown and are withheld from customers on the basis of commercial sensitivity.

TG4 notes that in 8.223 & 8.224, ComReg will seek additional financial data from 2rn. This will facilitate a detailed examination of 2rn's asset register and its cost drivers. We also note in 8.225 the suggestion that such an examination would be more appropriately carried out by a broadcast engineer or an economist. TG4 would favour the use of someone with expertise in broadcast transmission and multiplexing systems.

While the requirement for 2rn to publish a Reference Offer for Market B as detailed in 8.278-8.286 is welcome, the proposal does not seek to examine or provide an overview as to how costs are incurred and how efficient these costs are. An examination of costs and their fair apportionment does not address the possibility that these costs are inefficient. If 2rn's costs are found to be inefficient, the company is effectively generating excessive profits.

With respect to non-discrimination remedies as set out in 8.330 – 8.306, TG4 is of the view that there is a requirement to ensure that bit-rate allocations and service priorities on each multiplex must clearly be demonstrable to be fair and equitable. To this end, there should also be independent validation of dynamic bit-rate allocations so that all broadcasters can be confident that they are not being disadvantaged in any way. This should be included as part of the conclusion outlined in 8.308.

TG4 notes that its position on control of cost inputs as set out for Market A equally apply to Market B (8.349 – 8.409).

The analysis of market costs as set out in 8.420 – 8.423 confirms that DTT in Ireland is very expensive. This suggests that it is imperative that a detailed analysis of 2rn’s asset base be undertaken as well as an independent review of its operations and practices to determine where efficiencies could be generated. It also confirms TG4’s view that DTT will cease to be a primary distribution technology for broadcasters once broadband has been rolled out nationally. DTT is an expensive distribution system and will likely only continue for a further 10-15 years (2030-2035).

The efficiencies identified in 8.433 have not gone far enough. To meet its universal coverage obligations, RTÉ was obliged to implement a satellite solution (Saorsat also managed by 2rn) to augment coverage lost by the removal of a lot of very small relay sites. This has hardly led to a reduction in transmission costs for TG4. 2rn meanwhile has maintained most of its previous margin by levying a charge on RTÉ and TG4 for managing Saorsat. In summary, the apparent efficiencies derived from switching off tiny sites have been more than offset by addition of Saorsat.

Q7 Do you agree with ComReg’s preliminary proposals regarding on the Regulatory Impact Assessment, in respect of the Relevant BTS markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

TG4 agrees with ComReg’s preliminary proposals regarding on the Regulatory Impact Assessment, in respect of the Relevant BTS markets. TG4 would, however, welcome an undertaking from ComReg to commission a full analysis of 2rn’s multiplexing and transmission assets, and a thorough examination of 2rn operations and practices their impact on costs as these relate to the creation of tariffs. TG4 would also like to see an analysis undertaken of any allocation of RTÉ charges attributable to Market A and Market B tariffs.